



**Droits et Démocratie**  
**Rights & Democracy**

Centre international des droits de la personne et du développement démocratique  
International Centre for Human Rights and Democratic Development

**Seizing an Opportunity:**

**Afghan Women and the Constitution-Making Process**

**Rights & Democracy Mission Report**

**May-June 2003**

**By Ariane Brunet and Isabelle Solon Helal**

**September 2003**



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*“The Koran took 23 years to complete and here we have been given a few months to achieve a Constitution. We know everything has been decided in advance yet it is essential that civil society be heard. It is like a father organizing everything for a wedding and once all has been done asking his daughter if she wants to get married!”*

Participant at the meeting on women’s rights organized by the Development of Civil Society of Afghanistan (DCSA), West Kabul, June 3, 2003.

## INTRODUCTION

Constitution-making is not new to Afghanistan. Since 1923, Afghanistan has been governed by eight different constitutions. However, Afghan women have had a relatively limited history of participation in constitutional Loya Jirgas : the 1964 and the 1977 Constitutional Loya Jirgas, for example, included only four and twelve women respectively.<sup>1</sup>

Still, the 1977, 1980 and 1990 constitutions all contained gender equality clauses. On the other hand, the presently applicable 1964 Afghan Constitution only refers to the people of Afghanistan as having “equal rights and obligations before the law” – this is the document that is considered by today’s constitutional drafting committee as the basis for Afghanistan’s next constitution.<sup>2</sup>

In a country where *de jure* norms have less of an impact on women’s rights than traditional norms<sup>3</sup>, Afghan women have not only prioritized work towards entrenching women’s rights in the next constitution, but have also devised strategies to ensure that the constitution-making process translates into democratic gains for women.

This report will analyze the Afghan constitution-making process from a gender perspective. It discusses the present social and political context in Afghanistan; examining in detail the structures and stages of the constitution-making process, and making recommendations for the upcoming Constitutional Loya Jirga regarding the representation of women, the criteria for election of female members, the security of women participants, and measures to ensure that

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<sup>1</sup> See ICG Asia Report no. 48, Afghanistan: Women and Reconstruction, March 14, 2003, p. 19.

<sup>2</sup> Ibid.

<sup>3</sup> ICG Asia Report no. 48, op. cit., note 1, p. 1.

women's voices are heard. Finally, it discusses some of the legislative and democracy-building priorities Afghan women have recently voiced.

## **SOCIAL AND POLITICAL CONTEXT FROM A GENDER PERSPECTIVE**

*"I think many of us in the UN feel that it is better to proceed and achieve an imperfect result than delay waiting for perfection which we will never realize."*<sup>4</sup>

"*We have to give it a try*" was the response of the head of an Afghan NGO to the question whether or not Afghan civil society would participate in the constitution-making process.

Amidst threats and intimidation, harassment, and lack of transparency, freedom of expression, freedom of movement and freedom of association, Afghan women are training each other on the constitution-making process, the electoral process and on the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), signed by Afghanistan in March 2003. One feels like people are going through these motions with the obscure chance that Afghan society will gain "something" from the process. Women have engaged in the process with the energy of those who have nothing to lose. Women will speak out, debate and take risks.

In the eight months following the Rights & Democracy's first mission to Afghanistan, nothing much has changed, yet one can feel the feverishness and tension mounting as the Constitutional Loya Jirga (CLJ) gets closer. For a few within Afghan civil society, this has something to do with trying to make the best from this small window of opportunity.

In spite of this hope, insufficient excitement exists for choosing one's own political system and institutions. The reason behind this is that those who control the political agenda and the economy in Afghanistan are mounting their own campaign to further destabilize the country. It is perceived that warlords and conservative forces who are well-placed within President Hamid Karzai's government will work to ensure that the outcome of the Loya Jirga will be in their favour. Their interests lie in maintaining a war economy, since this is a system they gain from.

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<sup>4</sup> Nigel Fisher, Deputy Special Representative of the Secretary-General in Afghanistan (DSRSG), UNAMA, Press Briefing, Kabul, July 10, 2003.

Journalists, experts in electoral processes, and private security agents: a new set of experts and specialists walk the streets of Kabul; they venture into the provinces in order to watch the Bonn Agreement's clock ticking away until Election Day in June 2004. Everyone expects new terrorist attacks, more wars on the Afghan-Pakistani border, further skirmishes in the South, and continued banditry. In his press briefing on July 10, 2003, Nigel Fisher, the Deputy Special Representative of the Secretary-General in Afghanistan, clearly identified security as a major concern and acknowledged the warring between commanders as well as the daily intimidation of ordinary Afghans by their own security forces. It is expected that the situation will become more tense and precarious as civil society members and others try forming political parties and alliances. Additionally, more tension is expected to mount as the Afghan Transitional Authority (ATA) attempts to reform the security sector.

The obsession with meeting the Bonn Agreement deadline, the absence of transparency, the lack of security, the occupation of Iraq, the factional domination of the democratic process, the uncertain loyalty of provincial governments to the process, and the confusing public campaign, all contribute to rendering the integration of women's human rights in the constitution a funambulist exercise with no one to watch. For Afghan women, life has improved just enough that some of them are finally willing, and able, to challenge the *status quo*.

**The elusive gains made with Afghanistan's ratification of CEDAW, the very new concept of a Ministry of Women's Affairs, the weak coordination among donor countries regarding women's rights, the varied and contradictory gender policies proposed in a variety of UN/ATA documents, and the lack of gender-focused staff appointments at the United Nations Assistance Mission to Afghanistan (UNAMA), indicate that women's human rights also need to be protected by civil society organizations and by the building of a women's movement that is educated and capable of being a valuable interlocutor to a State that should be governed by the rule of law. This cannot happen over a few years, let alone over a few months.**

## 1. The Issue of Security

Kofi Annan, Hamid Karzai, Lakhdar Brahimi, Nigel Fisher, Afghan civil society organizations, and international NGOs are all in agreement that the UN-mandated International Security and Assistance Force (ISAF) must be deployed in the provinces. German General Norbert van Heyst declared that ISAF troops should be deployed in the provinces to ensure security well before next year's planned elections. An additional 10,000 soldiers were needed in his opinion.<sup>5</sup> As NATO takes over the German and Dutch command of ISAF, military officials in NATO recognized that NATO could play a greater role in Afghanistan but this would require a mandate from the UN Security Council.

As newspapers describe Afghanistan as sitting on the edge of chaos,<sup>6</sup> security at minimal cost is being implemented in the form of the Provincial Reconstruction Teams (PRTs). Military-led, composed of civil affairs soldiers with expertise in engineering, medicine, psychology and law, as well as special forces and regular army units, the original goal of these teams was to extend the influence of Karzai's government beyond Kabul, stabilize the country, help secure an area for NGO activities outside the capital and to coordinate the reconstruction process by identifying reconstruction projects, conducting village assessments and liaising with regional commanders.<sup>7</sup>

The controversy around the PRTs is unlikely to die down. Humanitarian organizations complain that the PRTs have created confusion by not distinguishing between military and humanitarian operations. They argue that the PRTs threaten the work of NGOs: the Afghan population will progressively assimilate humanitarian workers and US soldiers (or soldiers from any other Coalition member since PRTs are also staffed with New Zealanders, Italians, French, British and soon Germans). NGOs are concerned that aid distributed through PRTs is "politically biased in favour of areas where the local authorities are sympathetic to the Coalition."<sup>8</sup> They advocate a

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<sup>5</sup> See McGill University List-serve, AFGHANDEV Digest Special Issue (2003-276), 7 August 2003 to 8 August 2003.

<sup>6</sup> See Los Angeles Times article, August 4, 2003.

<sup>7</sup> See Relief Web report by Center for Humanitarian Cooperation, The Provincial Reconstruction Team in Afghanistan and its Role in Reconstruction, 31 May 2003. Available at: <http://www.reliefweb.int/>

<sup>8</sup> See press release issued by Action Contre la Faim, ACTED, AFRANE, AMI, Architecture et Développement, Enfants du Monde/Droits de l'Homme, Handicap International, Madera, MDM, MRCA, Solidarités and Groupe URD, French NGOs say "Stop the Confusion" Between Military and

clear distinction between PRTs and humanitarian workers. Moreover, they urge military personnel to wear their uniforms at all times. They also urge the military to focus on activities within the range of military expertise leaving health, agriculture, water, sanitation, education and social service projects to the humanitarian NGOs.

With the new type of peacebuilding missions and asymmetric warfare, it seems that international humanitarian law is becoming dated. Currently the distinction between combatant and non-combatants is blurred. Civilians, and women in particular, have become part of war strategies. In Afghanistan, as in other conflict zones, civilians are targets and resources, weapons and bargaining chips. Humanitarian principles of impartiality, neutrality and independence have been weakened, compromised and redefined. For women whose rights have been barely recognized in international human rights and humanitarian law this new context is a major setback. Afghan women are worried; their fear of gunmen, sexual violence and sexual harassment has yet to diminished. Their existence is governed by these threats and the *chadori* they continue wear testifies to this fact.

Have women been included in PRTs? Yes, the usual token representation of one, in Bamyan for example. One seems to be the magic number for claiming that gender mainstreaming has been accomplished. Afghan women who are aware of the establishment of the PRTs consider that these teams are offering a cheap version of security.<sup>9</sup> The PRTs do not provide security conditions that would enable women to fetch wood in an environment free of violence, use public transport without fear of harassment or even walk to school without fear of being kidnapped or raped.<sup>10</sup> Additionally, domestic violence is unlikely to subside as security is conducted in such a secretive manner, while aid and intelligence work are conducted simultaneously and when security means unnerving citizens. A gender assessment of how this new way of delivering security affects the civilian population is necessary and urgent.

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Humanitarian Personnel, February 3, 2003.

<sup>9</sup> “Security can not been done on the cheap. PRTs can not serve as a substitute for real human and financial resources to cover the electoral processes.” Sultan Aziz, Senior Advisor on Demobilization for the United Nations Assistance Mission in Afghanistan (UNAMA), at the Oxfam International Afghanistan Country Policy Meeting, Session: Myth or Reality: Addressing Obstacles to Security and Reconstruction, Kabul, June 12, 2003. (Taken from Ariane Brunet’s notes during Mr. Aziz’s verbal presentation).

<sup>10</sup> See Human Rights Watch Report, Vol. 15, No. 05, July 2003, “Killing you is a Very Easy Things for Us”: Human Rights Abuses in Southeast Afghanistan, p.10-13 and p. 70-87.

Yet women have repeatedly demanded an expansion of the ISAF mandate. The provision of clear-cut soldering and securing of their neighbourhoods is the only way that women can begin functioning under at least a relative sense of normalcy. It is the men lurking about in small groups, popping up unexpectedly that women most fear. What is the role of the PRTs in this regard? And even in their restructured and improved version,<sup>11</sup> will the PRTs provide the security and rule of law needed to give the approaching elections a chance? How will women be included in this security plan? What rules are being established to integrate their security needs?

A major reform of the Afghan Ministry of Defence is necessary in order to carry out the disarmament, demobilization and reintegration programme (DDR). Nigel Fisher has announced that DDR had been postponed in order to await such reform. Meanwhile, women wait for these changes, hoping for significant transformations of their lives.

In the midst of this situation of insecurity, impunity and warlordism, Afghanistan works to create its new constitution. And against all odds, Afghan women have decided to take part in this process and are trying to ensure that the constitution includes mechanisms that will guarantee their human rights as well as those of their family members. The difficulty of ensuring the implementation of the constitution is a major concern. How does one implement a constitution in a country where the law of the gun continues to reign? This is their priority and their biggest challenge. Afghan women have recognized that much is to be gained from participation in the process of creating a constitution, including shattering the *status quo*, raising awareness on women's legal rights and building democratic institutions as well as coalitions. **Women's groups are seizing the moment, riding the wave - because there is no second chance.**

What is the constitution-making process? Does the process have the democratic drive to ensure its legitimacy? How are women's voices and concerns being included? What are Afghan women's priorities for the new constitution that will see Afghanistan off in its first decades as a new nation?

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<sup>11</sup> At this stage there four of the eight originally planned PRTs have been set- up (Gardez, Bamyan, Kunduz, Mazar-I-Sharif); they are composed of around 40 to 60 people. In the new security and aid plans of the Bush Administration, PRTs there could be expanded anywhere from 12 to 20 teams with 200

## THE CONSTITUTION-MAKING PROCESS

The Bonn Agreement stipulates that a Constitutional Loya Jirga (CLJ) must be convened within 18 months of the establishment of the Transitional Authority in order to draft a new constitution.<sup>12</sup> Some commentators have argued that the Bonn Agreement timeframe for the constitution process is more flexible than the restrictive interpretation by the Transitional Administration. The International Crisis Group (ICG) argues that the Bonn Agreement only requires the initiation of the constitution-making process in the above timeframe, not the completion of the Constitution – such an interpretation would allow more time for the constitution-making process.

The Bonn Agreement also states that the Constitutional Commission shall be established by the Transitional Authority with the assistance of the United Nations. Annex III of the Bonn Agreement requests that the United Nations conduct as soon as possible (i) a registration of voters in advance of the general elections that will be held upon the adoption of the new constitution, no later than two years from the date of the convening of the Emergency Loya Jirga (which was convened on 9 June 2003); and (ii) a census of the population of Afghanistan.

According to the 12-page document entitled “The Constitution-Making Process in Afghanistan” prepared by the Secretariat of the Constitutional Commission of Afghanistan in March 2003, the constitution-making exercise will be accomplished through three constitution-making organs: the Drafting Commission, the Constitutional Commission, and the Constitutional Loya Jirga.

The document states:

*A Secretariat will support the functions of each of the three constitution-making bodies. The international community, with the United Nations in the lead, will coordinate closely with the Secretariat and each constitution-making organ to ensure that each step in the process has the necessary support, both material and technical, to successfully complete the constitution-making process.*

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soldiers per team.

<sup>12</sup> Bonn Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, article 1 (6).

## **1. The Drafting Commission**

The Drafting Commission was appointed by the President of Afghanistan on October 5, 2002, and had the responsibility of producing the preliminary draft of the Constitution. The preliminary draft which served as a set of recommendations to the Commission on constitutional arrangements was submitted to the Constitutional Commission on the day of its inauguration in April 2003, along with a report that explains its recommendations for the format of the future constitution. To this day, these documents have not been made public.

## **2. The Constitutional Commission**

The primary responsibilities of the Constitutional Commission are to “consult widely” with the people of Afghanistan and to produce a draft Constitution by 30 August 2003, for submission to the Constitutional Loya Jirga in December 2003. Additionally, the Constitutional Commission’s function includes, among others, facilitating and promoting public information on the constitution-making process during the entire period of its work; conducting public consultations in each province of Afghanistan, and among Afghan refugees in Iran and Pakistan and, where possible, other countries, to solicit the views of Afghans regarding their national aspirations; preparing a report analyzing the views of Afghans gathered during public consultations and making the report available to the public; and educating the public on the Draft Constitution by returning to all of the provinces of Afghanistan and to the refugee populations in Iran and Pakistan.

The mandate of the Constitutional Commission reads that:

*The Commission will ensure broad participation of women in the constitutional-making process. The Constitutional Drafting Commission consists of nine members including two women. The representation of women will increase in the soon to be established Commission. The women commissioners will lead, where possible, consultations with women in light of culture sensitivities in some areas. The Commission will also educate the public through their regional and provincial staff to inform women and other groups about the need for women’s involvement in the process. The staff will also identify suitable venues, times and ways of meeting and/or communicating with the Commission.*

*The Commission will be working closely with the Ministry of Women’s Affairs, which together with UNIFEM, is collecting inputs, holding seminars and other public education programs about the constitutional rights of women. Further, the Commission will liaise with the women civil society organizations that will put at the disposal of the Commission a broad network of their grass root organizations. Gender balance is also a priority for the selection of the regional consultation teams.*



As mentioned above the draft constitution was not released by the Constitutional Commission during the consultation period and was not expected to be published before September 2003. This is problematic and demonstrates the lack of transparency and accountability that has characterized this process.<sup>13</sup> The Afghan Independent Human Rights Commission in particular questioned the secrecy of the process. **It called on the constitution commission to share the draft with the people of Afghanistan for consultation purposes.**<sup>14</sup> **Further, transparency not only requires that the documents be made public, but also that sufficient time be given for public consultation in order to ensure that the values and aspirations of the people of Afghanistan, including the women, be reflected in the constitution.** It is important to take the time to ensure that the final draft of the Constitution is legitimate, credible, and accepted by all Afghans. In South Africa, for example, the consultation process for the South African Constitution took two years. In Afghanistan, after 23 years of war and amidst a climate of insecurity<sup>15</sup> the consultations lasted a mere 2 months.

During this two month period, where and when security allowed, members of the Constitutional Commission travelled to the provinces to hold public meetings about the constitution, collate surveys and to receive comments. However, the process continued to be marred with problems. Afghans complained that the process was “too rushed and confusing, and did not fairly represent women or the various regions”<sup>16</sup>. At one meeting, for instance, while banners on the wall proclaimed the rights of women, only one woman was present among the 33 representatives from the province. Moreover, in Logar province, officials planned on sending three men and one woman from each district to the consultations, however, due to security concerns and threats- no women attended the meetings. A provincial consultation that does not include half the population

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<sup>13</sup> See ICG Asia Report no. 56, [Afghanistan's Flawed Constitutional Process](#), 12 June 2003 at p. i: “The document that must express the values and aspirations of a people may lack widespread legitimacy because it has been drafted in a secretive and unaccountable manner.”

<sup>14</sup> See Agence France Presse, [Afghanistan Launches Public Consultation on Constitution Amid Criticism](#), June 3, 2003. Available on: [http://quickstart.clari.net/qs\\_se/webnews/wed/bf/Qafghanistan-politics.Ri5F\\_Du2.html](http://quickstart.clari.net/qs_se/webnews/wed/bf/Qafghanistan-politics.Ri5F_Du2.html)

<sup>15</sup> Joint Statement of the Afghan Independent Human Rights Commission (AIHRC) and the United Nations Assistance Mission in Afghanistan (UNAMA) on the Upcoming Constitutional Consultations, June 1, 2003.

<sup>16</sup> Danish Karokhel, IWPR Stories, July 23, 2003.

of the province can not be considered democratic nor legitimate. The capacity of Afghan civil society, including Afghan women, to lobby, raise awareness, advocate and build coalitions is strongly affected by the lack of freedom of movement and expression as well as the lack of time. Gender-sensitive consultative methods and security measures should have been put in place prior to beginning the process. For instance, in Uganda's constitution-making process, women leaders in the 167 districts were trained to solicit women's views of the constitution and as a result one third of the submissions came from women.<sup>17</sup> With regards to security, critics of the process warned in advance that security would be the key to the success of the constitution process.<sup>18</sup> Yet no special security provisions for women have been made.<sup>19</sup>

The importance of an inclusive, wide, gender-sensitive, and democratic consultation process is eloquently explained by Maja Duruwala in the context of the Indian and South African constitutional reform processes:

*It is only through the process that rests on a knowledge of, and input from, the community level that solutions will emerge. Then, even if there is no political will to implement those solutions, the people will have benefited from the exercise by being better informed about their own governing document which makes them sovereigns of their country and from which they have derived too little benefit for too long.<sup>20</sup>*

The Afghan Civil Society Forum, for example, understood the importance of wide consultations and seized the momentum of the process in order to engage in public education and public awareness raising campaigns about the constitution throughout Afghanistan. With civil society organizations engaged and available to contribute to, and participate in, the constitution making process, it is difficult to understand why the Interim Administration and the UN did not create the necessary conditions to ensure a wider consultation process.

In March 2003, the United Nations justified the absence of a fuller public process with the following three concerns: security for members of the Constitutional Commission and the public;

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<sup>17</sup> See Granville Austin, They should therefore seek to effectively include the view of all people. Available on: <http://www.humanrightsinitiative.org/publications/const/austin.pdf>

<sup>18</sup> For example, see quote by Barnett Rubin in Relief Web, Afghanistan: Special Report on the New Constitution, June 2, 2003.

<sup>19</sup> See Joan Ruddock MP, Parliamentary Question, 29 April 2003, Available on <http://www.joanruddock.org.uk/speeches/newsitem.jsp?newsid=225>

<sup>20</sup> See Maja Daruwala, Civil Society Involvement in Constitutional Review, Available on [http://www.humanrightsinitiative.org/publications/const/civil\\_society\\_involvement\\_in\\_constitutional\\_revi](http://www.humanrightsinitiative.org/publications/const/civil_society_involvement_in_constitutional_revi)

the risk that extremist groups would hijack the process, and the danger of public confusion.<sup>21</sup> As explained by the ICG:

*None of these (concerns), however, warrants the weak public education and consultation process that has been designed. A series of specific local solutions exist that can at least in part improve the security situation around consultations. The risk of capture by the aforementioned factions is exacerbated rather than assuaged by the current process. And any public confusion can be remedied because it is caused in the first instance by the failure of the Transitional Administration and the UN to conduct a transparent drafting process and to craft a meaningful public education program. Finally, the UN arguments fail to recognise the importance of public legitimacy even in a moment when action by those with arms is more likely than popular mobilisation.*

Additionally, the above actors failed to recognize the power of a democratic process in a country such as Afghanistan, emerging from a long war where fundamentalist warlords still have the upper hand over the central government. Constitution-making processes can, and have, laid the foundation for peace and stability. Indeed, ‘process of consultation and participation has even brought stability to countries struggling to arise out of the ashes of war and military strife such as Eritrea; civil conflict, as in Uganda, and immeasurably unjust systems, such as in South Africa. Equally, the education and awareness-raising activities of the process assist in ensuring continuous scrutiny of functioning, greater accountability and transparency.’<sup>22</sup>

The consultation process has come and gone and the window of opportunity to create a genuinely representative document is quickly closing, but the Constitutional Loya Jirga, which will discuss and vote on the draft, still has the chance to create space for a democracy-building exercise through enhanced political participation by civil society. Will the Transitional Authority and the UN seize the opportunity? How has civil society utilized the opportunity?

### **3. The Constitutional Loya Jirga Process**

The Constitutional Loya Jirga (CLJ) is the representative body assembled in Afghanistan for the purpose of agreeing on the constitution. Its role is to review and adopt the constitution. It was expected to be convened in October 2003 and was scheduled to finish its work by the 25th of October, 2003. However, Hamid Karzai announced in a 7 September, 2003 decree, based on the

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ew.pdf

<sup>21</sup> See ICG Asia Report no. 56, *op. cit.*, note 13, p. 21.

recommendation of the Constitutional Commission, that the CLJ will be postponed until December 2003. At that time, the draft constitution will be submitted to the CLJ members who are mandated to decide on the final version of the constitutional document. At the end of the CLJ, it is said that the final version of the Afghan constitution will be published and widely disseminated.

### **3.1 Representation of Women in the CLJ**

In July 2003, President Hamid Karzai issued a decree on the Constitution that establishes the plans for the Loya Jirga. The decree determines the procedures for electing the Loya Jirga's 500 representatives, 450 of which will be elected members and 50 of whom will be appointed. The decree states that, of these representatives, 64 women will be elected by women representatives in the 32 provinces, 42 members will be elected by representatives of Afghan refugees in Iran and Pakistan, displaced people in the country, nomads, Hindus and Sikhs, 15% of whom must be women; and 50 delegates will be appointed by the President, half of whom will be women. Thus, women representatives have been allocated 20% of the total seats in the CLJ.

**In response to the President's decree Afghan civil society representatives commented that the allocation of only 20% of the total designated seats for women is insufficient:** "More than half of the population of Afghanistan consists of women. Considering their sufferings and miseries, their active presence in the process of a Constitutional Loya Jirga will make it more legitimate and democratic. (...) Measures must be found to increase the participation of women."<sup>23</sup> Indeed, the Platform for Action and the Beijing Declaration, as well as Security Council Resolution 1325 (2000) urge states to increase the representation of women at all levels in decision-making, at all times, including in conflict-resolution and during peace processes.

In Afghanistan, women's rights are viewed as part of a Western agenda; they are used as a propaganda tool by all sides and linked to cultural and religious values. Every possible road block to the realization of women's rights and to the participation of women in decision-making processes has been installed: the perpetuation of warlordism, the lack of security, and the lack of effective gender policy coordination. In this context, Security Council Resolution 1325 remains

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<sup>22</sup> See Maja Daruwala, *op.cit.* at note 20.

<sup>23</sup> See Weekly Afghanistan Report, Recommendations By Afghan Civil Society Representatives On The

nothing more than wishful thinking. Activists know that “women’s lack of institutional power undermines their contribution to society at large.”<sup>24</sup>

Accordingly, UNIFEM's report entitled "Women, War and Peace" advocates for maintaining a minimum 30% representation of women in peace negotiations, and ensuring that women’s needs are taken into consideration and specifically addressed in all such agreements. As mentioned above, the planned representation of women at the CLJ in Afghanistan is well below the recommended level and should be increased. In light of the experiences of the Emergency Loya Jirga (in some provinces restrictions and interference prevented women's participation in the election process), Afghan civil society representatives recommend the following: **a) As in the Emergency Loya Jirga, the allocation of seats for women should be on a regional basis; b) In provinces with large cities, the number of seats allocated to women should be increased (to more than two); and c) At least one woman should come from each province. If she cannot be elected, the CLJ’s Executive Committee should select her under the supervision of the proposed independent committee (see below).**

Further, **as recommended in the Afghanistan Research and Evaluation Unit paper on *Strategic Coordination in Afghanistan*, there is an urgent need for a strategic gender policy review conducted jointly by the ATA/AACA and UNAMA, with the participation of donor countries, international financial institutions and NGOs.**<sup>25</sup> **Although unlikely, it would be important that this take place prior to the Constitutional Loya Jirga.**

### **3.2 Criteria for Election of Members**

At the same time, article 3 of the decree sets out the criteria for election of members:

- a. Election of members of the Loya Jirga to approve the constitution must take place in a just and open atmosphere free of any interference, trouble, political influence, and national and regional tendencies.

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CLJ, August 7, 2003. Available at: <http://www.azadiradio.org/en/weeklyreport/2003/08/07.asp#60179>

<sup>24</sup> See Anissa Hélie, *Feminism in the Muslim world: Leadership Institutes*, Center for Women’s Global Leadership and Women Living Under Muslim Laws, 2000.

<sup>25</sup> See Nicholas Stockton in *Strategic Coordination in Afghanistan*, Afghanistan Research and Evaluation

- b. Patriotism, national unity, and the interests of the Afghan people are considered to be the basic criteria.
- c. The electorates must try to elect educated people with sufficient influence who must have basic knowledge of the principles of the constitution.

According to Afghan civil society representatives, these criteria are too vague and measures are needed to ensure that the criteria are applied. For example, it is suggested “that during the election phase, a special committee with full authority, consisting of representatives of the Government, the international community, human rights and civil society, should review the candidates to determine whether they respect the criteria or not -- in which case they would have to withdraw their candidacy.” Moreover, the requirement that the 50 selected delegates need to fulfill<sup>26</sup> is considered by Afghan civil society representatives to be a positive step towards guaranteeing the presence of scholars. However, **they advocate that the 25 women members of the CLJ must also be legal scholars, specialists of the constitution and other experts. They suggest that, to make this Loya Jirga more democratic, these selected delegates should be chosen from lists prepared by civil society organizations.**

**Also, representatives of Afghan civil society have recommended the creation of an independent body with representatives of civil, social, and professional organizations to supervise the organization of the elections of the CLJ.**

### 3.3 Security

The decree establishes that the Ministry of the Interior will be responsible for security, among other issues. Given the climate of threats and insecurity that reigned during the June 2002<sup>27</sup> Loya Jirga (orchestrated by several powerful military and political party leaders including forces under present Defence Minister Fahim and the former Minister of the Interior, Qanooni, among others)

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Unit, Issues Paper Series, August 2002. [http://www.areu.org.pk/publications/strategic\\_coord.pdf](http://www.areu.org.pk/publications/strategic_coord.pdf), p. 45.

<sup>26</sup> Article 6 of the decree states that the head of the Afghan government will select 50 members of the Loya Jirga to approve the constitution, 25 of which will be eligible women, and the other 25 members will be chosen from among the lawyers, constitution experts, and intellectuals by the head of government.

<sup>27</sup> See Ariane Brunet and Isabelle Solon Helal, *Women’s Rights in Afghanistan*, Rights & Democracy, September 2002. Available at [www.ichrdd.ca](http://www.ichrdd.ca)

**it is advisable that the International Security and Assistance Force (ISAF) take charge of security in the regions as well as in Kabul through out the Constitutional Loya Jirga process<sup>28</sup>.**

The possibility of interference by the warlords and local commanders is considered a serious threat for free elections.<sup>29</sup> Furthermore, a recent Amnesty International report establishes that the current Afghan police who fall under the jurisdiction of the Ministry of the Interior do not have the capacity to protect human rights.<sup>30</sup> The present Ministry of Interior, Mr. Jalali acknowledges that the police should be trained and disciplined to ensure better security and to protect human rights.<sup>31</sup> **It is essential that the security force in charge during the CLJ be able to guarantee the human rights of *all* the participants of the CLJ. Further, all reported threats and coercion should be investigated promptly by security personnel (in coordination with the Executive Committee and civil society observers) who should act with due diligence and in conformity with international human rights standards. It is essential that these violations also be addressed when they take place in the private sphere, for example when the perpetrators are women's family members or community leaders.**

An alternative security measure, according to Barnett Rubin, of the International Centre for Cooperation, should include changing the role of the PRTs to render them much more seriously focused on providing security outside Kabul, rather than carrying out a few rehabilitation projects.<sup>32</sup>

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<sup>28</sup> Both Barnett Rubin, Director of the Center on International Cooperation and Lakdar Brahimy recommend that security could be ensured by extending the operations of the ISAF beyond the confines of Kabul. See ReliefWeb, op.cit, note 18.

<sup>29</sup> See Weekly Afghanistan Report, Recommendations By Afghan Civil Society Representatives On The CLJ, 7 August 2003. Available at: <http://www.azadiradio.org/en/weeklyreport/2003/08/07.asp#60179>

<sup>30</sup> See Amnesty International, Afghanistan, Police Reconstruction Essential for the Protection of Human Rights, March 2003 (AI Index: ASA 11/003/2003).

<sup>31</sup> See ReliefWeb, Afghanistan: Amnesty Report advocates police reform, UN OCHA Integrated Regional Information Network, March 13, 2003. Available on: <http://www.reliefweb.int/w/Rwb.nsf/0/c80b7a97b2845ba085256ce8006f1ec7?OpenDocument>

<sup>32</sup> ReliefWeb, op. cit, note 18.

**The following additional recommendations can be made regarding security for women delegates, observers and lobbyists during the CLJ:**

- **provide transportation (buses, for example) for women travelling from the provinces to participate, observe or lobby at the LJ;**
- **provide women-only accommodation for women delegates of the CLJ, as well as for women attending the CLJ as observers or to lobby - and ensure that the accommodation is secure 24 hours a day;**
- **ensure that women attending the CLJ are not threatened by warlord factions before, during and after the CLJ;**
- **ensure that the security unit at the CLJ include female security personnel and female health and trauma counselling practitioners who are trained on gender issues;**
- **ensure that women can be accompanied by a person of their choice when being interviewed by security personnel at the CLJ;**
- **ensure that members of the Afghan Independent Human Rights Commission as well as civil society observers of the CLJ have access to women and women delegates during the CLJ and that they accompany the security personnel during the CLJ;**
- **ensure that the women participants of the CLJ have a safe, secure and private meeting space close to the main meeting area to discuss issues of concern or to strategize.**

### **3.4 Ensuring Women's Voices are heard at the CLJ**

Prior to the Constitutional Loya Jirga, the UNDP/UNAMA will be convening a conference for women delegates to the Loya Jirga. The stated purpose of the exercise is to empower female delegates for the Constitutional Loya Jirga (CLJ) and to assist them devising a clear and unified agenda for gender issues to be considered in the CLJ. To guide this process, the UNDP/UNAMA



have proposed to develop a manual that will cover the following issues: the concept of the Loya Jirga, women's rights, the constitution, lobbying tactics and networking strategies.

This meeting is a positive development, as long as its main goal is to create the space for women to meet prior to the CLJ in order to prepare an effective working strategy for women and the coordination of their agendas. It is essential that this meeting not marginalize women's issues from the CLJ itself: **women must be part of all the discussions around the content of the constitution. To make sure this happens, it is important that the secretariat of the Commission come to an agreement with Afghan civil society members and ensure that members of civil society, including women, be allowed to meet with, and lobby freely, the members of the CLJ, on the grounds of the CLJ.**

**In addition to this, it would be useful for an NGO with gender expertise on violence against women and health, among other issues, to be on call during the CLJ in order to advise the women delegates and civil society representatives when necessary. It would also be advisable to draw a list of Afghan NGOs and their respective expertise, in order to easily identify the counterparts. It is important for the building of a women's movement in Afghanistan, to ensure that women from all provinces, including women refugees, take part in this meeting and in the CLJ.**

**More over, it is recommended that women delegates identify civil society experts on particular issues to accompany them and provide advice on these issues during the debate.**

What issues will Afghan women advocate? What are their priorities? How do they envision the new Afghan Constitution?

## **WOMEN'S PRIORITIES IN THE CONSTITUTION-MAKING PROCESS**

### **1. Historical Overview of Women's Legal and Political Rights in Afghanistan**

For a historical overview of women's legal and political rights in Afghanistan please refer to *Annex 1* of this report.

## 2. Women's Priorities

In May 2003, on the eve of the beginning of the constitutional consultation process, Afghan female judges, lawyers, doctors, women's rights activists, students, journalists, among others, participated in a workshop on women's rights in constitutions and in family laws, organized by Rights & Democracy and the Women Living Under Muslim Laws Network (WLUML), in coordination with State Minister of Women's Affairs Mahbooba Haqooqmal and Assifa Kakar, Member of the Constitutional Commission.

The workshop idea arose from the Rights & Democracy mission to Afghanistan in September 2002, when Afghan women judges and lawyers expressed a sense of urgency in ensuring that women's rights be entrenched in the future Afghan constitution. Reforming Afghan family law from a gender perspective, using examples of best practices from other countries in the Muslim world<sup>33</sup>, was also considered essential as many of the violations of Afghan women's rights result from the application of Afghan family laws and customary practices that are largely based on interpretations of *sharia*<sup>34</sup>.

Even if the future constitution of Afghanistan succeeds in entrenching women's rights, this alone will not guarantee the realization of women's rights in Afghanistan. The above-mentioned reform of Afghan family laws should be carried out to ensure that this body of legislation not be used as a tool by conservative forces to ensure their control over society.

During the Rights & Democracy/WLUML workshop participants highlighted areas of concern for women in the on-going constitutional reform process and discussed the production of comparative legal memorandums to serve as public education and lobbying tools for those involved in the constitutional reform process. Participants considered it essential for the

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<sup>33</sup> This work is based on the following study of family laws in the Muslim world: Women Living Under Muslim Laws (WLUML), Knowing Our Rights: Women, family, laws and customs in the Muslim World, (2003)

<sup>34</sup> Abdullahi A. An-Na'im defines sharia as an individual and collective normative system which is supposed to regulate the daily lives of Muslims. See Abdullahi A. An-Na'im, "Islam and Human Rights: Beyond the Universality Debate," *Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000) p. 97

implementation of women's rights in Afghanistan that the future Afghan Constitution contain enforcement mechanisms as well as fundamental rights and affirmative action clauses.<sup>35</sup>

Furthermore, **participants emphasized the importance of the Constitution in terms of guaranteeing women's equality, women's social, economic and cultural rights (the rights to health, education, and employment were highlighted), women's political rights and women's citizenship rights (the right to dual citizenship),** among others. In other forums, Afghan women's recommendations for the constitution also emerged including **the right to compulsory secondary education for both sexes and "disparities in retirement ages, gender imbalances at the Supreme Court, and the condemnation of 'inappropriate customary practices' that violate *sharia* and international law."**<sup>36</sup>

In addition to the above priorities, some participants at our meeting expressed the need for a constitutional acknowledgement of the role of *shari'a* in Afghan law.

Will the new Afghan Constitution address the role of *shari'a* in Afghanistan? How will the relationship between Islam, *shari'a* and human rights be addressed in this Constitution? Will the constitution have precedence over the application of *shari'a*? How will the Constitution ensure that the interpretation and application of *shari'a* law in Afghanistan be compatible with Afghanistan's international obligations under CEDAW? What is the role of the judiciary in this regard?

Given the social, political and historical context of Afghanistan, particularly for women, it is crucial to consider these questions when addressing women's rights in Afghan law. To that end, an environment where these questions can be openly discussed by Afghan civil society during the CLJ is necessary.

The renowned scholar Abdullahi Ahmed An-Na'im considers that historical formulations of *shari'a* discriminate against women and calls for a reinterpretation of Islamic sources to secure

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<sup>35</sup> Accordingly, in a spirit of collaboration and based on the legislative and lobbying priorities of Afghan participants to the workshop, memorandums on the topics of fundamental rights, affirmative action and enforcement mechanisms were written and translated into Dari and Pashto. The memorandums are annexed to this report. See annex 2.

<sup>36</sup> ICG Report, op. cit., note 1, p. 20.

equality between men and women in Muslim personal laws (Islamic family law).<sup>37</sup> An-Na'im explains that *shari'a* needs to be reformed according to today's social, economic and political context in order to take account of international human rights standards.<sup>38</sup>

As another scholar of Islamic studies explains: "Although the law [*shari'a*] is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law – the human *fiqh* (literally, understanding) – that must be normative for society."<sup>39</sup> (our emphasis)

According to An-Na'im, the proposed reinterpretation of *shari'a* should be done by each community of Muslims according to its own context, instead of treating all such societies in the same way:

*This contextualization is particularly important because of the role of the state as the framework for the articulation and implementation of public policy for Islamic societies today. Whatever role sharia may play in the lives of contemporary Muslims, that role will necessarily be mediated through the agency of their respective national states, rather than by the autonomous action of the global Muslim community as such. As an essentially political institution, any state has to balance a variety of competing claims and interests. It is true that some of those claims and interests will probably reflect the religious sentiments of the population. But in view of the religious and political diversity of the population of Islamic countries today, and the complexity of their regional and global economic and security concerns, it is totally unrealistic to expect any state to be solely motivated by the religious sentiments of even the vast majority of its population.*<sup>40</sup>

While An-Na'im advocates for an internal dialogue to take place in each Muslim society, he links this dialogue with a necessary culturally-sensitive, timely and aware "cross-cultural dialogue" in order to enhance the influence of international human rights standards in both the domestic and global context of that society.<sup>41</sup>

To women and men in some of the Afghan communities visited by Rights & Democracy, Islamic law is what they have been practising to maintain a sense of community amidst the ramblings of war and the idiosyncratic edicts of the Taliban and other local warlords. Rights & Democracy realized in provinces such as Parwan and Kapisa, that when citizens are given a chance to express

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<sup>37</sup> An-Na'im, *op.cit.*, note 34, p. 99.

<sup>38</sup> An-Na'im, *op.cit.*, note 34, p. 98.

<sup>39</sup> Bernard Weiss, *The Spirit of Islamic Law* 116 (1998) Emphasis in original.

<sup>40</sup> An-Na'im, *op.cit.*, note 34, p. 99.

themselves, their views and definitions of “Islamic law” are as varied as those of the Afghan political leaders, fundamentalists and warlords.

Thus, in the context of Afghanistan, we hope that the CLJ will create the necessary condition to enable civil society to engage in an internal dialogue about these issues that are crucial to the re-interpretation of women’s rights in Afghanistan. The process of **entering into a popular education programme on women’s rights can be quite productive in the long-term. Afghan women NGOs are aware that the constitutional and electoral processes will provide the opportunity to discuss and raise awareness about women’s rights in their societies. International funders should follow their lead.**

### **3. An Internal – External Process: Coalition Building**

Networking and coalition-building helps identify and express issues of common concern; it allows women to share strategies and build from each other’s experiences. Coalition-building takes time, resources, leadership and advocacy as well as knowledge of, and access to, rights.

During our visits to Afghanistan in September 2002 and in May-June 2003, women clearly stated their need to meet with other women and women’s groups outside of Afghanistan, working across borders, ethnicity and class. Afghan women want to meet with other women who have experience addressing issues of Islam and its relation to the law. Women’s groups who have encountered intimidation practices and violence from both state and politico-religious movements should have the opportunity to meet with women in Central Asia to discuss ways and means to push forward progressive agendas, no matter the obstacles. Afghan women have a long history in clandestine struggles for survival. The struggle to participate and benefit from the reconstruction and peacebuilding is new, and effective solidarity initiatives must be nurtured and encouraged by donor agencies.

**It is our hope that International NGOs, women’s rights NGOs, and donors will be able to begin facilitating regional networking among Afghan women’s groups.** It is through the exchange of strategies and information, and through linking with other women’s movements with

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<sup>41</sup> Ibid.

extensive experience in advocacy and leadership (such as the women's movements of Pakistan, Iran and India) that Afghan women will learn to voice their concerns and build effective campaigns. Only then will women's rights become an issue in itself, guided by Afghan women themselves, and not a tool for political gain or for propaganda used during a violent conflict. It is by linking with the women from countries such as Tajikistan that Afghan women can better understand how to use the peacebuilding and reconstruction phase to ensure gains for women's human rights. The strategy of building women's networking capacity regionally has the potential to contribute to the struggle against fundamentalisms and terrorism in Afghanistan.

## **CONCLUSION**

The Afghan constitution-making process is far from perfect. As explained in this report, the drafting, educational and consultative phases of the process have so far lacked the democratic drive to ensure their legitimacy. Since the beginning of the constitution-making process, both the Afghan government and UNAMA have failed to create the necessary conditions to ensure a secure, transparent, inclusive, wide, and gender-sensitive constitution-making process. These actors failed to recognize that constitutional processes based on gender-sensitive community consultation and participation can lay the foundations for peace and stability.

Notwithstanding the situation of insecurity all over Afghanistan, the rampant warlordism, and the on-going impunity for violations of women's rights in particular, Afghan women have seized the moment in order to build coalitions inside and outside of Afghanistan, raise awareness on women's rights and debate gender issues. Importantly, their efforts and strategies also aim towards ensuring that the next Afghan constitution entrenches women's human rights through the inclusion of constitutional enforcement mechanisms, fundamental rights and affirmative action clauses; their legislative priorities in this regard take account of their social, political, economic and cultural history and context. For these reasons, Afghan women have also prioritised the reform of Afghan family laws from a gender perspective. In doing so, they have chosen to coalesce with women's rights scholars, activists and lawyers from other Muslim countries through the Women Living Under Muslim Laws Network and Rights & Democracy.

The recent decision to delay the Constitutional Loya Jirga presents the Afghan authorities and UNAMA with a short two-month window to create conditions conducive to engaging in a

democracy-building exercise where the political participation of civil society is possible, encouraged, and enhanced. To facilitate the participation of women in the CLJ, it is essential that the design and programme of the CLJ be reformed in order to increase the participation of women and ensure that discussions on women's rights issues are not marginalized during the CLJ. Women experience war differently than men; they experience violence differently; and they have different survival tactics than men – in order for women to participate fully in the CLJ, gender-sensitive security measures must be implemented. And even at this late stage, as civil society has repeatedly demanded, the draft constitution must be made public to allow for informed dialogue on the issues at stake. Afghan women deserve nothing less.

***Recommendations to the Afghan Transitional Administration, the Constitutional Commission and UNAMA Regarding Security for Women Delegates, Observers and Lobbyists during the CLJ:***

1. The UN-mandated International Security and Assistance Force (ISAF) **must** take charge of security in the provinces as well as in Kabul through out the Constitutional Loya Jirga (CLJ) process.
2. It is essential that the security personnel at the CLJ be able to guarantee the human rights of *all* the participants of the CLJ.
3. All reported threats and coercion of CLJ participants should be investigated promptly by security personnel (in coordination with the Executive Committee and civil society observers) who should act with due diligence and in conformity with international human rights standards. It is essential that these violations also be addressed when they take place in the private sphere, for example when the perpetrators are women's family members or community leaders.
4. Transportation (buses, for example) for women travelling from the provinces to attend or lobby at the CLJ should be provided.
5. Women-only accommodation for women delegates of the CLJ as well as for women attending the CLJ as observers or to lobby should be provided. The accommodation must be secured 24 hours a day.
6. Women attending the CLJ must be protected from threats by warlord factions before, during, and after the CLJ.
7. The security unit at the CLJ must include female security personnel and female health and trauma counselling practitioners who are trained on gender issues.
8. Women should be accompanied by the person of their choice when being interviewed by security personnel at the CLJ.

9. Members of the Afghan Independent Human Rights Commission (AIHRC) as well as civil society observers of the CLJ should have access to women and women delegates during the CLJ and they should accompany security personnel during the CLJ.
10. Women participants of the CLJ must have a safe, secure and private meeting space close to the main meeting area to discuss issues of concern and to strategize.



**ANNEX 1**

**Prepared by:**

**Cheshmak Farhoumand-Sims**

**York University, September 2003**

**Table 1: A HISTORICAL OVERVIEW OF WOMEN IN AFGHANISTAN<sup>42</sup>**

<b>Time Frame</b>	<b>Policy</b>	<b>Reaction and Outcome</b>
<p><b>First Monarch Amir Abdur-Rahman (1880 – 1901)</b> -embarked on modest reforms to benefit women</p>	<p>- institution of a civil code state appointments of clergy to reduce independence of Mullahs customary practices that bound women to remarry next of kin forbidden child brides given right of refusal laws allowing women to sue husbands for alimony and request divorce were allowed</p>	
<p><b>Second Monarch Habibullah (1901 – 1919)</b> - continued father’s reforms</p>	<p>- all of the above tried to limit the practice of taking more than 4 wives by banning the keeping of concubines and ‘female slaves’</p>	
<p><b>Third Monarch Amir Amanullah (1919 – 1929)</b> - deepened reform efforts as part of a more systematic program of modernization that sought a new intellectual basis in Afghan nationalism and pan-Islamism - promotion of socio-economic position of women - gender equality became a political issue “only educated women could be good wives and mothers”</p>	<p>daughters of the elite were sent to Turkey and Switzerland for higher education campaign against the veil in 1928 instigated regulations requiring Western dress in Kabul 1921 family code substantially improved legal standing of women: banned child marriage, required judicial permission before a man could take an additional wife, removed some family law questions from mullahs’ jurisdiction, and reiterated Abdur-Rahman’s rule concerning a widow’s right to choose her next spouse 1923 Constitution made generic reference to equality and made education compulsory for all Afghans (this was difficult to implement outside of Kabul) creation of new criminal and civil administrative codes</p>	<p>- instituted magistrate courts to implement reforms in a first step to secularize the formal justice system - far reaching reforms lacked adequate popular support and a fiscal base and led to opposition among elites whose authority was threatened - reforms led to revolts in tribal areas even though reforms not extended there - 1921 <i>Nizamnama</i> became focus of opposition in 1924 Loya Jirga - revolts in Khost and Nangarhar provinces ultimately led to Amanullah’s fall - before leaving Kabul, he cancelled reforms and progress crumbled with girl schools closing and the return of women</p>

<sup>42</sup> Information taken from “*Afghanistan: Women and Reconstruction.*” ICG Asia Report no. 48, March 14, 2003

Time Frame	Policy	Reaction and Outcome
<b>Fourth Monarch Nadir Shah (1929 – 1933)</b>	<ul style="list-style-type: none"> <li>- all legal codes based wholly on narrow interpretations of Islamic law</li> <li>- justice administered by religious courts</li> <li>- Society of Learned Muslim Interpreters of Law <i>Jamiat-ul-Ulama</i> formed to ensure consistency of laws with Islamic norms</li> </ul>	<ul style="list-style-type: none"> <li>studying abroad</li> </ul>
<b>Fifth Monarch Zahir Shah (1933 – 1973)</b> <ul style="list-style-type: none"> <li>- pace of modernization accelerated</li> </ul>	<ul style="list-style-type: none"> <li>- 1959: Kabul University became co-educational</li> <li>- voluntary observance of <i>pardah</i> (seclusion) reintroduced</li> <li>- within a limited political space, some women found public roles: <ul style="list-style-type: none"> <li>- 1958: 1<sup>st</sup> women delegate to UN</li> <li>- 1965: women participated in elections</li> <li>- 1965-1969: women Minister of Public Health</li> <li>- 1971-1972: women political advisor to PM</li> <li>- two women nominated to Senate</li> <li>-</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- upper/middle class women found work within Kabul's academic and legal institutions</li> <li>- paid employment severed women's traditional ties</li> <li>- documented incidents of acid attacks on unveiled women students at Kabul University</li> <li>- reforms and benefits did not reach rural women except for a few educated ones</li> </ul>
<b>Daoud's Presidency (1973 – 1978)</b> <ul style="list-style-type: none"> <li>- denied political freedom to preserve his authority</li> <li>- the rights he did extend benefited only a select number of middle and upper class women</li> </ul>	<ul style="list-style-type: none"> <li>- did extend some social rights to elite women to support his claim of modernization</li> <li>- included women in the 20 member Constitution Advisory Committee, 15% of loya jirga were women</li> <li>- 1974 Constitution included article 27 granting women equal rights and obligations under law, the rights to education (article 10), and employment (articles 9, 41, 42)</li> </ul>	
<b>Barmak PDPA Communist Rule (1978 – 1986)</b> <ul style="list-style-type: none"> <li>- instituted revolutionary reforms without sensitivity to cultural context which almost guaranteed failure</li> <li>- used terror to eliminate resistance (ie. Massacre in Kunar 1979)</li> <li>- ultimately, wave of modernization and reforms of the status of women led to a state of war which snowballed into a 23 year conflict</li> </ul>	<ul style="list-style-type: none"> <li>- supported equal rights in the civil law and opposed "unjust patriarchal feudalistic relations between husband and wife"</li> <li>- prohibited forced marriages of girls and widows and banned arranged marriages</li> <li>- introduced minimum age of marriage for women and men</li> <li>- abolished bride price</li> <li>- introduction of compulsory female education</li> <li>- encouraged women to unveil, be more active in society and work outside the home</li> <li>- forced literacy classes in rural areas</li> </ul>	<ul style="list-style-type: none"> <li>- women participated more directly in government through memberships with PDPA central committee and in ministries</li> <li>- reforms resulted in disaffection of traditional power holders in countryside</li> <li>- forced literacy classes sparked active resistance</li> <li>- regime's reforms were also catalyst for development of 7 Pakistan-based parties and Iranian-based Shia resistance groups that supported Islamic commanders and leaders within the country</li> </ul>

Time Frame	Policy	Reaction and Outcome
<p><b>PDDPA Communist Rule (1986 – 1992)</b>  <b>Najibullah</b>            -institution of a number of significant measures concerning women’s access to government structures, education and employment</p>	<p>-family courts to handle such matters as divorce and inheritance            -judicial association that attempted to mediate family disputes before referring them to court            -women’s association that provided professional and vocational training</p>	
<p><b>Civil War Years (1992 – 1996)</b>  <b>Sibghatullah Mujadidi, Burhanuddin Rabbani</b></p>		<p>-legal and social gains for women decreased and women became the target of physical and sexual violence in an atmosphere of war and conflict            -by 1995, Afghanistan had the highest infant mortality and maternal mortality rates            -less than 30% had access to health care            -90% of girls were illiterate            -this lack of access to basic necessities and lack of security extended to refugee camps where women were particularly vulnerable</p>
<p><b>Taliban Years (1996 – 2001)</b>            -After two years of fighting the Taliban took over Kabul in September 1996            -their stated goals were: restoring peace, collecting weapons and implementing shari’a law</p>	<p>-the Taliban instituted laws in accordance to their strict interpretation of the Shari’a and women were the most vulnerable victims of these decrees            -women and girls were denied education, freedom of movement, and restricted from working</p>	

**ANNEX II**

## **WOMEN'S RIGHTS IN THE FUTURE CONSTITUTION OF AFGHANISTAN**

### **Tools for Civil Society**

During the Rights & Democracy mission to Afghanistan in September 2002, Afghan women judges and lawyers expressed a sense of urgency in ensuring that women's rights be entrenched in the future Afghan constitution. Many aspects of Muslim Family Laws relate to rights contained in the constitutional documents: equality, nationality, citizenship, marriage, divorce, among others. Thus, Rights & Democracy, and the International Women Living Under Muslim Laws (WLUML), in coordination with Minister Hoquqmal, the State Minister on Women's Affairs and our Afghan partners joined efforts in a project to attempt to contribute to the reform of the Afghan legal system from a gender perspective.

In May 2003, on the eve of Afghanistan's public consultations on the future Afghan constitution, Rights & Democracy and WLUML, organized a workshop on women's rights in constitutions and in family laws. During the workshop participants highlighted areas of concern for women in the on-going constitutional reform process and discussed the production of comparative legal memorandums to serve as public education and lobbying tools for those involved in the constitutional reform process. Participants considered essential to ensuring the implementation of women's rights in Afghanistan that the future Afghan constitution contain enforcement mechanisms as well as fundamental rights and affirmative action clauses.

Accordingly, the accompanying memorandums on the topics of enforcement mechanisms, fundamental rights and affirmative action and are written in a spirit of collaboration and based on the legislative and lobbying priorities of Afghan participants to the workshop.

It was the hope of all partners consulted that the constitutional consultative process be prolonged, postponing the constitutional Loya Jirga passed the October 2003 schedule in order to enable a truly democratic and transparent legal reform process to take place. It is essential that Afghan citizens be able to fully benefit from the constitutional process and that the process serve to engage citizens in a dialogue about human rights and democratic development thereby fulfilling a public education purpose. For this to take place more time is needed and security must be improved through out the country.

# 1 MECHANISMS FOR ENFORCEMENT OF RIGHTS IN CONSTITUTIONS

## 1. Supremacy clause

### 1.1 What is it?

A supremacy clause is an article in a constitution that gives the constitution priority where it is inconsistent with other laws. In other words, any law that is inconsistent with the provisions of the constitution is of no force or effect. The courts have the responsibility to determine whether or not a law is inconsistent with the constitution. This is called the power of judicial review.

### 1.2 Why is a supremacy clause important for the enforcement of the constitution?

A supremacy clause entrenches (or secures) the constitution. Accordingly, the rights contained in the constitution are also entrenched (secured) meaning that any amendments to these provisions can be made only in accordance with the special amending procedures laid down by the constitution (the constitution cannot be amended by ordinary legislative action).

### Examples of supremacy clauses in constitutions:

*Article 2 of the Constitution of the Republic of South Africa<sup>43</sup>:*

*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*

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<sup>43</sup> The objective of the constitutional process that resulted in the signing into law of the Constitution of South Africa on 10 December 1996 was to ensure that the final Constitution is legitimate, credible and accepted by all South Africans. To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society, including women's groups and political parties represented in and outside of the Constitutional Assembly. The Constitution of South Africa therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.

**Article 1 of the Constitution of the Republic of Nigeria :**

*This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.*

*The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.*

*If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*

**Article 4(1) of the Constitution of Malaysia :**

*This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

**2. Remedies**

**2.1 What are they?**

Remedies are the means by which a right is enforced or by which the violation of a right is prevented or compensated. In other words, remedies are means employed to enforce a right or redress an injury. Remedies for violations of rights include the right to access justice; of reparation for harm suffered; and of access the factual information concerning the violations.

According to international human rights law, everyone has the right to an adequate, effective, and prompt remedy if their human rights are violated.

The right to a remedy can be violated in a variety of ways, including by:

- failing to provide adequate procedures to complain about, or obtain compensation for, killings by security forces;
- not carrying out thorough enquiries into alleged ill-treatment by security forces;
- not establishing complaints procedures regarding the interception of telephone calls;



- failing to provide means of redress for persons suspended from school on the grounds of their gender.

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) contain articles that guarantee the right to a remedy that is effective.

***Article 8 of the UDHR:***

*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

***Article 2 of the ICCPR obligates States to ensure that an effective remedy is available:***

*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

*3. Each State Party to the present Covenant undertakes:*

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.*

## **2.2 Private remedy clause**

### **2.2.1 What is it?**

A private remedy clause provides for the granting of a remedy to enforce the rights contained in the constitution.

The combination of a supremacy clause and a remedy clause in a constitution ensures that the fundamental rights it contains become part of “the supreme law of the land” to which inconsistent laws must yield, the rights become entrenched (alterable only by the special process of constitutional amendment) and enforceable.

In practice, the private remedy clause guarantees one’s right to apply to a competent court when they consider that their constitutional rights have been violated and seek adequate, prompt and effective relief.

### **2.2.2 Examples of private remedy clauses in constitutions:**

The Canadian Constitution Act of 1982 *is* the Canadian constitution. Part I of the Canadian Constitution is called the Canadian Charter of Rights and Freedoms (Articles 1 to 34 of the Canadian Constitution Act, 1982). The Charter of Rights and Freedoms spells out the rights of citizens in relationship to each other and to the Canadian government.

#### ***Article 24 (1) of the Canadian Charter of Rights and Freedoms :***

*(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

#### ***Article 38 of the Constitution of South Africa :***

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*

*The persons who may approach a court are:*

- (a) anyone acting in their own interest;*

- (b) *anyone acting on behalf of another person who cannot act in their own name;*
- (c) *anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) *anyone acting in the public interest; and*
- (e) *an association acting in the interest of its members.*

Furthermore, as is the case in South Africa, the constitution may also contain guarantees that ensure that the private remedy clause is effective. For example, the right to a private remedy in South Africa entails the right to access to information:

***Article 32 of the Constitution of South Africa***

*(1) Everyone has the right of access to :*

- (a) any information held by the state; and*
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.*

*(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

***Article 35 (1) of the Constitution of Hong Kong***

*(1) Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.*

*(2) Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.*

**2.2.3 An Example of the Use of a Constitutional Enforcement Mechanism : A Sexual Harassment Case from India<sup>44</sup>**

The petitioners were various social activists and non-governmental organisations concerned with finding suitable methods for the realisation of the true concept of ‘gender equality’, preventing the sexual harassment of working women in all workplaces through the judicial process and filling the vacuum in existing legislation. As a result of the brutal gang rape of a publicly-

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<sup>44</sup> Vishaka & Ors v. State of Rajasthan & Ors, (1997) 6 SCC 241, AIR 1997 SC 3011, (1998) BHRC 261, [1997] 3 LRC 361, (1997) 2 CHRLD 202

employed social worker in a village in Rajasthan, they filed a class action under Art 32<sup>45</sup> of the Indian Constitution seeking the court's enforcement of the fundamental rights provisions relating to working women, namely the right to equality, the right to practise one's profession and the right to life.

Other issues raised by the petition included: the fundamental right to non-discrimination; India's international obligations under Arts 11 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to *inter alia* 'take all appropriate measures to eliminate discrimination against women in the field of employment' (Art 11) and to 'undertake to adopt all necessary measures at the national level aimed at achieving the full realization' of the rights recognised in CEDAW (Art 24); and India's official commitment at the Fourth World Conference on Women in Beijing to, *inter alia*, 'formulate and operationalize a national policy on women which would continuously guide and inform action at every level and in every sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; [and] to institutionalise a national level mechanism<sup>46</sup> to monitor the implementation of the Platform for Action.'

In disposing of this petition the Court decided that:

1. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, belongs to the legislature and the executive. When, however, instances of sexual harassment result in violations of fundamental rights contained in the Constitution, effective redress requires that some guidelines for the protection of these rights should be laid down by the court to fill the legislative vacuum.
2. In view of the fact that the violation of such fundamental rights is a recurring phenomenon, a writ of *mandamus* (an extraordinary court order commanding an official to perform a

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<sup>45</sup> Article 32 is the private remedy clause of the Indian Constitution that guarantees the right to petition the Supreme Court to seek the enforcement of fundamental rights contained in the Constitution.

<sup>46</sup> See examples of national institutions in section 2 below.

ministerial act that the law recognizes as an absolute duty) needs to be accompanied by directions from the court for prevention of sexual harassment if it is to be successful.

3. Any international convention not inconsistent with the fundamental rights guaranteed in the Constitution and in harmony with its spirit must be used to construe the meaning and content of the constitutional guarantee and to promote its object; this is now an accepted rule of judicial construction and is also implicit in the Constitution.
4. It follows that Arts 11 and 24 of CEDAW, General Recommendations 22, 23 and 24 of the CEDAW Committee, relating to sexual harassment in the workplace, and India's commitment at the Fourth World Conference on Women may be relied upon to construe the nature and ambit of the gender equality guarantee in the Constitution and, since the guarantee includes protection from sexual harassment and the right to work with dignity, to formulate preventive guidelines.
5. Both the judiciary and the government have to meet the challenge of protecting working women from sexual harassment and making their fundamental rights meaningful. Governance of society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme.
6. In the absence of legislation, the obligation of the court under the Constitution must be viewed along with the role of the judiciary envisaged in the 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region.

The Court also issued guidelines and norms, to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women. For example:

- The employer or other responsible persons in the workplace or other institution is under a duty to prevent or deter the commission of acts of sexual harassment and to provide procedures for the resolution, settlement or prosecution of such acts by taking all steps required;
  - a. The definition of sexual harassment includes unwelcome sexually determined behaviour (whether directly or by implication) such as:

- i. physical contact and advances;
- ii. a demand or request for sexual favours;
- iii. sexually-coloured remarks;
- iv. showing pornography;
- v. any other unwelcome physical, verbal or non-verbal conduct of a sexual nature;

- All employers or persons in charge of any workplace, whether in the public or private sector, should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation, they should take the following steps:

- i. express prohibition of sexual harassment at the workplace should be notified, published and circulated in appropriate ways;
- ii. the rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender;
- iii. appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

## **2.3 Public remedy**

### **2.3.1 What is it?**

In addition, to containing articles that guarantee the right to seek a remedy for the violation of fundamental rights, constitutions may contain public remedy clauses that provide for positive action by the State to respect, promote, protect and fulfil fundamental rights. A public remedy

clause facilitates access to justice through democratic institutions created and maintained by the State.

### **2.3.2 Examples of public remedy clauses in constitutions:**

Chapter 9 of the Constitution of South Africa provides for the creation of State institutions that support the “constitutional democracy”:

#### ***Section 181 of the Constitution of South Africa :***

*(1) The following state institutions strengthen constitutional democracy in the Republic:*

- (a) The Public Protector.*
- (b) The Human Rights Commission.*
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.*
- (d) The Commission for Gender Equality.*
- (e) The Auditor-General.*
- (f) The Electoral Commission.*

*(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.*

*(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.*

*(4) No person or organ of state may interfere with the functioning of these institutions.*

*(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.*

#### ***Section 187 of the Constitution of South Africa establishes the functions of Commission for Gender Equality :***

*(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.*

*(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.*

*(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.*



## **II FUNDAMENTAL RIGHTS IN THE CONSTITUTION**

The objectives of a country's constitution are to limit the arbitrary action of the government, to guarantee the rights of the governed and to define the position of the sovereign power. A constitution makes an individual's fundamental rights legal in the eyes of the state. By becoming legally binding, the state owes each citizen the fundamental rights included in its constitution. This means that fundamental rights of the citizens guaranteed in the country's constitution can be upheld in a court of law. Constitutional rights are what elevate people living in a given country to the status of citizens, rather than merely subjects to be governed arbitrarily.

When rights included in a constitution are designated as "fundamental", this implies that these rights are considered politically essential to the existence of society in the state and necessary to guarantee individuals a sense of dignity and respect.

In 1993 the United Nations hosted the World Conference on Human Rights. The Vienna Declaration and Platform for Action states:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

### **1. Categories of rights**

While the Vienna Declaration and Platform for Action will celebrate its 10<sup>th</sup> anniversary this year most states continue to divide fundamental rights of citizens into different categories. The constitutions of most countries often derive the civil and political rights they guarantee to citizens from international legal instruments. These civil and political rights are sometimes referred to as "classic rights", and can also include economic and social rights. The right to life, liberty, freedom of association, and the freedom to vote, for example, fall under the category of classic

rights. These types of rights were developed to function as a constraint upon the unwarranted interference of governments in the everyday lives of their citizens. They place obligations on the state and limit its authority to act arbitrarily.

Social and economic rights are another category of rights that place obligations on governments to ensure that their citizens are able to live and work under conditions that adhere to a basic level of human dignity. Examples of such rights are the right to be protected from harm, the right to social services, the right to work, the right to collective representation and the right to access basic healthcare. Political rights can sometimes be mistakenly classified as social and economic rights, for example, the right to a fair trial or the right to seek justice.

There is an important difference between civil and political rights and social and economic rights. The state is expected to back-up the guarantee of civil and political rights, while social rights are generally treated as general policy objectives without a full judicial complaints procedure to guarantee them.

### ***Do Civil and Political Rights Place Only Negative Obligations on a State?***

Civil and political rights do not only place negative obligations on the state, that is, state actions in response to a violation of those rights. For example, in order to guarantee the right to a fair trial, positive action must be taken through the establishment and maintenance of an adequate judicial and law enforcement system. Furthermore, certain social and economic rights are contained within political rights treaties and are based upon negative obligations, such as the prohibition of slavery and forced labour or the right to freedom of association or to equal treatment before the law. These rights can be claimed before a court of law, they are considered justiciable. Similarly, if certain social rights are violated such as the right to strike or the freedom to engage in collective bargaining, the state action can be subject to judicial review.

### **1.1 Absolute, Conditional and Qualified Rights**

No statement of rights in any charter or any constitution is absolute. All liberties and freedoms are subject to certain regulations. What is important is that these regulations do not infringe upon

rights neither in an arbitrary nor in an unreasonable manner, nor that they exceed their legitimate purpose for society as a whole. Legislation and policies can create regulations for the collective good. For example, freedom of information and freedom of expression are guaranteed rights that cannot be curtailed arbitrarily; however, in a court case trying a crime of sexual violence against a minor or a woman there may be restrictions that the press must adhere to over issues such as reporting the name of the victim to the public (in order to protect his or her privacy), printing a photograph of a witness (which could threaten their safety), or the dissemination of offensive or hateful publicity.

Conditions and qualifications do not imply that fundamental rights can be disregarded or watered down. Any conditions must promote a specific and legitimate aim, for example, a condition placed in the interest of public safety. Any infringement must be regulated by law and must be in line with the spirit of the constitutional right in question. Whenever possible, less intrusive methods should be applied instead.

## **2. Equality Clause**

Equality before the law and the right to equal protection before the law are basic guarantees of a constitution. It is this provision which on the one hand limits discrimination in state legislation regarding civil liberties, and on the other hand provides a safeguard to citizens against discrimination which could threaten to deny citizens the enjoyment of their social and economic rights. Equal protection to all is the basic principle of justice before the law.

Article 7 of the United Nations Universal Declaration of Human Rights, states all human rights are equal before the law and are entitled, without any discrimination, to equal protection of the law. ***What does the principle of equality mean?*** It means that all human beings are equal and therefore the law should be applied in the same way for all people. Equality before the law negates all special privileges to any citizen or class, and subjects all people to be treated equally before the law under any circumstance or in any situation regardless of their class, race, ethnicity, income, gender, religion, tribe or language.

### **3. Language of Rights**

All legal texts formulate their statements from the basic meanings of the words used in the text. Words used to describe rights are of utmost importance. Generally, words used in constitutional texts are such that they have broad meanings and are not restrictive in approach. Such words set a high standard and provide a wide margin of interpretation in court. For example, the term “dignity” has various meanings and conditions. Some constitutional texts may state that the dignity of a person (old texts may use the word “man” instead of “person”) is to be respected while some say it is inviolable, meaning it can never be violated in any form whatsoever. The use of word *inviolable* prevents degrading punishment even against a convicted person.

Another example is the term “*inalienable*” rights (an adjective meaning that something can never be taken away). Use of the word ‘*inalienable*’ restricts the state from suspending constitutional rights, even in emergency situations and prevents arbitrary action against citizens. Similarly, for laws to be in accordance with the provision of fundamental rights guaranteed in a constitution, use of a word such as “*inconsistency*” instead of “*in conflict*” imply different meanings and differ in the strictness of the criteria the courts will use to judge the validity of a law, if a dispute arises about a statutory provision that infringes upon a citizen’s rights.

### **4. Are Fundamental Rights Only for Citizens?**

A country’s constitutional rights are generally exclusively reserved for the citizens of that country. Different countries guarantee different rights; however, there are some basic rights available to all persons within a country, even if they are in that country temporarily. Such rights that guaranteed irrespective of citizenship or residency status include basic civil liberties such as the right to life, protection from arbitrary arrest and detention, the right to a fair trial, the right to be innocent until proven guilty. Article 4 of Pakistan’s Constitution does not distinguish a citizen from a non-citizen and protection of the law are the guaranteed rights of all individuals in the country. Similarly, Article 14 of Sri Lanka’s Constitution stipulates for a particular length of stay for an individual to be able to enjoy the right of freedom of speech, assembly, association, occupation and movement on the same footing as Sri Lankan citizens.

#### ***4.1 What is the Purpose and Function of Fundamental Rights?***

##### **i. To Provide A Legislative Framework**

Fundamental rights provide a framework for the legislature to enact laws in accordance with these rights and to enable policies which guarantee fundamental freedoms and place obligations on the state to provide the necessary environment for citizens to enjoy their guaranteed rights. Most constitutions include a clause which restricts the state from enacting laws that are inconsistent with citizens' fundamental rights. If any law in whole or in part is not in accordance with these rights, then that law is rendered void. A state's superior courts are vested with the authority of judicial review, to verify that laws conform to the constitution and to dispel laws that are deemed unconstitutional. Article 8 of Pakistan's 1973 Constitution states "(1) Any law, or any custom or usage having force of law, in so far as it is inconsistent with the rights conferred by this chapter, shall, to the extent of such inconsistency, be void; (2) the state shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void."

##### **ii. To Protect from State Action**

These rights provide protections against actions of the state which are in derogation of the fundamental rights. Fundamental rights require that states abstain from prejudicial actions against citizens and any transgressions are rendered void.

There are two forms of rights that protect from invalid government or other state authorities. One is substantial and the other is procedural. Substantive rights are considered an end in themselves. For example, the dignity of a person is inviolable. Procedural rights provide for procedures to be adopted by the state when dealing with individuals. For example, Article 33 of Bangladesh's Constitution provides for safeguards when an individual is arrested and detained.

Similar rights are included in Article 10 of Pakistan's Constitution and Article 22 of India's Constitution. These articles state the rights of the accused, for example:

- the accused has right to know the charge against her/him
- the accused had the right to defend herself/himself through a counsel of her/his choice,

- the accused cannot be detained beyond a certain period without the written authorization of a judicial officer.

### **iii. To Safeguard Against Arbitrary Distinctions and Classifications**

Although affirmative action provisions (see accompanying memorandum on this topic) allow states to take special measures to benefit disadvantaged sections of society, an equality clause provides a check upon any arbitrary distinction or classification. The Supreme Court of Pakistan holds that reasonable classification is permissible, but must have a reasonable basis or justification.

There can be no universal standard to test reason for a classification as a particular classification may be reasonable in some circumstances and unreasonable in others. A classification's reason should be based on an intelligible differentiation between persons or things grouped together and those who are excluded. The differentiation must have a rationale link to the object sought to be achieved by such classification.

### **iv. Fundamental Rights Maintain an Overarching Supervision over Administrative Institutions**

The field of administrative law is expanding. Executive authorities are acquiring legislative and quasi-judicial functions in addition to administrative tasks. Now, instead of '*quasi-judicial*', the term '*adjudication*' is used. On the one hand, executive branches of government are acquiring these functions while on the other hand common law countries continue to consider any action of the administration that is not in accordance with the law is invalid in practice. In such countries, it is the substantive and procedural aspects of rights that keep the executive authorities in check.

### **v. To Protect the Right of Minorities against Abuse by the Majority**

What distinguishes a constitution's fundamental rights from ordinary rights under the law is that fundamental rights can be enjoyed by a minority and cannot be altered or amended through

ordinary legislation. They are thus not subject to authoritarian or arbitrary dictates of the majority. Some constitutions place fundamental rights as part of the basic structure of the Constitution and cannot be subjected to amendment.

## **5. Concept of Rights Developed According to the Corresponding Legal System**

The recognition of citizens' fundamental rights in their true sense is contingent to the system of governance developed and adopted under the Constitution. This includes stipulations for legislative procedures, the authority of Parliament or other law-making bodies, the functions of executive authorities and most importantly, the type of judicial system.

**I. Legislative powers :** Fundamental rights are not embodied unless legislation is drafted subject to the provisions of those rights. The constitutions of India, Pakistan and Bangladesh clearly provide that with the commencement of their respective constitutions, any law, custom or usage having force of law, if it is inconsistent with the provisions of the constitutional rights shall be rendered void. To determine whether a law or custom is inconsistent with the constitution, the respective countries have provided the power of judicial review to their superior courts created under the Constitution. Thus, making legislative acts subject to judicial review to verify conformity with the constitution is fundamental for the enjoyment of a state's constitutional rights.

Despite such guarantees of rights under the constitution, occasionally countries make laws that are exceptions. For example, in Pakistan the Muslim Family Laws Ordinance of 1961 cannot be constitutionally challenged in any court. This exception is in violation of citizens' rights and is a hindrance to genuine equality for all citizens.

**Adoption of Pre-Existing Laws :** The constitutions of most developing countries, particularly former colonies, came into force only during the past few decades. Some were created in conformity with the system of governance already in existence. Criteria adopted for the continuation of those laws within the old system of governance is a primary factor for effective implementation of fundamental rights. Article 47 (2) of Bangladesh's Constitution protects many

pre-existing laws and it is will of the legislature whether to amend those old laws or not. Sri Lanka's Constitution kept all pre-existing laws in addition to the rights stated in the constitution.

***Article 16 of the Sri Lankan Constitution states that:***

*(1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.*

*(2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.*

Exceptions granted to either pre-existing laws or laws enacted after the adoption of the Constitution often affect women and other disadvantaged sections of society. In much of the developing world, personal status laws are decades old and have not been enacted through proper legislative procedures. Customs retain the force of law and are not subject to a guarantee of constitutional rights.

**II. Executive Actions :** An important part of examining constitutional rights is to look at clauses of immunity granted to executive state authorities, created with the intent to maintain law and order or for reason of security. The constitutions of Pakistan, Bangladesh and India, despite stating the provision of freedom against arbitrary arrest and detention, allow state authorities to enact laws of preventative detention and protect preventative detentions from habeas corpus writs of the courts.

**Judicial System :** Without effective judicial redress through enforcement mechanisms fundamental rights are meaningless. The *right to petition* for redress against a rights violation is a fundamental right recognized in countries. Please see the accompanying memorandum on enforcement mechanisms.



### **III. AFFIRMATIVE ACTION IN THE CONSTITUTION**

#### **1. What is Affirmative Action?**

Affirmative action describes special measures aimed at providing opportunities to disadvantaged and underutilized groups (specifically women and minorities) who are unable to enjoy basic rights and opportunities as a result of long-term discrimination. The institution of affirmative action policies acknowledges the impact of discrimination and is designed to correct past injustices, and promote the full participation of all citizens in the social and economic life of a society. Affirmative action policies are often included in education and employment policies or instituted in the constitution of states where a certain segment of the population has experienced long term and protracted discrimination based on sex, nationality, religion or other distinctions. South Africa is an example of a country whose constitution has incorporated affirmative action as a legal matter to correct past injustices against a population based on race. Afghanistan is an example of a country that would benefit from the inclusion of such provisions in its constitution, and its implementation at all levels of society.

Affirmative action programs are used to increase the number of women, minorities and other under-represented segments of society (i.e. the handicapped) into environments where imbalances exist due to prejudice and discrimination. These could include institutions of higher education and places of employment. In order for affirmative action to be a useful tool for social transformation, studies have pointed to the need for assessing past and existing circumstances, and developing a program that has well defined goals and a realistic time frame for change. It is more valuable to mainstream affirmative action as a 'principle' than as a method of setting and enforcing quotas.

Affirmative action policies are aimed at righting past wrong; providing opportunities to those who were negatively impacted by discrimination because of their race, nationality or sex, and therefore need, and indeed deserve, special measures to encourage and support their full participation in society. A useful metaphor to illustrate the importance of affirmative action is to compare men and women to the wings of a bird. Imagine if one wing is weak as a result of being 'closed' for many many years, it will need extra care, attention and 'exercise' to strengthen and

be able to flap like the other wing. If both wings are not able to work in tandem, the bird is unable to fly, and in the same way, if men and women are not provided with equal rights and opportunities to develop to their full potential and contribute equally to their society, that society is unable to progress and develop.

Articles 2 and 4 of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) obliges States Parties to the Convention to end discrimination against women and institute special measures in the Constitution, and pass legislation to promote women's full participation in the social, economic and political life of the country. As a state that has recently ratified CEDAW, and is in the process of drafting a new Constitution, Afghanistan is in an excellent position to bring its commitment to its citizens and the international community together by incorporating the provisions of CEDAW into its constitution.

## **2. Why is Affirmative Action an important strategy to use?**

There are many social and economic benefits to the institution of affirmative action policies. This is especially true in societies that have experienced social division based on nationality, ethnicity, sex, religion or language.

### ***1. Affirmative action is about good governance, and moral and political leadership***

Societies that have experienced long term, deep-rooted prejudices and institutional discrimination benefit from practicing affirmative action policies. In those societies where inequalities have effected the ability of *all* citizens to benefit from rights and opportunities, affirmative action serves two purposes: first it is a symbol of the commitment and the political will of political and social leaders to social betterment and transformation; and second, more than a symbol, it is a tangible way to open up public space for previously underprivileged factions of society. Hence governments that promote affirmative action are demonstrating their commitment to good government and their concern for the well-being of *all* citizens.

**2. *Affirmative action is about promotion of positive values in a society***

Affirmative action policies promote the message that all citizens should have access to educational and employment opportunities and thereafter be valued for their capacities and not for the colour of their skin, their nationality, sex or other distinguishing features. Promoting the principle of ‘unity in diversity’ can only serve to promote a more cohesive and healthy society for all citizens, and this is particularly important in societies that have experienced long term internal conflict which has created or further entrenched divisions between groups and people.

**3. *Affirmative action is about a strengthening the economy***

When a large percentage of the population is unable to access education and jobs, this deprives the economy of vast amounts of human resources whose contributions would undoubtedly benefit all of society. Affirmative action policies ensure a ‘level playing ground’ for all citizens and thereby increase the pool of eligible and competent candidates to a position. The inclusion of under-represented members of society into the economic life of a country can only lead to positive change including job creation, and an improved standard of living which in effect will strengthen an economy and make it attractive for foreign investment.

**4. *Affirmative action is about peace, justice and human rights***

Affirmative action is about righting past wrongs and promoting the creation of societies founded on principles of justice, equity and human rights. The internal peace and social stability of society depends on these principles, and their absence is empirically linked to political unrest, social chaos and economic volatility.

**5. *Affirmative action is about basic entitlements***

International human rights instruments state entitle all human beings to basic rights including food, shelter, education, and health. Affirmative action would not be needed if states applied the principle of equal protection and rights and opportunities to all citizens. Since every society has a

segment of the population that experiences discrimination based on sex, nationality, race and other distinguishing features, affirmative action policies are a *necessity* to ensure that *all* citizens can enjoy basic entitlements. So by instituting affirmative action measures in constitutions and other legislations, governments are simply fulfilling their obligation to promoting and protecting the human rights of all their citizens.