

Breaking Barriers

Challenges to Implementing Laws on Violence
Against Women in Afghanistan and Tajikistan

with special consideration of displaced women

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Chapter 1

Afghanistan

I. Introduction

Since the fall of the Taliban in 2001, women’s rights and equality in education, employment, politics, public life, and protection from violence in Afghanistan have improved.¹ Women have regained many of the rights they lost during the Taliban regime and have gained new rights, including protection and remedies for crimes of violence committed against them, at least in the law as written.² The current Afghan Constitution guarantees equal rights between men and women, the right to free education for all citizens, and the right to work for “every Afghan.”³ The Afghan government ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 2003, and enacted its framework law to eliminate sexual and gender-based violence (SGBV), the Elimination of Violence Against Women Law (EVAW Law), in 2009.⁴

This chapter examines the current context of violence against women in Afghanistan, including the forms, causes, and levels of violence, and analyzes the legal framework for violence against women in Afghanistan, focusing primarily on the EVAW Law. It identifies the principal barriers to effective implementation of the EVAW Law and legal protections for women facing violence. The additional, unique vulnerabilities and protection concerns for internally displaced and returnee Afghan women receive highlighted attention.

¹ The term “women” in this report refers to all females regardless of age and does not exclude females under the age of majority. *Afghanistan: Fight Rampant Sexual Harassment*, HUMAN RIGHTS WATCH (Oct. 14, 2014), <http://www.hrw.org/news/2014/10/14/afghanistan-fight-rampant-sexual-harassment>; Chandrika Narayan, *Women’s rights groups hail conviction of Afghan cleric for girl’s rape*, CNN (Oct. 27, 2014), <http://www.cnn.com/2014/10/26/world/asia/afghan-girl-rape/>; Zulaikha Rafiq, *Afghan women keep the business of life going*, NEW INTERNATIONALIST BLOG (Dec. 3, 2014), <http://newint.org/blog/2014/12/03/afghan-women-rights/>.

² Gabriel Dominguez, *UN Women chief ‘seriously concerned’ Afghan women’s gains may be reversed*, DEUTSCHE WELLE (Nov. 28, 2014), <http://www.dw.de/un-women-chief-seriously-concerned-afghan-womens-gains-may-be-reversed/a-18100806>. The English version of the EVAW Law relied upon in this report is contained in Annex I of the Islamic Republic of Afghanistan, *First Report on the Implementation of the Elimination of Violence against Women (EVAW) Law in Afghanistan*, MINISTRY OF WOMEN’S AFFAIRS (Jan. 2014), http://mowa.gov.af/Content/files/EVAW%20Law%20Report_Final_English_17%20%20March%202014.pdf. Article 6 of the EVAW Law provides the following rights for a victim of violence: (1) prosecution of the offender; (2) access to a protective center, safe home, or other secure place; (3) free access to emergency health services; (4) having an advocate or legal aid provider; (5) compensation from the resulting act of violence; and (6) confidentiality.

³ Afg. Const., Jan. 26, 2004, Arts. 22, 43, 44, 48. The English translation of the Constitution of Afghanistan referenced in this report is available on the Afghan Embassy in Poland’s website, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>.

⁴ Afghanistan signed CEDAW on August 14, 1980, but did not ratify it until March 5, 2003.

II. Women's Rights in Afghanistan: Inequality and Violence

A. Current political context

The recent political context in Afghanistan signals change. After the formation of the National Unity Government in 2014, President Ashraf Ghani and Chief Executive Officer Abdullah Abdullah signed a petition from the Afghan Women's Network—a network of non-governmental organizations working on women's issues in Afghanistan—indicating their commitment to advance implementation of the EAW Law, the National Action Plan for Women of Afghanistan (NAPWA), and other relevant national and international commitments. The petition, a non-binding statement, details policy areas, including thirty specific recommendations for the empowerment of Afghan women and the involvement of women in political leadership and peace and security matters.⁵ President Ghani further stated his intention to establish a presidential women's advisory board comprised of thirty women's rights advocates and experts from across the country.⁶ First Lady Rula Ghani also plays an active role in advancing the rights of women and internally displaced persons (IDPs),⁷ including launching a United States Agency for International Development (USAID) women's empowerment program known as "Promote."⁸

Women's rights advocates fear roll backs in the achieved progress, particularly as conservative forces appear to be gaining strength since the withdrawal of the International Security Assistance Force (ISAF) at the end of 2014, evidenced by increasing numbers of Taliban attacks against women's rights activists.⁹ In some instances, the Afghan Parliament and judiciary have

⁵ Oxfam Briefing Paper 200, *Behind Closed Doors: The risk in denying women a voice in determining Afghanistan's future*, OXFAM 4 (Nov. 24, 2014), http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp200-behind-doors-afghan-women-rights-241114-summ-en.pdf.

⁶ *Id.*

⁷ See generally Zulaikha Rafiq, *Afghanistan has become a better place for women, but there is a long way to go*, THE TELEGRAPH (Dec. 4, 2014), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/11271438/Afghanistan-has-become-a-better-place-for-women-but-there-is-a-long-way-to-go.html>; Jan Egeland, *Our Unkept Promise to Afghan Women*, AL JAZEERA (Dec. 6, 2014), <http://www.aljazeera.com/indepth/opinion/2014/12/job-only-half-done-afghanistan-201412661314812621.html>.

⁸ OXFAM, *supra* note 5.

⁹ Ben Smith, *Prospects for Afghanistan as ISAF Withdrawal Approaches*, H. OF COMMONS LIBRARY, Research Paper 14/18, 29 (Mar. 19, 2014); Ben Smith, *Afghan Women 2014*, STANDARD NOTE (SNIA/6841), INT'L AFFAIRS AND DEF. SECTION, 4 (Mar. 5, 2014); Spozhmai Maiwandi, *Are Legal Protections for Afghan Women improving or reversing?*, WOMEN NEWS NETWORK (June 18, 2014), <http://womennewsnetwork.net/2014/06/18/protections-afghan-women/>. See generally OXFAM, *supra* note 5; see Rafiq, *supra* note 7; Sune Engel Rasmussen, *Afghanistan's women risk their lives to demand equal rights and protection*, THE GUARDIAN (Nov. 25, 2015), <http://www.theguardian.com/global-development/2015/nov/25/afghanistan-women-risk-lives-demand-equal-rights-protection>. In October 2015, Taliban fighters seized the northeastern city of Kunduz and attacked Radio Roshani, a radio station with focused programming on women's rights issues. Although the attacks directly affected women's rights journalists, they affected women on a broader scale as Radio Roshani's literacy and other programming for women have ceased. See, e.g., Sudarsan Raghavan, *Afghan radio station focused on women's rights is a casualty of the Taliban*, WASH. POST (Nov. 15, 2015), https://www.washingtonpost.com/world/asia_pacific/an-afghan-womens-radio-station-becomes-a-taliban-casualty/2015/11/15/64f8eeac-7db6-11e5-bfb6-65300a5ff562_story.html.

already tried to erode legal protections for Afghan women.¹⁰ As Afghanistan has assumed primary responsibility for its own security and overall international assistance has been reduced, ISAF's withdrawal and Taliban resurgence are predicted to have a significant impact on the country's economic and political landscape.¹¹ Advocates have expressed concern that both domestic and international stakeholders will compromise by scaling back on women's rights in the interest of ongoing peace and reconciliation negotiations with the Taliban.¹²

B. *The state of Afghan women in education, employment, and politics*

In the fifteen years since the Taliban regime ended, Afghanistan has witnessed the increased presence and participation of women in education, employment outside the home, and political elections. Female education in Afghanistan has risen, with almost four million girls in school as of the beginning of 2014, the highest number in Afghanistan's history.¹³ Of the 8.3 million students in schools across Afghanistan, approximately 39% are girls, a record high and a dramatic improvement since 2001 when fewer than a million students attended school, of which a negligible number were girls.¹⁴ Despite the increased numbers of girls attending school, a recent investigation shows that Afghanistan continues to have the "highest level of gender disparity in primary education in the world, with only 71 girls in primary school for every 100 boys."¹⁵ The literacy rate is 24.2% for females and 52% for males.¹⁶

There has also been some advancement in women's employment since 2001. Afghan women are now employed in a range of professions, including as doctors, police officers, pilots, judges, governors, and prosecutors.¹⁷ However, most women continue to work primarily in the informal sector. Women are significantly unrepresented in the private sector, working in predominately low-income jobs such as domestic services, cooking, and tailoring.¹⁸ Comprising less than one-fifth of lawyers, women remain under-represented in the legal sector.¹⁹ Overall,

¹⁰ Maiwandi, *supra* note 9. For example, laws have been proposed to reinstate stoning as punishment for adultery and to abolish the seats designated for women on provincial councils. There have also been ongoing attempts to repeal the EVAW Law.

¹¹ Dominguez, *supra* note 2; Michelle Barsa, *Determining if Progress Will Prevail or Peril: The Role for Women in Defining Afghanistan's Future*, 38 WTR FLETCHER F. WORLD AFF. 87, 91 (Winter 2014).

¹² Dominguez, *supra* note 2. See also OXFAM, *supra* note 5.

¹³ Dominguez, *supra* note 2. See also OXFAM, *supra* note 5.

¹⁴ Dominguez, *supra* note 2. See also OXFAM, *supra* note 5; Smith, *Afghan Women 2014*, *supra* note 9; Arne Strand, *Expanding and improving the quality of girls' education in Afghanistan*, BROOKINGS (Aug. 19, 2015), <http://www.brookings.edu/blogs/education-plus-development/posts/2015/08/19-girls-education-afghanistan-strand>.

¹⁵ Strand, *supra* note 14.

¹⁶ *The World Factbook, Afghanistan*, CIA (Sept. 24, 2015), <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>.

¹⁷ OXFAM, *supra* note 5.

¹⁸ Gayle Tzemach, *Women's achievements and continued challenges in Afghanistan*, COUNCIL ON FOREIGN REL. (Sept. 9, 2014), <https://www.devex.com/news/women-s-achievements-and-continued-challenges-in-afghanistan-84305>.

¹⁹ Maria Caspani, *Afghan women need more female judges and prosecutors to get justice – report*, THOMSON REUTERS FOUND. (Mar. 19, 2014), <http://www.trust.org/item/20140319112526-w75mh>.

only 21% of the female urban workforce is employed, and even fewer in the rural areas, which contributes to women's economic dependence on men.²⁰

Women's participation in elections and assumption of government positions have increased, and women now hold 28% of the seats in the National Assembly.²¹ The Afghan Constitution provides quotas for women's seats in both the upper house, House of Elders (*Meshrano Jirga*), and the lower house, House of the People (*Wolesi Jirga*), of the National Assembly, guaranteeing that women must be included in parliamentary positions.²² The same is true of provincial council seats.²³ The Independent Election Commission reported nearly 300 women (accounting for 12% of the candidates) ran for provincial posts in 2014, reflecting a record number of women candidates on the ballot.²⁴ Moreover, women showed up in record numbers to vote in the first round of the Afghan presidential elections on April 5, 2014, which boasted the largest voter turnout of the last three elections.²⁵

In an effort to elevate women to high-level government positions, President Ghani appointed two women as governors of Ghor and Daikundi provinces in 2015, four women to cabinet level positions in April 2015, and has publicly vowed to appoint four female ambassadors.²⁶ Women's rights advocates regard these appointments "as little more than window dressing" to placate international donors, and criticize that they do little to address systematic discrimination against women.²⁷ Even though some women are now in higher level government positions, the lack of consultations and direct engagement with women and women's organizations prevents their voices from coming to the political forefront.

Indeed, while women have achieved some representation in parliamentary and provincial posts, they continue to lack significant political influence.²⁸ Many women in elected office are

²⁰ Tzemach, *supra* note 18.

²¹ *Proportion of seats held by women in national parliaments (%)*, WORLD BANK (2014), <http://data.worldbank.org/indicator/SG.GEN.PARL.ZS>.

²² Afg. Const., Arts. 83-84; *see also* Smith, *Afghan Women 2014*, *supra* note 9.

²³ In May 2013, the House of People passed a law abolishing a requirement that women should make up a quarter of elected provincial council officials. The House of Elders then reinstated the quota, and after an intervention from the presidency, the two houses reached a compromise, reducing the quota to 20%. *See* Smith, *Afghan Women 2014*, *supra* note 9.

²⁴ Maiwandi, *supra* note 9.

²⁵ *Id.*

²⁶ *Afghanistan Nominates First Female Judge to the Supreme Court*, RADIOFREEEUROPE/RADIOLIBERTY (June 30, 2015) <http://www.rferl.org/content/afghanistan-female-judge-supreme-court/27102086.html>; Sune Engel Rasmussen, *Afghan activists urge donors to make aid conditional on women's rights*, THE GUARDIAN (Sept. 15, 2015), <http://www.theguardian.com/global-development/2015/sep/05/afghanistan-womens-rights-aid-gender-equality>; Rachel Vogelstein, *Afghan Women A Year into Ghani Presidency*, COUNCIL ON FOREIGN REL. (Oct. 5, 2015), <http://blogs.cfr.org/women-around-the-world/2015/10/05/afghan-women-a-year-into-ghani-presidency/>.

²⁷ Rasmussen, *supra* note 29.

²⁸ Dominguez, *supra* note 2.

perceived to lack constituency-based legitimacy and political authority.²⁹ Women involved in politics are also vulnerable to harassment, intimidation, and security threats.³⁰

On June 30, 2015, President Ghani nominated Anisa Rasouli, the Head of the Afghan Women's Association and former juvenile judge, to the Supreme Court.³¹ With nine votes short of approval, the National Assembly, influenced by Islamic clerics and some male lawmakers, rejected Rasouli's nomination, declaring that "a woman was not fit to try serious crimes."³² The rejection of Rasouli's nomination to become Afghanistan's first female Supreme Court justice was a major disappointment to women's rights advocates. Although the National Assembly includes sixty-nine females, at least twenty of the female members were absent during the vote.³³ One advocate for women's rights observed that some of Afghanistan's female parliamentary members "are worse to women than men" and opined that the reason that parliamentarians did not approve Rasouli's nomination is simply because she is a woman.³⁴

C. Violence against Women in Afghanistan: forms and current levels

Despite positive steps in the advancement of women's rights and protections in Afghanistan, in particular since President Ghani assumed office, violence remains a reality for many Afghan women and girls.³⁵ United Nations (UN) officials confirm and studies report that violence against Afghan women reached "pandemic" levels in 2013 and into early 2014, with "up to 87.2% of women having experienced some form of violence, such as physical, psychological, sexual, economic violence, social abuse [and/or] forced and early marriage."³⁶ The Afghan Independent Human Rights Commission (AIHRC) reported a 25% increase in cases involving violence against women in 2013 from 2012, a rise which continued in 2014.³⁷ Extremist groups are specifically targeting women and girls who participate in public life by running for office, attending school, or speaking out about their rights.³⁸ Forms and levels of violence against women vary depending on location with heightened levels of violence found in rural areas in

²⁹ *Id.*

³⁰ Tzemach, *supra* note 18.

³¹ RADIO LIBERTY, *supra* note 29.

³² *Historic bid to become Afghanistan's first female justice falls 9 votes short*, THE WASH. POST (July 27, 2015), https://www.washingtonpost.com/world/asia_pacific/an-afghan-judge-was-nominated-to-the-supreme-court-trouble-is-shes-a-woman/2015/07/27/bbb80a82-2ef3-11e5-818f-a242f28e7022_story.html.

³³ *Id.*

³⁴ Shadi Khan Saif, *Afghan MPs reject first female Supreme Court judge*, ANDALOU AGENCY (July 8, 2015), <http://www.aa.com.tr/en/politics/552143--afghan-mps-reject-first-female-supreme-court-judge>.

³⁵ Dominguez, *supra* note 2.

³⁶ Smith, *Afghan Women 2014*, *supra* note 9; Dominguez, *supra* note 2.

³⁷ Ghanizada, *Woman killed by her husband in Logar province*, KHAAMA PRESS (KP) (Dec. 25, 2014), <http://www.khaama.com/woman-killed-by-her-husband-in-logar-province-8881>; Mina Habib, *Tackling Gender-Based Violence in Afghanistan*, INST. FOR WAR AND PEACE REPORTING (June 9, 2014), <https://iwpr.net/global-voices/tackling-gender-based-violence-afghanistan> (the AIHRC "recorded 228 cases of abuse against women in April and May of 2014, a significantly higher rate than over the past solar year ending April 2014, when there were a total of 997 cases").

³⁸ *Country Profile: Afghanistan*, WOMEN FOR WOMEN INT'L, 1 (Aug. 2014), http://www.womenforwomen.org/sites/default/files/WfWI-Afghanistan-Country-Profile%2008202014_0.pdf.

southern and eastern provinces bordering Pakistan where there are high levels of gender insecurity and widespread discriminatory traditional practices, and in communities where former insurgents are reintegrating.³⁹

In the majority of cases of violence against women, the perpetrators are male family members.⁴⁰ Many Afghan men believe they are the “owners” of women and children, and treat them as property.⁴¹ As the chairperson of the AICHR put it, violence occurs because family members use “religion,” “culture,” and “tradition,” to keep power and control over women.⁴² Restrictions on women’s dress, including wearing the veil, and seclusion of women in the home persist. Although protection is provided as a reason to limit a woman’s mobility outside the home, it is practiced to keep her “from the eyes of other men” and to preserve the male family member’s honor.⁴³ If a woman goes outside the home, a male guardian or chaperone (*mahram*) generally must accompany her.⁴⁴ These restrictions limit the rights of Afghan women in general, and displaced women and girls are at increased vulnerability due to dismantled family networks with fewer or no male chaperones.⁴⁵ Limitations on mobility further prevent displaced women and girls from accessing health, education, and employment opportunities as well as reduce their ability to maintain relationships with their home communities or establish new social networks in displacement.⁴⁶

1. Honor killings

In Afghanistan, women and girls are considered to embody family honor, and they often pay the price if they are perceived to have offended custom, tradition, or honor.⁴⁷ Female rape victims in Afghanistan are deemed to have brought shame on their family and community and

³⁹ *UN Women Afghanistan Development Results Narrative 2014-2017*, UN WOMEN, 10 (2015), <http://www.unwomen.org/~media/headquarters/attachments/sections/executive%20board/2015/as%2015/un%20women%20afghanistan%20programme-pdf.pdf?v=1&d=20150624T220301>.

⁴⁰ *Afghanistan: No Country for Women*, AL JAZEERA (July 3, 2015), <http://www.aljazeera.com/programmes/101east/2015/06/afghanistan-country-women-150630115111987.html>.

⁴¹ *10 of the most dangerous places to be a woman*, THE NEW ECONOMY (June 17, 2014), <http://www.theneweconomy.com/insight/10-of-the-most-dangerous-countries-to-be-a-woman>; *Listening to Women and Girls Displaced to Urban Afghanistan*, NORWEGIAN REFUGEE COUNCIL (NRC) 13 (Jan. 2015), <http://reliefweb.int/report/afghanistan/listening-women-and-girls-displaced-urban-afghanistan>.

⁴² AL JAZEERA, *supra* note 40.

⁴³ *Listening to Women and Girls*, NRC, *supra* note 41, at 13, 16.

⁴⁴ *Id.*

⁴⁵ Afghanistan’s National Policy on Internally Displaced Person recognizes that “culture and custom often confine women to their ‘homes’, restricting their movement and making it difficult for them to adequately attend to the nutritional, health, educational and social needs of their children.” *National Policy on Internally Displaced Persons*, THE GOV’T OF THE ISLAMIC REPUBLIC OF TAJIKISTAN, MINISTRY OF REFUGEES AND REPATRIATION 19 (Nov. 25, 2013), <http://morr.gov.af/Content/files/National%20IDP%20Policy%20-%20FINAL%20-%20English%281%29.pdf> [hereinafter *IDP Policy*].

⁴⁶ *Listening to Women and Girls*, NRC, *supra* note 41, at 16. In a study conducted by the NRC, 71% of girls interviewed did not attend school; no girls interviewed in the Kabul Informal Settlement attended school. Obstacles to attending school included having to help their families and prohibition by their families.

⁴⁷ See *Urgent Action: Rapist Sentenced, Girl Survivor Still at Risk*, AMNESTY INT’L (Oct. 30, 2014), https://www.amnestyusa.org/sites/default/files/uaa25314_1.pdf.

risk double victimization through honor killings.⁴⁸ Similarly, women suspected of having sexual relations outside of marriage (*zina*) are widely perceived to bring shame on their families and also risk being the subject of an honor killing, either on the initiative of male family members or at the direction of local councils comprised of male elders.⁴⁹

Box 1-1. Rape Brings Shame on Families in Afghanistan: Case Example

In 2014, an Afghan cleric (*mullah*) was convicted of brutally raping a ten-year-old girl in a mosque and sentenced to 20 years in prison for raping a minor and a fine of 1,500,000 Afghani (which equates to roughly USD\$30,000).⁵⁰ The judge recognized that as a child, the girl could not commit adultery, and the *mullah's* acts constituted rape.⁵¹ Due to the shame the rape had brought on the family, the family removed the girl from school.⁵² According to police and women's rights activists, the girl's family members plotted to kill her to defend the family's honor because they were ashamed by her rape.⁵³

There are no concrete statistics on how many women and girls in Afghanistan fall victim to honor killings, but according to the AIHRC, at least 243 cases of confirmed honor killings were recorded between January 2011 and May 2013.⁵⁴

2. Forced marriage and *baad*

Exact figures of forced marriage in Afghanistan are unknown. However, an Asia Foundation survey of over 65,000 Afghans reports that forced marriage, including *baad*—marrying a woman to someone as a blood price or to achieve peace linked to murder, sexual violence, or in line with other customs and traditions—is one of the greatest problems Afghan women face.⁵⁵ The practice is reported with the highest frequency in the southeast and the lowest in Hazarajat in the center of the country.⁵⁶

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Wazhma Samandary, *Shame and Impunity: Is Violence against Women becoming more brutal?*, AFGHAN ANALYSIS NETWORK (Nov. 30, 2014), <https://www.afghanistan-analysts.org/shame-and-impunity-is-domestic-violence-becoming-more-brutal/>; Narayan, *supra* note 1.

⁵¹ Rod Nordland, *Afghan Mullah Who Raped Girl in his Mosque Receives 20-Year Prison Sentence*, N.Y. TIMES (Oct. 25, 2014), <http://www.nytimes.com/2014/10/26/world/asia/afghan-mullah-who-raped-girl-in-his-mosque-receives-20-year-prison-sentence.html>.

⁵² *Urgent Action: Rapist Sentenced*, AMNESTY INT'L, *supra* note 47.

⁵³ Nordland, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ *Afghanistan in 2014: A Survey of the Afghan People*, ASIA FOUND. 1 (2014), <https://asiafoundation.org/resources/pdfs/Afghanistanin2014final.pdf> (EVAW Law, Art. 3(4) defines *baad*).

⁵⁶ *Id.*

3. Domestic violence

The Asia Foundation’s survey further reveals domestic violence as one of the major problems for Afghan women particularly in the west, southwest, and southeast of the country.⁵⁷ Husbands abuse wives, but women also experience violence—physical, psychological, and economic—from in-laws and other family members.⁵⁸ It is reportedly common for parents to encourage their sons to beat their wives.⁵⁹ No official data exists, but murder, including honor killings (discussed above), of women by their husbands or other family members is widespread.⁶⁰ IDP communities report that domestic violence is a common outcome of the pressures of displacement.⁶¹

Box 1-2. Divorce in Afghanistan

In Afghanistan, the majority of women who experience domestic violence do not divorce due to economic dependence on their husbands and cultural pressure to keep families united.⁶² Women who seek divorce face challenges. An identification document (*tazkera*) and a marriage certificate proving the marriage are required to pursue divorce in court. Many rural, and as many as 80% of internally displaced women, do not have a *tazkera* or a marriage certificate.⁶³ Women must obtain the consent of their husband or father to obtain a *tazkera*, which can be particularly difficult in cases of domestic violence. For example, as reported in *The Guardian*, an Afghan domestic violence survivor was forcibly married at age seven to an abusive husband who disfigured her face by cutting off her nose, slashing her lips, and beating her until she lost consciousness.⁶⁴ She did not have a *tazkera*, but sought the help of legal counsel at the Norwegian Refugee Council (NRC), which had to pay her drug-addict father to obtain a *tazkera* on her behalf.⁶⁵ A NRC legal advocate observed: “Customarily, men don’t want to take *tazkera* for their women. They say it’s not right to take women to a government office who will take their picture and put it on a piece of paper. . . . They say it’s a shameful act.”⁶⁶

⁵⁷ *Id.* Domestic violence is less frequently cited as a problem in the northeast and Hazarajat.

⁵⁸ UN WOMEN, *supra* note 39.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Displacement Dynamics: IDP Movement Tracking, Needs and Vulnerability Analysis, Herat and Helmand*, SAMUEL HALL, commissioned by the International Organization for Migration (IOM), Kabul 52 (2014), <https://www.iom.int/files/live/sites/iom/files/Country/docs/IOM-Afghanistan-IDP-Survey-Herat-Helmand-Full-Version.pdf>.

⁶² Sune Engel Rasmussen, *Afghanistan, domestic violence and divorce: one woman’s harrowing story*, THE GUARDIAN (May 5, 2015), <http://www.theguardian.com/global-development/2015/may/05/afghanistan-domestic-violence-divorce-one-woman-harrowing-story-setara>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

4. Sexual harassment

Sexual harassment remains a major problem in Afghanistan. No domestic laws specifically prohibit sexual harassment and legal protection for victims is very limited.⁶⁷ Although significant progress has been made to improve girls' access to education and integrate women into the Afghan Parliament and civil service, according to Human Rights Watch, "unchecked sexual harassment has been a significant obstacle to women's employment and participation in public life."⁶⁸ Women and girls have struggled "to regain their rights after being completely shut out of education and employment during Taliban rule."⁶⁹ They face sexual harassment daily, and those who have reported harassment to the police have typically received no assistance.⁷⁰

As evidenced by the March 2015 assault of a young woman who was protesting sexual harassment in the streets of Afghanistan, women who speak out against sexual harassment end up targets of violence.⁷¹ Part of a staged protest, Kubra Khademi, a young Afghan woman, walked through Kabul's most populated neighborhood, Kote Sangi, where she said women are frequently harassed, wearing metal armor to demonstrate her denunciation of sexual harassment.⁷² A group of men followed Ms. Khademi shouting insults and throwing rocks at her. She went into hiding after several angry men showed up at her home.⁷³

⁶⁷ *Afghanistan: Fight Rampant Sexual Harassment*, HUMAN RIGHTS WATCH, *supra* note 1.

⁶⁸ *Id.*

⁶⁹ Human Rights Watch reports that President Ghani has described levels of sexual harassment in schools as "shocking," and has ordered the Ministry of Education to report every incident of sexual harassment in schools to enable action against harassers. He has directed relevant ministries to develop a plan to counter sexual harassment in educational institutions. So far, "[o]nly one government agency, the Independent Directorate of Local Governance, has developed anything resembling an anti-sexual harassment policy. The directorate's 'anti-harassment policy guideline' cites a commitment in the government's 2007-2017 National Action Plan for the Women of Afghanistan (NAPWA) to adopt and implement 'a policy against sexual harassment' as the basis for the guideline." *Id.* It sets out a detailed description of harassment and measures a victim can take, including anonymously seeking the assistance of a Conflict Resolution Committee. There is little information on the actual implementation of this policy and there is currently no legislation to protect women from sexual harassment.

⁷⁰ *Id.*

⁷¹ Elsa Buchanan, *Kabul: Men stone woman protesting sexual harassment with metal armour*, INT'L BUS. TIMES (Mar. 5, 2015), <http://www.ibtimes.co.uk/kabul-men-throw-rocks-punches-woman-protesting-sexual-harassment-metal-armour-1490681>.

⁷² *Id.*

⁷³ *Id.*

5. Prosecution for running away from home and attempted zina (sex outside marriage)

Women in Afghanistan face prosecution for running away from home, often in the context of domestic violence or forced marriage, and other alleged “moral crimes.”⁷⁴ However, there is no legal basis for prosecuting a woman for running away or elopement.⁷⁵ The Afghan Penal Code regulates specific *Sharia* law crimes and penalties, providing that the crimes of *hudood* (meaning crimes with predetermined or fixed punishments in the Qur’an), *qisas* (a category of crimes for which an “eye for an eye” or retaliatory punishment is allowed under *Sharia* law), and *diyat* (financial compensation paid to victims of particularly serious crimes such as murder or bodily harm) “shall be punished in accordance to the provisions of Islamic religious law applicable in Afghanistan.”⁷⁶ Running away from home is not codified as and does not constitute any of the above-mentioned types of crimes.⁷⁷ The government has even issued guidelines that women should no longer be prosecuted for running away from home.⁷⁸ Notwithstanding the lack of legal basis, women are still being prosecuted for this reason.⁷⁹

Prosecutors have successfully brought cases against women by transforming the act of running away into a charge of attempted *zina*.⁸⁰ Although there is a basis for prosecuting *zina* in the law,⁸¹ there is no definition or explanation of the elements of the crime, and the law has been misinterpreted to bring false charges against women who have had no actual or intended sexual contact with a man, but have merely been found in the presence of a man who is not a family member.⁸² Authorities allege that a woman who runs away from home is doing so in order to have unlawful sexual intercourse.⁸³ In reality, many women in Afghanistan leave their homes to escape domestic violence or forced marriages.⁸⁴

⁷⁴ “*I Had to Run Away*”: *The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan*, HUMAN RIGHTS WATCH (Mar. 28, 2012), <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>.

⁷⁵ Fatma Boggio-Cosadia, *Elimination of Violence Against Women in Medica Afghanistan Legal Aid Practice: Second Report - An analysis on the use of the Elimination of Violence Against Women Law (EVAW Law) in Medica Afghanistan legal aid cases*, MEDICA AFG. 8 (Nov. 2014), http://www.medicamondiale.org/fileadmin/redaktion/5_Service/Mediathek/Dokumente/English/Documentations_studies/Analysis-Report_Use-of-EVAW-Law_November-2014_CR-Medica-Afghanistan.pdf.

⁷⁶ *Id.* See also Afg. Penal Code, Art. 1.

⁷⁷ Boggio-Cosadia, *supra* note 75.

⁷⁸ Smith, *Prospects of Afghanistan*, *supra* note 9, at 25.

⁷⁹ *See id.*

⁸⁰ *See id.* While Afghan Law does explicitly criminalize the act of “attempted *zina*,” prosecutors have interpreted Article 29 (initiation or intent to commit a crime) and Article 427 of the Afghan Penal Code together to charge women for “attempted *zina*” or the “intent to commit *zina*.”

⁸¹ *See* Afg. Penal Code, Art. 427.

⁸² As Human Rights Watch has pointed out, “[t]his vagueness makes it easy for a husband or father angered by a woman or girl fleeing from home to allege, if she has spent any time in the company of a man after having fled, that *zina* has occurred.” “*I Had to Run Away*,” HUMAN RIGHTS WATCH, *supra* note 74.

⁸³ *Id.*

⁸⁴ *Id.*

Box 1-3. The Paghman Case

In the high profile 2014 case of the “Paghman rapists,” ten men dressed in police uniforms and armed with rifles robbed and gang-raped four women who were returning to Kabul from a wedding with their families, and traveling through the Paghman district.⁸⁵ The accused in the Paghman case were not charged with rape, but with sex outside marriage (*zina*). Although *zina* typically implicates both parties, and is often used against female rape victims, many believe the women were not charged in this case because the victims’ husbands were present during the attacks and the rapists were strangers.⁸⁶ According to Human Rights Watch, “[t]he fact that the husbands were overpowered and humiliated . . . in a sense made them the victims in the eyes of the government.”⁸⁷

Former President Hamid Karzai immediately publicly demanded justice, and within a week, police arrested seven suspects, whom the victims identified. After a two-hour trial, a court sentenced the defendants to death by hanging.⁸⁸ An appeals court upheld the sentences for five of the seven defendants, and reduced the sentences of two of the men to 20 years in prison due to insufficient evidence to justify the death penalty.⁸⁹

Although the Paghman case demonstrates the Afghan government’s ability to prosecute cases of violence against women if there is political will and heightened media attention, this case also portrays the deep failings of the country’s justice system and lack of commitment to rule of law, particularly with respect to issues of due process.⁹⁰ The case involved alleged coerced confessions, inadequate time to prepare a defense, and lack of eyewitness testimony presented at trial.⁹¹

The Paghman case further highlights the dangers for female victims of sexual violence who face severe social stigma in Afghanistan.⁹² Police investigators allowed journalists to observe the four women when they identified the alleged attackers in a lineup, potentially placing the victims at risk and deterring victims of future sexual attacks

⁸⁵ Gary Owen, *A Gang Rape in Afghanistan is Exploited for Political Theater*, VICE NEWS (Sept. 15, 2014), <https://news.vice.com/article/a-gang-rape-in-afghanistan-is-exploited-for-political-theater>.

⁸⁶ *Afghanistan: Gang Rape Trial Badly Flawed: Due Process Violations, Political Interference Undermine Justice*, HUMAN RIGHTS WATCH (Sept. 8, 2014), <https://www.hrw.org/news/2014/09/08/afghanistan-gang-rape-trial-badly-flawed>. See also Owen, *supra* note 85.

⁸⁷ Owen, *supra* note 85.

⁸⁸ *Id.*

⁸⁹ *Id.*; see also Rod Nordland, *Afghan Court Confirms 5 Death Sentences in Rape Case That Led to Outrage*, N.Y. TIMES (Sept. 15, 2014), http://www.nytimes.com/2014/09/16/world/asia/court-confirms-5-death-sentences-in-afghan-rape-case.html?_r=0.

⁹⁰ *Afghanistan: Gang Rape Trial Badly Flawed*, HUMAN RIGHTS WATCH, *supra* note 86 (which observed that “the case was marked by serious flaws, in the police investigation and in a trial that violated international due process standards as well as protections under Afghan law and the constitution”). See also Samandary, *supra* note 50.

⁹¹ *Afghanistan: Gang Rape Trial Badly Flawed*, HUMAN RIGHTS WATCH, *supra* note 86. See also Owen, *supra* note 85.

⁹² *Afghanistan: Gang Rape Trial Badly Flawed*, HUMAN RIGHTS WATCH, *supra* note 86.

from coming forward.⁹³ The media published reports disclosing personal details of the victims, including their names, their villages, and their faces.⁹⁴

Moreover, by charging the men with *zina*, as Amnesty International observed, “the authorities continued a pattern of addressing rape in a completely flawed manner—not as a crime against the dignity, autonomy and bodily integrity of the woman, but as a crime of ‘morality’ and a crime against marriage, thereby objectifying women instead of treating them as rights-holders.”⁹⁵

6. Internally displaced and returnee Afghan women are more vulnerable to sexual and gender-based violence

Due to the political, security, and economic transitions faced by Afghanistan since the withdrawal of ISAF, internal displacement continues to rise against a backdrop of on-going armed conflict, high rates of civilian casualties, increased abuses by non-state armed groups, and pervasive conflict-related violence.⁹⁶ In 2015, there was a significant number of new displacements in the Kunduz and Badakshan provinces, which border Tajikistan.⁹⁷ As of June 2015, there were at least 948,000 IDPs living in Afghanistan, including 103,000 new IDPs in the first six months of 2015, as a result of conflict and violence.⁹⁸ Many Afghans are migrating to urban areas where poverty and unemployment are increasing.⁹⁹ Between January and August 2015, approximately 417,825 Afghans returned or were deported to Afghanistan after living abroad in exile.¹⁰⁰ Reintegration into society is challenging and displaced Afghans, particularly women, are more vulnerable due to precarious housing situations with poor sanitation and hygiene conditions, limited access to basic services such as food, water, and electricity,¹⁰¹ as well as economic insecurity and a volatile security situation.¹⁰²

⁹³ *Id.*

⁹⁴ Samandary, *supra* note 50.

⁹⁵ *Afghanistan: President must reverse death penalty decision*, AMNESTY INT’L 1 (Oct. 3, 2014).

⁹⁶ *Afghanistan: As humanitarian space shrinks, IDP policy must be implemented*, INTERNAL DISPLACEMENT MONITORING CTR. (IDMC) & NRC (June 19, 2014), <http://www.internal-displacement.org/south-and-south-east-asia/afghanistan/2014/as-humanitarian-space-shrinks-idp-policy-must-be-implemented> [hereinafter IDMC/NRC].

⁹⁷ Anne-Kathrin Glatz, *Afghanistan: New and long-term IDPs risk becoming neglected as conflict intensifies*, IDMC (July 16, 2015), <http://www.internal-displacement.org/south-and-south-east-asia/afghanistan/2015/afghanistan-new-and-long-term-idps-risk-becoming-neglected-as-conflict-intensifies>.

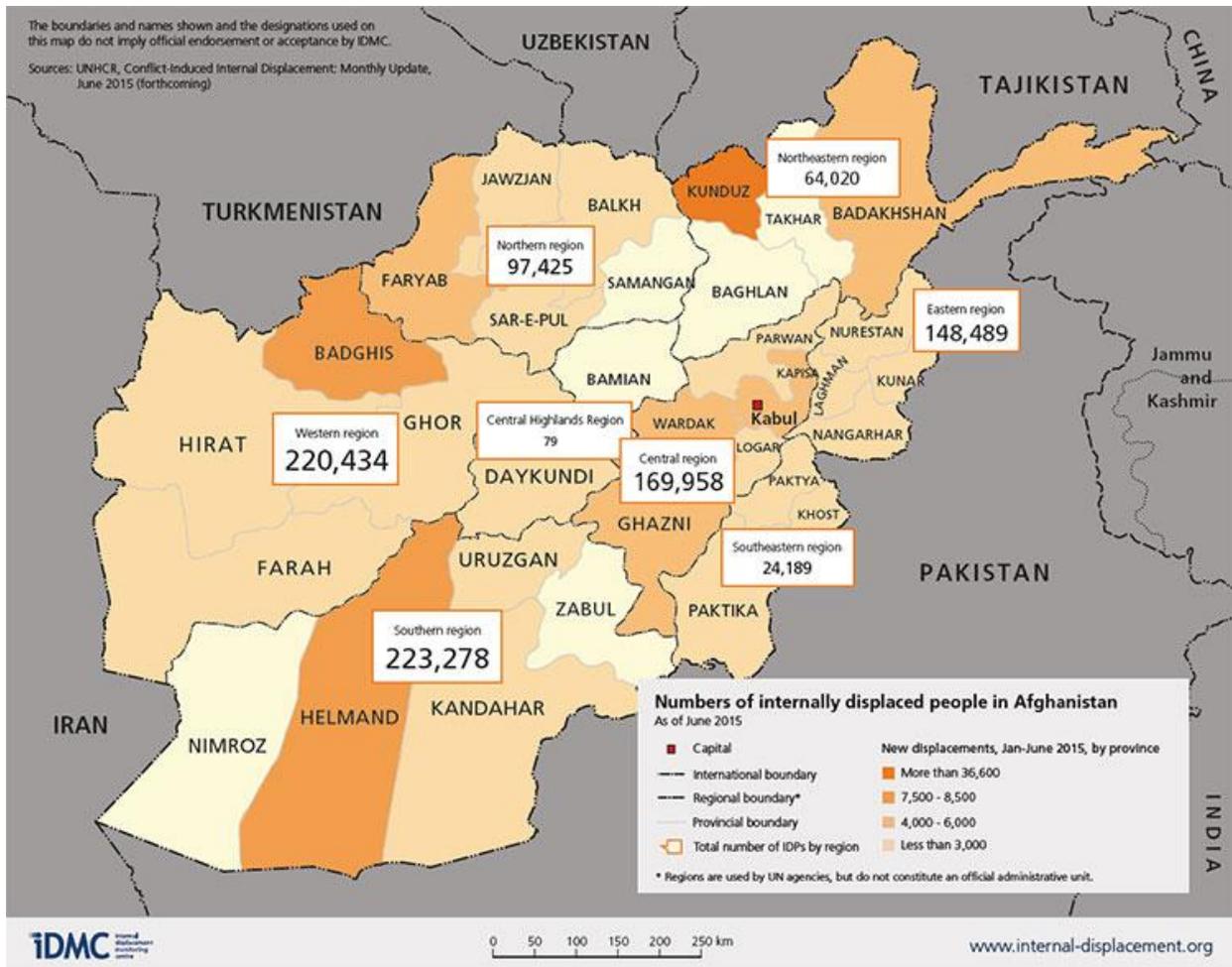
⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Autumn Newsletter, IOM AFG. 3 (2015), https://www.iom.int/sites/default/files/mission_newsletter/file/IOM-Afghanistan-Newsletter-Autumn-2015.pdf; see also Shareena Qazi, *Afghan returnees from Pakistan endure dire conditions*, AL JAZEERA (Dec. 3, 2015), <http://www.aljazeera.com/news/2015/12/afghan-returnees-pakistan-live-dire-conditions-151203151127275.html>.

¹⁰¹ *Policy Brief: National Policy on IDPs in Afghanistan*, SAMUEL HALL, on behalf of NATIONAL IDP POLICY WORKING GROUP (Mar. 2015), http://samuelhall.org/wp-content/uploads/2015/04/IDP-Policy-Briefing-note_SH_-English_FINAL.pdf.

¹⁰² *2015 UNHCR country operations profile – Afghanistan*, UNHCR (2015), <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e486eb6&submit=GO>. For more information on the context for returnees, see *The 2015 Afghanistan Refugee and Returnee Overview*, UNHCR (2015), <https://docs.unocha.org/sites/dms/Afghanistan/2015%20Afghanistan%20Refugee%20and%20Returnee%20Overview.pdf>.



Internally displaced and returnee women and girls are particularly vulnerable and at high risk of gender-based violence and abuses including but not limited to gender discrimination, sexual harassment, sexual assault and rape, and early and forced marriage. Displaced women are also more often forced into prostitution or trafficked.¹⁰³ The heightened risk is due to IDP women's low economic status, social isolation, and lack of traditional support networks and social protection mechanisms.¹⁰⁴

Many returnee refugees and IDPs live in informal settlements in major urban areas such as Kabul, Jalalabad, and Kandahar.¹⁰⁵ Comprised of basic tarpaulin tents and one-room mud huts, the informal settlements are overcrowded with up to 20 people living in one or two simple

¹⁰³ Lida Ahmad, *Sexual violence: unacceptable on all counts*, FORCED MIGRATION REV., REFUGEE STUD. CTR, UNIV. OF OXFORD, ISSUE 46 (May 2014), <http://www.fmreview.org/afghanistan/ahmad>.

¹⁰⁴ *Global Overview 2014: people internally displaced by conflict and violence-Afghanistan*, IDMC/NRC (May 14, 2014), <http://www.internal-displacement.org/assets/publications/2014/201405-global-overview-2014-en.pdf>.

¹⁰⁵ *Listening to Women and Girls*, NRC, *supra* note 41, at 8.

rooms under the threat of eviction by the government.¹⁰⁶ Conditions in Jalalabad and Kandahar are slightly better than Kabul for those who can afford more than one room, but it is not uncommon for up to 20 family members to live together in cramped conditions.¹⁰⁷ Poor quality water, insufficient sanitation, and scarce electricity plague the settlements.¹⁰⁸ High rates of unemployment, lack of food security reaching dangerous hunger levels, and poverty prevail in displaced communities.¹⁰⁹ Urban communities shun displaced populations perceiving them as threats to the already limited local resources and competition for employment.¹¹⁰

Displacement amplifies the loss of traditional support mechanisms when women relocate to a new and unfamiliar area. A study conducted by the Internal Displacement Monitoring Centre (IDMC) and the Norwegian Refugee Council (NRC) found that “the legal status of women and the decision-making power remain linked to that of a male relative.”¹¹¹ Therefore, women are “unlikely to own land, inherit or have security of tenure should their husband or another male relative from which they depend die, divorce, or disappear.”¹¹² When displaced women are victims of abuses such as forced marriage or domestic violence, they cannot easily access external protection mechanisms. Going to the police or seeking out the justice system puts them at great risk of being ostracized by their families and communities.¹¹³ In precarious situations, such as negotiating a marriage or attempting to break an engagement, internally displaced women are often more vulnerable to violent outcomes because they lack the support of a male relative.¹¹⁴

Despite assistance from national and international organizations to address increased vulnerabilities while living in urban displacement, displaced women and girls, particularly in Kabul, Jalalabad, and Kandahar, face significantly greater challenges than males and increased violence.¹¹⁵ In general, women and girls have less access to services and opportunities than in their pre-displacement places of origin.¹¹⁶ Specifically, displaced young women and girls are frequently kept in seclusion and are often prohibited from leaving the house, which drastically reduces their access to education, healthcare, and livelihood opportunities.¹¹⁷

¹⁰⁶ *Id.* at 20; see also Danielle Moylan, *Displaced Afghan Women Face Prison Conditions*, AL JAZEERA (Mar. 31, 2015), <http://www.aljazeera.com/indepth/opinion/2015/03/displaced-afghan-women-face-prison-conditions-150330104049003.html>.

¹⁰⁷ *Listening to Women and Girls*, NRC, *supra* note 41, at 20.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ *Id.* at 17.

¹¹⁰ *As humanitarian space shrinks*, IDMC/NRC, *supra* note 96.

¹¹¹ *Id.* at 9.

¹¹² *Id.* at 9-10.

¹¹³ Camille Hennion, *Displacement and violence against women in Afghanistan*, FORCED MIGRATION REV., REFUGEE STUD. CTR, UNIV. OF OXFORD, ISSUE 46 (May 2014), <http://www.fmreview.org/afghanistan/hennion>.

¹¹⁴ *Id.*

¹¹⁵ *Listening to Women and Girls*, NRC, *supra* note 41, at 8.

¹¹⁶ *Id.* at 26.

¹¹⁷ Dan Tyler & Susanne Schmeidl, *Urban realities for displaced young women and girls*, FORCED MIGRATION REV., REFUGEE STUD. CTR, UNIV. OF OXFORD, ISSUE 46 (May 2014).

The degradation of socio-economic conditions for displaced households increases the risks of forced marriage and domestic violence.¹¹⁸ Exploitation of girls and women increases during displacement as struggling families sell their daughters to pay debts or to generate much-needed income. Internally displaced girls are susceptible to being targeted by outsiders to the IDP community who seek out desperate families willing to give away their young daughters for marriage because they cannot feed them.¹¹⁹

The marriage age of displaced Afghan females is younger than the general Afghan population—male family members promise girls as young as eight for engagement to much older men.¹²⁰ Early marriage often results in early widowhood, which means some displaced mothers in their twenties attempt to survive as single heads of household.¹²¹ Approximately 19.3% of displaced women are widows, compared with 3.6% nationally, and are at higher risk of violent outcomes in situations such as claiming inheritance and negotiating marriages because they lack support from male relatives.¹²²

Domestic violence is widespread in displaced communities because men, idle and frustrated from lack of employment, find it difficult to adjust to new challenges and take out aggression on women.¹²³ Women report that violence occurs more often during displacement because their husbands are “more stressed.”¹²⁴ High levels of drug use are common among men, who have little access to addiction treatment, aggravating circumstances for women living in such households.¹²⁵

Box 1-4. Mental Health Impacts of SGBV and Displaced Women

Psychosocial problems among displaced women in Afghanistan are prevalent. Some women express a preference for death to their current life.¹²⁶ As a result of their situation, displaced women reported feelings of shame, depression, and helplessness.¹²⁷ The lack of mental health services in Afghanistan for women, with access to services even more limited for displaced women, leaves displaced women to cope with trauma on their own; some resort to self-harm.¹²⁸

¹¹⁸ *As humanitarian space shrinks*, IDMC/NRC, *supra* note 96.

¹¹⁹ Katie Nguyen, *Displaced Afghan women risk ‘cheap’ marriages, isolation and depression*, THOMAS REUTERS FOUND. (May 8, 2014), <http://www.trust.org/item/20140508052252-ibru1/>.

¹²⁰ *Listening to Women and Girls*, NRC, *supra* note 41, at 13, 14.

¹²¹ *Id.* at 14.

¹²² Hennion, *supra* note 113.

¹²³ *Listening to Women and Girls*, NRC, *supra* note 41, at 15.

¹²⁴ *As humanitarian space shrinks*, IDMC/NRC, *supra* note 96.

¹²⁵ *Listening to Women and Girls*, NRC, *supra* note 41, at 15.

¹²⁶ *Id.* at 23.

¹²⁷ Tyler & Schmeidl, *supra* note 117.

¹²⁸ *Id.*

III. Afghan Legal Framework for Preventing and Punishing Violence Against Women

A. *The Elimination of Violence Against Women (EVAW) Law*

Afghanistan is an Islamic country with a 99% Muslim population.¹²⁹ Afghanistan's laws and social affairs must adhere to Islamic *Sharia* law, which is considered the supreme law of the land.¹³⁰ According to the Holy Qur'an, the central Islamic religious text, "[t]here is no distinction between male and female."¹³¹ Thus, the principle of equality can be interpreted as enshrined in the Qur'an.

Although the Afghan Constitution, on paper, supports human rights and women's rights, antiquated civil and criminal codes are still in force throughout the country that discriminate against women.¹³² Critics point out that the Afghan Penal Code and the Civil Code adopted in 1976 and 1977, respectively, "are vague, outdated and lacking sufficient clarity regarding women's rights."¹³³ For example, under the Afghan Civil Code, marriage is defined as "a contract that legalizes intercourse between a man and a woman."¹³⁴ Disparate treatment of males and females includes a lower minimum marital age—sixteen for girls, eighteen for men—and an exception to the minimum marital age for girls to be married at age fifteen with the consent of her father or the court.¹³⁵ Husbands may divorce their wives at any time for any or no reason, but women seeking divorce must obtain the approval of their husbands and produce witnesses in court to testify that the divorce is justified.¹³⁶ Even though the Afghan government has signed CEDAW, other international human rights treaties, and the UN Security Council Resolution 1325 on women, peace, and security, national law still predominates,¹³⁷ preventing international instruments from effectively protecting Afghan women from violence, particularly sexual violence.¹³⁸

Recognizing the violence faced by Afghan women and the legislative void offering protection, Afghan women's rights advocates, civil society organizations, and some lawmakers, supported by the Ministry of Women's Affairs (MoWA) and the Ministry of Justice (MOJ), drafted a bill in

¹²⁹ CIA, *supra* note 16. The population of Afghanistan is 80% Sunni Muslim and 19% Shia Muslims.

¹³⁰ Article 3 of the Afghan Constitution provides: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."

¹³¹ QUR'AN 4:124.

¹³² Afg. Const., Arts. 6, 7, 22, 58.

¹³³ Ahmad, *supra* note 103.

¹³⁴ Afg. Civ. Code, Art. 60.

¹³⁵ Afg. Civ. Code, Arts. 70 and 71.

¹³⁶ Afg. Civ. Code, Art. 135. *See also Violence Against Women in Afghanistan*, THE ADVOCATES FOR HUMAN RIGHTS (May 18, 2011), <http://www.stopvaw.org/afghanistan>.

¹³⁷ Article 3 of the Afghan Constitution provides that no laws should contravene the tenets and provisions of Islam, and therefore *Sharia* law is the supreme law of the land.

¹³⁸ Ahmad, *supra* note 103.

2008 to criminalize certain acts of violence against women.¹³⁹ In 2009, then-president Hamid Karzai issued a presidential decree enacting the EVAW Law, which was lauded as a major step forward for women's rights.¹⁴⁰

The EVAW Law is based on provisions set forth in the Afghan Constitution establishing the rights to liberty and human dignity and recognizing that family is a fundamental pillar of society that the state should protect¹⁴¹ as well as principles of Islamic *Sharia* law.¹⁴² The EVAW Law defines terms such as "violence," "sexual assault," "humiliation," "intimidation," and "persecution" in the context of acts perpetrated specifically against women.¹⁴³ Under the EVAW Law, there are 22 enumerated acts deemed as violence against women, including crimes of physical and sexual violence, early and forced marriage, forced self-immolation, suicide or isolation, deprivation of rights to education, work, health, and property rights.¹⁴⁴ These crimes are punishable by law, and the EVAW Law provides sentencing guidelines.¹⁴⁵

The EVAW Law specifies that the rights of the victim include prosecution of the offender, access to shelter or a safe place, access to emergency health services, access to an advocate or legal aid provider, compensation for damages resulting from an act of violence, and

¹³⁹ Fawzia Koofi, *It's Time to Act for Afghan Women: Pass EVAW*, FOREIGN POL'Y (Jan. 13, 2015), <http://foreignpolicy.com/2015/01/13/its-time-to-act-for-afghan-women-pass-the-evaw/>; see also *Afghanistan's EVAW Law*, CANADIAN WOMEN FOR WOMEN IN AFG. 1, http://www.cw4wafghan.ca/sites/default/files/attachments/pages/cw4wafghan-afghansevawlaw_0.pdf.

¹⁴⁰ *In the Spotlight: Implementing the EVAW Law at a Critical Juncture*, SAMUEL HALL, external evaluation of the EVAW Comm'n Project commissioned by UN WOMEN 6 (2013).

¹⁴¹ See EVAW Law, Art. 1; Afg. Const., Art. 25 and 54.

¹⁴² EVAW Law, Art. 2 provides for the following objectives of the EVAW Law: (1) "[s]afeguarding the religions and legal rights and protecting the human dignity of women;" and (2) "[p]rotecting well being of family and fighting against customs, traditions and practices [that] cause violence against women contrary to the provisions of the religion of Islam."

¹⁴³ EVAW Law, Art. 3.

¹⁴⁴ EVAW Law, Art. 5 expressly recognizes that commission of the following acts constitute violence against women: (1) rape; (2) forcing into prostitution; (3) recording the identity of a victim and publishing it in a manner that damages her reputation; (4) burning, using chemicals or other dangerous substances; (5) forcing self-immolation or suicide or using poisonous or other dangerous substances; (6) causing injury or disability; (7) battery and laceration; (8) selling or buying women for the purpose of or under the pretext of marriage; (9) *baad* (defined in EVAW Law, Art. (3)(4) as "[m]arrying a woman to someone as blood price or to achieve peace linked to murder, sexual assault or other circumstances to observe indecent customs and traditions"); (10) forced marriage; (11) prohibiting the right to marriage or the right to choose a spouse; (12) underage marriage; (13) abuse, humiliation, intimidation; (14) harassment or persecution; (15) forced isolation; (16) forcing a woman to drug addiction; (17) deprivation of inheritance; (18) preventing possession of personal property; (19) deterring the right to education, work, access to health services; (20) forced labor; and (21) denying a relationship with woman to prevent her from access to property, inheritance or other rights. It also recognizes (22) marrying more than one wife without observing Article 86 of the Civil Code, which requires that the following conditions must take place for a man to marry more than one woman: (1) the marriage will not cause injustice between the wives; (2) the man can provide each woman with food, clothes, a suitable house and medical treatment; and (3) the first wife must suffer from an incurable disease or be unable to bear children. The punishment for failing to meet all three requirements is imprisonment of no less than three months.

¹⁴⁵ EVAW Law, Arts. 17-41. Sentencing guidelines for certain acts are included in the EVAW Law while the Penal Code is referred to for others.

confidentiality.¹⁴⁶ Under the EVAW Law, a victim of violence or her relatives may file a written complaint to the police, human rights offices (*huquq*) of the MOJ, courts, and offices of the MoWA located in each of Afghanistan's 34 provinces.¹⁴⁷ State institutions that receive the complaints must inform MoWA, and the prosecutors' offices and courts are to prioritize violence against women cases and process them as expeditiously as possible.¹⁴⁸ With the exception of the crimes of rape, forced prostitution, publicizing the identity of a victim, burning or the use of chemical substances and forced self-immolation or suicide—which the state *must* prosecute through the formal judicial system, consistent with other areas of Afghan criminal law—a victim may withdraw her case at any stage of prosecution, which terminates the proceeding.¹⁴⁹ This is highly problematic as women face many pressures to withdraw their claims.

In addition to delegating responsibilities to MoWA and the MOJ, the EVAW Law obligates the Ministry of Religious Affairs, Ministries of Education and Higher Education, Ministry of Information and Culture, Ministry of Interior Affairs, and Ministry of Public Health to adopt specific preventive and protective measures to end violence against women.¹⁵⁰ To establish coordination among governmental, non-governmental, and other relevant organizations, the EVAW Law requires the establishment of an EVAW High Commission comprised of deputies from the above ministries as well as the Attorney General's Office and Ministry of Labor, Social Affairs, Martyrs, and Disabled, and members of the AIHRC, Kabul Specialized Family Court, and Afghanistan Independent Bar Association.¹⁵¹ Chaired by MoWA, the EVAW High Commission is charged with monitoring the implementation of the EVAW Law, including studying and evaluating factors of violence, collecting statistics of violence related to crimes, and suggesting amendments to the Law or adopting regulations and procedures to more effectively implement the Law.¹⁵² Notably, the Law does not contain a provision requiring that adequate budget be allocated to implement the Law or provide for sanctions of government officials who fail to perform their obligations.

Although the EVAW Law recognizes 22 acts of violence against women, the list is not comprehensive. Despite calls by the UN and others to recognize "honor killing" as a specific crime, honor killing is not enumerated under the EVAW Law as a form of violence against women and the Afghan Penal Code has not been amended to recognize honor killing as a crime.¹⁵³ Rather, the offense of murder under the Penal Code is mitigated when it involves an

¹⁴⁶ EVAW Law, Art. 6

¹⁴⁷ EVAW Law, Art. 7.

¹⁴⁸ EVAW Law, Art. 7.

¹⁴⁹ EVAW Law, Art. 39; *Justice through the eyes of Afghan women: Cases of Violence Against Women Addressed through Mediation and Court Adjudication*, UNITED NATIONS MISSION IN AFG. (UNAMA) (Apr. 15, 2015), http://unama.unmissions.org/Portals/UNAMA/UNAMA-OHCHR/UNAMA_OHCHR_Justice_through_eyes_of_Afghan_women_-_15_April_2015.pdf.

¹⁵⁰ EVAW Law, Arts. 8-14.

¹⁵¹ EVAW Law, Art. 15

¹⁵² EVAW Law, Art. 16

¹⁵³ Honor killings are not clearly defined in Afghan law. Article 398 of the Afghan Penal Code states: "A person defending his honour, who sees his spouse or another of his close relations, in the act of committing adultery or

honor killing, and a perpetrator receives a more lenient sentence to a term “not exceeding two years.”¹⁵⁴

Moreover, tension exists between some provisions of the EAW Law and the Afghan Penal Code leaving some women unprotected. For example, the EAW Law explicitly recognizes *baad* as a crime against women, including girls under 18; increases the term of imprisonment for up to ten years for someone who gives or takes a woman in *baad*; and also imposes medium term imprisonment upon a witness, counsel, marriage solemnizer, or other involved party.¹⁵⁵ However, the Afghan Penal Code criminalizes *baad* only in the case of a widow or a woman over 18, which carries a medium-term imprisonment not to exceed two years.¹⁵⁶ Even though both the Afghan Penal Code and the EAW Law ban *baad*, women continue to be forced into marriage as retribution or to make amends for crimes committed by male family members due to reliance on the informal justice system, which relies on tribal law that allows for the exchange of women.¹⁵⁷ *Baad* is more frequently cited as a problem in the east and southeast, but rarely in the northeast, west, northwest, and central areas of Kabul and Hazarajat.¹⁵⁸

If women exercise their right to choose their own spouse, they may be charged and imprisoned for adultery. For example, the press reported a case where the father of Zahra, a young Afghan woman, promised her in marriage to a 70-year-old man because her brother had “stolen” the second younger wife of the man. Zahra was exchanged for her brother’s crime. Resisting the marriage, Zahra ran away with a young man, but they were caught after two years and jailed for adultery.¹⁵⁹

The EAW Law currently exists as a freestanding law. However, the MOJ is leading governmental discussions to integrate criminal provisions of the EAW Law into the Penal Code.¹⁶⁰ Advocates believe that existence of the EAW Law as separate from the Penal Code is crucial to the protection of women’s rights in Afghanistan and the recognition that violence disproportionately affects women and girls. Incorporating the EAW Law into the Penal Code would thus weaken the EAW Law.¹⁶¹ Moreover, it is possible that not all of the EAW Law’s provisions will be included in a revised Penal Code, which would reverse progress made on the prevention and protection of Afghan women from violence.¹⁶²

being in the same bed with another and immediately injures or kills one or both of them shall be exempted from punishment for laceration and murder but shall be imprisoned for a term not exceeding two years.”

¹⁵⁴ *Id.*

¹⁵⁵ EAW Law, Art. 3, 5, 25.

¹⁵⁶ Afg. Pen. Code, Art. 517.

¹⁵⁷ Alissa J. Rubin, *For Punishment of Elder’s Misdeeds, Afghan Girl Pays the Price*, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/17/world/asia/in-baad-afghan-girls-are-penalized-for-elders-crimes.html?_r=0.

¹⁵⁸ *Afghanistan in 2014*, ASIA FOUND., *supra* note 55, at 27.

¹⁵⁹ Mirwais Jalalzai, RAWA News, *Zahra: An Afghan woman victim of domestic violence*, KHAAMA PRESS (Oct. 23, 2014), <http://www.rawa.org/temp/runews/2014/10/23/zahra-an-afghan-woman-victim-of-domestic-violence.html>.

¹⁶⁰ *Justice through the eyes*, UNAMA, *supra* note 149, at 5.

¹⁶¹ Correspondence with Taj Sultana, Protection and Advocacy Mngr., Danish Refugee Council-Afghanistan (Dec. 22, 2015) (on file with CGRS) [hereinafter DRC-Afg.].

¹⁶² *Id.*

Box 1-5. IDP Policy and SGBV Prevention

In November 2013, Afghanistan adopted a National Policy on Internally Displaced Persons to implement strategies to prevent future displacement as well as respond to the immediate short-term needs of the country's current displaced persons. For the first time, the Afghan government clearly defines who qualifies as an IDP: "all persons who are forced to flee or leave their homes, including as a result of national or international military operations, Taliban abuses, natural disasters and development projects and those who remain in affected areas."¹⁶³ Recognizing that women "are often at greater risk of physical and sexual violence, as well as poverty, and frequently have no access to critical medical or psycho-social services or law enforcement and legal remedies despite the traumas they experience,"¹⁶⁴ the IDP Policy explicitly affirms Afghanistan's commitment to implement appropriate strategies and programs to protect the rights of displaced women.¹⁶⁵ On paper, the IDP Policy identifies the vulnerabilities of women and aims to protect displaced women in a manner consistent with the EAW Law and other related laws and policies. In reality, the implementation of the IDP policy has been slow in large part due to lack of political will on the part of the Ministry of Refugees and Repatriation, the government agency responsible for carrying out the policy.¹⁶⁶

B. Cases prosecuted under the EAW Law

The EAW Law enables women victims of violence the right to register crimes committed against them with the AIHRC, the police, or a MoWA, *huquq*, or prosecutor's office.¹⁶⁷ If a case is registered—and it is not referred for resolution by mediation or the informal justice system (see sections III.C and IV.D)—it should be referred to the prosecutor's office.¹⁶⁸ The prosecutor's office conducts a preliminary investigation and has the discretion to indict abusers under the EAW Law, Penal Code, or both, and may refer the case to the court for trial.¹⁶⁹

Despite the many entry points for victims, according to statistics from the Afghan government, AIHRC, and reports from legal aid providers, few cases involving violence against women have been resolved through the formal judicial process.¹⁷⁰ In 2013, the AIHRC found that of the 2,400

¹⁶³ Turner, *supra* note 96; *Global Overview*, *supra* note 104.

¹⁶⁴ *IDP Policy*, *supra* note 45. The IDP Policy notes that female heads of households, expectant mothers, mothers with young children, and women with disabilities are particularly vulnerable. *Id.* at 20.

¹⁶⁵ Section 7 of the IDP Policy reaffirms the human rights that IDPs are entitled to and highlights the specific vulnerabilities of women: protection of life, integrity liberty, and security; right to adequate housing and access to land; right to livelihood; right to water, food, clothes—adequate standard of living; right to health care; right to education; right to property protection and compensation; participatory rights, including the right to vote.

¹⁶⁶ Turner, *supra* note 96; *Global Overview*, *supra* note 104.

¹⁶⁷ EAW Law, Art. 7.

¹⁶⁸ *A Way to Go: An Update on Implementation of the Law on Elimination of Violence against Women in Afghanistan*, UNAMA, 1 (Dec. 2013), <http://www.refworld.org/docid/52a6dff4.html>.

¹⁶⁹ *Id.*

¹⁷⁰ Boggio-Cosadia, *supra* note 75. For example, Medica Afghanistan, a non-profit non-governmental organization working to eliminate violence against women, reports that out of a total number of 1,277 cases from August 1, 2012 to December 31, 2013, the EAW Law was invoked in 98 (7.6%) cases. The Afghan government reports that

cases of violence against women referred to the justice system, only 400 (16.67%) of the cases were processed and adjudicated; the remaining were unsettled, withdrawn, or closed.¹⁷¹ In its December 2013 update report on the implementation of the EVAW Law in Afghanistan, the UN Assistance Mission in Afghanistan (UNAMA) observed that registration of reported incidents of violence against women increased by 28% from October 2012 to September 2013, amounting to 650 cases (compared to 470 cases in 2011-2012).¹⁷² However, the use of the EVAW Law as a legal basis for indictment increased only by 2%.¹⁷³ The discrepancy between the number of reported incidents and the indictments may reflect the insufficiency of evidence to indict, but could also reflect that many cases did not proceed through the judicial system because women preferred not to press charges (see section IV.B below) or chose to resolve matters through mediation or informal mechanisms (see sections III.C and IV.D below). Between October 2012 and September 2013, courts applied the EVAW Law to convict in only 55% of the 109 indictments filed under the EVAW Law, which constitutes a 17% decrease in courts' use of the EVAW Law to decide cases.¹⁷⁴ The primary reasons for these low numbers are discussed in section IV.

As of July 2015, Women for Afghan Women (WAW) was representing displaced Afghan women in seven cases before the family court including issues of domestic violence, inheritance, engagement abolition, separation and child custody.¹⁷⁵ The engagement abolition case was based upon an indictment of *baad* under the EVAW Law and has been resolved. The other six cases are still in progress, and with the exception of the inheritance issue, are being pursued under the EVAW Law as the victims in those cases suffered from violence.

out of 4,505 VAW cases reported from March 2012 to March 2013, 518 (11.5%) of registered cases went through the formal legal process and resulted in either punishment or acquittal. Punishments included 10 death sentences, 292 jail sentences, 59 cash fines, 67 divorces, and 40 acquittals. See *First Report on the Implementation of Violence against Women (EVAW) Law in Afghanistan*, ISLAMIC REPUBLIC OF AFG. MINISTRY OF WOMEN'S AFFAIRS (Jan. 2014) [hereinafter *Afg. First Report on EVAW*].

¹⁷¹ Simar Samar, *Corruption is a brutal enemy of Afghan women*, THOMAS REUTERS FOUND. (May 3, 2013), <http://www.trust.org/item/20130502130716-v16ht/>.

¹⁷² *A Way to Go*, UNAMA, *supra* note 168, at 3.

¹⁷³ In a May 2014 interview, the director of the Office of the Special Attorney for Afghanistan reported that "[j]ust in the capital city of Kabul, more than 3,500 cases of violence against women have been solved in the past four years, and the perpetrators have been convicted, sentenced with imprisonment and even execution." Maiwandi, *supra* note 9. This number of reported prosecutions conflicts with the December 2013 United Nations investigation of the implementation of the EVAW Law (see section III.B) which found that while the number of complaints about violence against women invoking the EVAW Law had increased by 28% in 2012-13 compared with 2011-12, the number of prosecutions had only risen by 2% over the same period. See Smith, *Afghan Women 2014*, *supra* note 9; see also Jalalzai, *supra* note 159.

¹⁷⁴ *A Way to Go*, UNAMA, *supra* note 168, at 3.

¹⁷⁵ Videoconference Interview by CGRS with Women for Afghan Women (July 12, 2015).

Box 1-6. Legal Aid Success Stories

Rates of prosecution of violence against women under the EAW Law remain minimal. However, there have been some successes, often owing to the involvement of legal aid providers and women's rights advocates in Afghanistan who push the system to work for their clients. Legal aid organizations provide women facing violence and their families with legal advice and collaborate with prosecutors to indict perpetrators.¹⁷⁶ Lawyers collect evidence, such as taking pictures of women's injuries and obtaining medical certificates, and are present during trial.¹⁷⁷

Out of eight criminal cases prosecuted in 2012 and 2013, Medica Afghanistan—a non-profit, non-governmental Afghan women's organization working to eliminate violence against women—succeeded in convincing prosecutors to indict six cases under the EAW Law provisions, sometimes together with other provisions of the Penal Code.¹⁷⁸ Prosecutors' indictments based upon the EAW Law familiarize judges with its provisions, bringing further legitimacy to the EAW Law. Some of the cases, including three cases where the indictment was based solely on provisions of the EAW Law, resulted in convictions, indicating some willingness of the courts to follow prosecutors' indictments.¹⁷⁹

Attorneys have also successfully used the EAW Law to help prevent honor killings. For example, in March 2014, after an Afghan couple eloped, the woman's father pressed bigamy charges against them, claiming that his daughter was already married to her nephew.¹⁸⁰ The woman claimed she had been engaged to her nephew against her will and without her knowledge and was not married.¹⁸¹ Several of the woman's male family members publicly vowed to carry out an honor killing against her, angry not only that she had defied her family, but also that she had married someone from a different ethnic group.¹⁸² A lawyer from Women for

¹⁷⁶ Boggio-Cosadia, *supra* note 75. Legal aid organizations may also defend women accused, indicted, prosecuted, and judged during all stages of proceedings; and represent women in civil proceedings before family courts such as divorce, child custody and alimony, and mediation.

¹⁷⁷ *Id.*

¹⁷⁸ Three cases were indicted on the sole basis of battery and laceration under the EAW Law; one case on causing injury or disability and *baad* under the EAW Law; one case on injury or disability under the EAW Law and attempted murder under the Penal Code; and one case on injury or disability under the EAW Law and murder under the Penal Code.

¹⁷⁹ Boggio-Cosadia, *supra* note 75. While the EAW Law is not applicable in civil proceedings, according to Medica Afghanistan, lawyers have referred to the Law's provisions in divorce requests in family court based on harm. In addition to providing evidentiary documentation such as medical certificates and testimonies, lawyers quote from the EAW Law as a deliberate strategy to underline the type of violence the woman has gone through, and to underscore the fact that such acts of violence are forbidden and punishable under the Law. This strategy can have positive effects as it promotes the concept that violence against women is a crime. It has been helpful for lawyers to highlight this, particularly in family courts where judges do not deal with criminal offenses and are not familiar with the EAW Law.

¹⁸⁰ Jawad Sukhanyar & Rod Nordland, *Forbidden Afghan Couple are Reunited After Arrests*, N.Y. TIMES (June 17, 2014), http://www.nytimes.com/2014/06/18/world/asia/forbidden-afghan-couple-reunited-after-arrests.html?_r=0.

¹⁸¹ *Id.*

¹⁸² *Id.*

Afghan Women, who won dismissal of the bigamy charges for the couple, indicated the authorities had offered to draw up a warrant for the arrest of the woman's father for attempting to force her to marry against her will, a crime under the EAW Law.¹⁸³ These actions are believed to have prevented the family from carrying out the honor killing.

C. Use of the EAW Law by legal aid attorneys in mediation and violence prevention

Islamic law emphasizes resolving disputes through peaceful solutions particularly within the family, and emphasizes that such solutions must be just and accepted by the free will of both parties.¹⁸⁴ This, coupled with the many barriers to pursuing criminal prosecution under the EAW Law discussed in the following section, influence many women to turn to mediation.¹⁸⁵ Attorneys for women have sought to use the EAW Law to prevent violence through awareness raising and to resolve cases through informal mediation primarily in cases of domestic violence. The majority of cases of violence against women reported to the police and prosecutor's offices are being processed outside of the formal justice system—mostly through mediation.¹⁸⁶ Women are often reluctant to file complaints against their husbands or immediate family members with authorities and prefer mediation, hoping for a resolution that preserves family unity.¹⁸⁷ Fear of public scrutiny, high costs, and corruption in the judicial system also deter women from seeking prosecution (discussed in more detail below). Civil redress, such as divorce, fair alimony and custody settlements, and living violence-free may be more important to women than seeking imposition of criminal sanctions against their abusers.¹⁸⁸

To incorporate the EAW Law into mediation processes, legal aid organizations working with survivors have referred to EAW Law provisions in the signed agreements, clearly laying out which actions constitute a crime against a woman and the consequences for violating the EAW Law.¹⁸⁹ Legal aid organizations report that quoting the EAW Law in mediation agreements has had a positive effect on men and women. Referencing the EAW Law has reportedly deterred perpetrators of violence who are alerted that certain acts of violence against women have criminal consequences.¹⁹⁰

While mediation can result in a positive solution for some women, this is not always the case. Alarming, in some mediation cases, women were not present during the mediation

¹⁸³ *Id.*

¹⁸⁴ *Justice through the eyes*, UNAMA, *supra* note 149. Mediation (*miyanjigari*), reconciliation (*sulha*) and arbitration (*tahkim*) are terms found in Islam that refer to peaceful dispute resolution.

¹⁸⁵ *A Way to Go*, UNAMA, *supra* note 168, at 12. Afghan law does not prohibit mediation in EAW cases.

¹⁸⁶ UNAMA examined the individual experiences of 100 women seeking justice under the EAW Law and found 65% of cases were resolved by mediation, and found only 5% of cases adjudicated through criminal prosecution resulted in sanctions against the perpetrators. See UNAMA, *supra* note 149, at 1, 2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Boggio-Cosadia, *supra* note 75, at 17.

¹⁹⁰ *Id.*

agreement and have had mediations imposed on them by other parties.¹⁹¹ Resolving cases through mediation also reflects a minimization of the grave crimes of violence against women and can even lead to increased vulnerability to further violence. The mediation process utilized by legal aid attorneys, while creative and beneficial to their clients in many respects in the current context, lacks a standardized approach or monitoring mechanism to ensure adherence to the principles of consent, safety, impartiality and inclusivity of the victim; however, it is often the only desirable option.¹⁹² While mediation may be an acceptable resolution for certain types of disputes, it is not a substitute for prosecution in cases involving serious crimes of violence, such as rape, forced prostitution, forced self-immolation or suicide, and to use it as a substitute in these cases is inconsistent with international law and policy.

In addition to mediation, the Danish Refugee Council (DRC) has reported success in raising awareness about the EVAW Law to prevent violence. For example, an 11-year-old girl had been betrothed at birth to her father's best friend's son who was 13 years older.¹⁹³ After being educated on the EVAW Law and understanding the criminal liability faced for underage marriage, the girl's father canceled the engagement.¹⁹⁴

Box 1-7. Violence Prevention: Case Study

The case of 22-year-old Humaira provides an example of how legal aid organizations have used the EVAW Law to prevent violence, resolve domestic conflict, and engage in alternate forms of dispute resolution. Humaira had been married to Murtaza for two years and they had a five-month-old daughter, Sofia. After Humaira gave birth to her daughter, her in-laws' behavior towards her changed as they expected she would give birth to a boy. Influenced by his family's behavior, Murtaza's treatment of Humaira worsened. Humaira's mother-in-law constantly demanded that Humaira do a lot of housework, and when she was unable to do something, her mother-in-law complained to Murtaza, who beat her. Humaira discussed the situation with her parents, but they advised her to be patient and try to keep her in-laws and husband happy as her impoverished parents could not support her financially.

Marzia, Humaira's neighbor, learned about Humaira's situation. Marzia, who had undergone a two-month community outreach worker training on the EVAW Law and Civil Code procedures provided Humaira with basic information about violence against women, and referred her to Women for Afghan Women (WAW) for legal advice. A WAW lawyer educated Humaira that under the EVAW Law, beating or physical abuse by anyone, including one's husband or in-laws, is a crime punishable for up to three months imprisonment and for imprisonment of three months to ten years if there is injury or disability.

¹⁹¹ *Justice through the eyes*, UNAMA, *supra* note 152, at 3.

¹⁹² *Id.*; see also Jalalzai, *supra* note 159; Ali M. Latifi, *UN says Afghanistan's court system fails women*, L.A. TIMES (Apr. 19, 2015), <http://www.latimes.com/world/afghanistan-pakistan/la-fg-un-afghanistan-women-courts-20150419-story.html>.

¹⁹³ Correspondence with DRC-Afg. (Jan. 2, 2016) (on file with CGRS).

¹⁹⁴ *Id.*

Humaira was not willing to file a case against her husband and in-laws as she feared her husband would divorce her and leave her and Sofia without support. Therefore, she requested DRC and WAW use an alternate way to address her problem. DRC and WAW invited her husband and in-laws to participate in a one month awareness raising training with other people from their community that focused on the legal consequences of physical abuse, including beatings in particular, and more generally on violence against women. Three months after the training, Humaira reported that her situation improved and her husband and in-laws discussed the information they gained during the training session.¹⁹⁵

IV. Barriers to Effective Implementation of the EVAW Law

The EVAW Law has theoretically advanced equality and women's rights in Afghanistan and has successfully provided protection and punishment in some cases (as detailed in the previous section). Despite being controversial, the EVAW Law has positively raised the profile of the gender agenda in Afghanistan. According to UN Women Chief Phumzile Mlambo-Ngcuka, the Law has provided "a platform for debate and awareness raising issues related to gender equality and the rights of women and girls particularly, to live a life free of violence."¹⁹⁶ However, six years after its enactment, SGBV against women and women's lack of legal rights persist in Afghanistan and, as the UN Women Chief further noted, weak implementation of the EVAW Law means that "perpetrators of violence go free."¹⁹⁷

Women's rights advocates fear that violence will only worsen since ISAF forces have withdrawn from the region. A main reason for the potential regression of women's legal protection is the lack of mechanisms for implementation and enforcement of the EVAW Law. Reports and studies of violence against women and political attitudes towards the EVAW Law in Afghanistan over the last year indicate that women continue to experience high rates of violence.¹⁹⁸ Amnesty International reports women's rights activists are facing increased levels of violence and harassment, to which the authorities "turn a blind eye."¹⁹⁹

Barriers to effective implementation of the EVAW Law, explored in the sections to follow, include deeply entrenched patriarchal views and bias against women, women's persistent fear of reporting due to lack of confidence in the authorities and judiciary, and continued reliance on informal justice mechanisms.²⁰⁰ While the discussion of barriers to implementation of the

¹⁹⁵ *Id.* (Names have been changed to maintain confidentiality.)

¹⁹⁶ Dominguez, *supra* note 2.

¹⁹⁷ *Id.*

¹⁹⁸ *Afghanistan turns a blind eye to rising violence against women activists – Amnesty*, RT (Apr. 7, 2015), <http://www.rt.com/news/247637-afghan-women-activists-amnesty/>; *See Their Lives on the Line: Women Human Rights Defenders Under Attack in Afghanistan*, AMNESTY INT'L (Apr. 7, 2015), <https://www.amnesty.org/en/documents/asa11/1279/2015/en/>.

¹⁹⁹ *Id.*

²⁰⁰ Article 64 of the Afghan Constitution allows the President to appoint the Chief Justice and justices of the Supreme Court with approval of the *Wolesi Jirga*. The decision on how justices are appointed may have significant implications for enforcing women's rights if the president lacks commitment to the rule of law and protecting

EVAW Law covered in this chapter is not exhaustive, it discusses the primary barriers identified by women’s rights advocates and legal aid providers and confirmed by Center for Gender & Refugee Studies’ (CGRS) research (see the Executive Summary for more on methodology).

A. Perceptions of sexual and gender-based violence and the EVAW Law: pervasive bias and discrimination against women

Implementation of the EVAW Law has been slow due to opposition to the Law by conservative lawmakers and members of society. Opponents of the EVAW Law question its legal status, arguing the Afghan Constitution requires Parliament to pass presidential decrees even though other Afghan laws enacted by presidential decree have been implemented without parliamentary approval.²⁰¹ In the face of the 2014 presidential elections and to mitigate the risk that a new president would reverse President Karzai’s decree enacting the EVAW Law, Afghan Parliament member and women’s rights activist, Fawzia Kofi, introduced the EVAW Law for ratification by Parliament in 2013.²⁰² Critics argue that Ms. Kofi’s introduction of the EVAW Law into Parliament was premature and politically motivated, that it re-opened controversy over the EVAW Law, bringing the Law to the attention of conservatives who were unaware of the presidential decree and, thus, has weakened the effectiveness of the Law.²⁰³ Conservatives take the position that Parliament must vote on the EVAW Law to give legal effect to the presidential decree. Some parliamentary members claim the EVAW Law contradicts Islamic *Sharia* law—including in particular that it prohibits forced and early marriages and establishes women’s shelters—and oppose its passage.²⁰⁴ Despite efforts from advocates over the last two years, the EVAW Law still has not received parliamentary approval.²⁰⁵

Despite the reported and confirmed statistics of rising violence against women in Afghanistan (see section II.C), some officials deny the levels of violence, claiming the numbers are actually low, and blaming women for the violence. Officials also reject accusations of bias or corruption (discussed below), asserting that the challenge in investigating cases of violence against women is the remote location of the incidents and that women are at fault for defying traditional roles

women’s rights. See Carolyn A. Dubay, *Beyond Critical Mass: A Comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan*, 24 FLA. J. INT’L. L. 163, 200-203 (April 2012).

²⁰¹ Christine Roehers & Sari Kouvo, *On a Knife’s Edge: The looming parliamentary debate about the Elimination of Violence against Women Law*, AFG. ANALYSTS NETWORK (May 16, 2013), <https://www.afghanistan-analysts.org/on-a-knifes-edge-the-looming-parliamentary-debate-about-the-elimination-of-violence-against-women-law/>; see also Smith, *Afghan Women 2014*, *supra* note 9. The Ulama Council, Afghanistan’s highest religious authority, has been silent on the need to protect women from violence and criticized President Ghani’s nomination of a woman to the Supreme Court as against *Sharia* law. See Fazul Rahim & F. Brinley Bruton, *Afghanistan’s Women: Future Clouded by Rampant Violence, Conservatism*, NBC NEWS (June 28, 2015), <http://www.nbcnews.com/news/world/afghanistans-women-future-threatened-violence-conservatism-n377631>.

²⁰² *In the Spotlight*, SAMUEL HALL, *supra* note 140, at 8.

²⁰³ *Id.*; see also Ali M. Latifi, *Afghan women in fight over rights law*, AL JAZEERA (May 30, 2013), <http://www.aljazeera.com/indepth/features/2013/05/201352711108360922.html>.

²⁰⁴ Ahmad, *supra* note 103.

²⁰⁵ *In the Spotlight*, SAMUEL HALL, *supra* note 140, at 64.

and leaving the home.²⁰⁶ In a September 2014 meeting in Lashkar Gah, the Institute for War and Peace Reporting (IWPR), a non-profit organization supporting journalists in conflict and crisis zones, reported that the “head of the women’s affairs ministry in the province, Jamila Niazi, claimed that levels of violence against women were very low.”²⁰⁷ Similarly, a few days later, about 100 people met in Bamyan, Afghanistan, to discuss what actions officials and organizations were taking to stem the rising tide of violence against women in the region.²⁰⁸ At this gathering, Mortaza Nejati, a local prosecutor who sits on the regional committee for preventing violence against women, rejected the allegations of delaying proceedings and letting suspects go for bribes, indicating that the “real challenge . . . was investigating cases that occurred in remote parts of Bamyan, a highland area where travel is difficult.”²⁰⁹ Torpekai Elkhani, the provincial head of the women’s affairs ministry, observed that contributory factors in the rise of SGBV include ignorance about women’s rights and social problems like unemployment and illiteracy, but also claimed that women leave themselves “open to assault” by being “too ready to stray from home.”²¹⁰ These kinds of sentiments impede the implementation of the EAW Law and other legal protections for women in Afghanistan.

Negative perceptions of the EAW Law persist beyond the Parliament and the Executive to other actors in the justice system. In recent years, trainings conducted in police stations, particularly the Afghan National Police’s (ANP) Family Response Units (FRUs), which handle family violence, troubled children, and female victims of crime, have contributed to an improvement of the attitude of some police towards women victims of violence.²¹¹ However, many police officers are still unaware of the EAW Law and of the appropriate procedure to file a complaint if a woman reports violence. Formal training on specific issues in violence against women cases is not provided universally, and is particularly lacking in smaller provinces and districts without FRUs.²¹² As UNAMA observes, some police fail to follow required legal procedures, and instead, refer cases to informal dispute resolution mechanisms which undermine the implementation of the EAW Law.²¹³

²⁰⁶ *Rising Violence Against Women in Central Afghanistan: Gender violence said to be rising in secure Bamyan province and falling to war-torn Helmand*, INST. FOR WAR AND PEACE REPORTING (IWPR) (Oct. 31, 2014), <https://iwpr.net/global-voices/rising-violence-against-women-central-afghanistan>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ FRUs are units of the Afghan National Police. The first FRU was created in 2006 prior to the enactment of the EAW Law. Boggio-Cosadia, *supra* note 75, at 14. A female police officer in Kabul who attended a GBV training for police recruits organized by the Ministry of Interior in collaboration with the United Nations Population Fund (UNFPA) in December 2014 observed that the training raised awareness about GBV among all participants, not just the female ones. She stated: “After completing this course my male colleagues were saying that they understood the importance of not using any kind of violence against women. Their mindset was changed as well.” See *Mariam: I’m More Capable of Recognizing Gender-Based Violence: Gender-based violence training not only improve skills, but also changes mindset*, UNFPA AFG. NEWS (Dec. 23, 2014), http://countryoffice.unfpa.org/afghanistan/2014/12/23/11185/mariam_i_m_more_capable_of_recognizing_gender_based_violence/.

²¹² Boggio-Cosadia, *supra* note 75, at 14.

²¹³ *A Way to Go*, UNAMA, *supra* note 168, at 25.

Despite some efforts to sensitize and train police, which have improved reception of women in some instances, there are still cases where women have reported domestic violence crimes and the police blame them for the abuse.²¹⁴ A representative of the AIHRC observed, “When a woman goes to the police to complain about a case of violence against her, the police [by their treatment] unfortunately commit a second act of violence against her. Sometimes women are even sexually abused by the police.”²¹⁵ Moreover, if a woman does not have marks of violence on her body, the relevant institutions refuse to register her complaint.²¹⁶ The EVAW Law does not contain sanctions if police or other authorities do not follow proper procedures.

According to Afghan lawyers representing women in SGBV claims and available government statistics, even if a case moves beyond the police, the prosecution of cases based on the EVAW Law remains low in the formal judicial system.²¹⁷ Legal aid lawyers working with women victims of violence advocate that prosecutors indict abusers under relevant provisions of the EVAW Law to explicitly recognize the crimes as those committed against women. Positively, some prosecutors have followed suggestions to indict under certain EVAW Law provisions, which forms the basis of the sentence.²¹⁸ However, in other cases, domestic violence in particular, prosecutors disregard the EVAW Law and indict under Penal Code provisions that fail to recognize the severity of the crime and the familial relationship between the perpetrator and the victim.²¹⁹ For example, in a case where a husband beat and raped his wife, a Medica Afghanistan lawyer advocated that the prosecutor indict the husband under the rape provision in the EVAW Law, which increased the maximum penalty from seven years to ten years because of the familial relationship.²²⁰ The prosecutor did not follow the attorney’s request and the husband received a much lighter sentence under the Penal Code.²²¹ This highlights the importance of explicitly recognizing marital rape, an unfamiliar concept under Afghan and

²¹⁴ Michelle Barsa, *Determining If Progress Will Prevail or Peril: The Role for Women in Defining Afghanistan’s Future*, 38-WTR FLETCHER F. WORLD AFF. 87, 92 (Winter 2014).

²¹⁵ Habib, *supra* note 37; UNAMA reported that women were asked to pay bribes to public officials. One woman reported that a police officer reportedly demanded sexual favors as a precondition to processing her complaint. *See Justice through the eyes*, UNAMA, *supra* note 149, at 22.

²¹⁶ Boggio-Cosadia, *supra* note 75, at 14.

²¹⁷ Videoconference Interview by CGRS with Women for Afghan Women (July 12, 2015). *See also* Boggio-Cosadia, *supra* note 75. According to Afghanistan’s First Report on EVAW, there were 4,505 violence-against-women cases reported between March 2012 and March 2013, but only 629 (13.9%) cases were referred for prosecution and 153 cases referred to court.

²¹⁸ Videoconference Interview by CGRS with Women for Afghan Women (July 12, 2015). *See also* Boggio-Cosadia, *supra* note 75, at 9.

²¹⁹ Boggio-Cosadia, *supra* note 75, at 11.

²²⁰ *Id.* at 21. Rape is criminalized under Article 17 of the EVAW Law. Where a woman’s chastity is violated, the perpetrator may be sentenced up to seven years in prison; if the perpetrator is a “close relative up to the third degree, a teacher, employee, or physician of the victim, or the perpetrator has authority or influence over the victim, the perpetrator should be sentenced to long term imprisonment of not more than ten years.” EVAW Law, Article 17(4)-(5).

²²¹ *Id.*

Islamic law, as a crime under the EVAW Law. Prosecutor's indictments based upon the EVAW Law to prosecute perpetrators of violence against women remain low.²²²

Some observe recent improvements in the attitudes of prosecutors, but there has been "no improvement in the attitude[s] of judges towards the EVAW Law and enforcement of the law by courts."²²³ Worse, lawyers have noticed "an increase in negative perceptions" of the EVAW Law, "including sarcastic remarks during court sessions."²²⁴ Judges rarely take initiative to apply the EVAW Law on their own, which they are empowered to do, but follow the prosecutors' indictments.²²⁵ In sum, women face bias and discrimination during the prosecution, hampering progress in their cases.

B. Women fear reporting violence

According to MoWA statistics, 5,406 cases of violence against women, including 3,715 cases under the EVAW Law, were registered from March 2013 to March 2014, indicating a 20% increase in overall registration of cases from previous years.²²⁶ A female member of the Afghan Parliament observed that "the rising numbers may reflect an increased willing[ness] to report crimes as women become more aware of their rights" under the EVAW Law.²²⁷ While that may be the case, in large part due to significant efforts of the women's movement in Afghanistan, it is commonly understood that these figures grossly underrepresent instances of violence against women in the country, in particular crimes of sexual violence. According to the AIHRC, less than 10% of reported violence concerns sexual violence, which is a "reflection of the powerful taboos against discussing it."²²⁸ A major barrier to the enforcement of the EVAW Law is women's fear of reporting crimes.

Women do not report violence perpetrated against them due to danger of increased violence, isolation, and stigmatization. A study by Medica Afghanistan found that the vast majority of women who sought help in Medica's offices refused to file a complaint because they were afraid of the consequences of initiating judicial proceedings such as "increased violence, including killing from their husbands after they have served their sentence and are released from prison," rejection by their families and communities, pressure from the family or husband to withdraw the complaint, if filed, and fear of lack of evidence to prove the violence due to refusal of witnesses to testify.²²⁹

²²² Sultanda, *supra* note 161.

²²³ Boggio-Cosadia, *supra* note 75, at 14.

²²⁴ Telephone Interview by CGRS with Afghan Lawyer, Name Withheld (Jan. 8, 2015). Boggio-Cosadia, *supra* note 75. Supreme Court justices have also expressed reluctance to accept the EVAW Law, commenting that it contains certain provisions that are "western and not according to Afghan culture and not Islamic."

²²⁵ Boggio-Cosadia, *supra* note 75, at 24.

²²⁶ *Justice through the eyes*, UNAMA, *supra* note 149.

²²⁷ Habib, *supra* note 37.

²²⁸ *For Afghan women, violence remains entrenched*, RAWA NEWS (Apr. 7, 2015), <http://www.rawa.org/temp/runews/2015/04/07/for-afghan-women-violence-remains-entrenched.html>.

²²⁹ Boggio-Cosadia, *supra* note 75, at 18.

A lack of women in the police force, police bias against women due to entrenched patriarchal norms, police insensitivity, and corruption within the criminal justice system also contribute to women's fear of reporting violence.²³⁰ As Human Rights Watch reports: "In Afghanistan's deeply gender-segregated society, many women [do] not feel able to speak with a man who is not their relative to report a crime, let alone discuss sensitive issues covered by the EVAW Law such as domestic violence, rape and forced marriage."²³¹ Many women do not approach state agencies because they mistrust the agencies or fear being subjected to further abuse, and feel there is nowhere they can turn for safety.²³²

According to AIHRC's chair, the main reason for the low numbers of violence against women cases proceeding through the justice system is "corruption and the improper use of influence in the judicial system."²³³ For example, one woman was asked to pay a bribe or marry the judge to get her case adjudicated; other women have been pressured by authorities to withdraw their complaints and return to their abusers.²³⁴

Women often understand that corruption and lack of training for police and prosecutors prevent their cases from being properly investigated and prosecuted.²³⁵ Perpetrators of violence against women often avoid punishment due to personal or political connections with police or prosecutors and the payment of bribes, which in turn encourages others to commit violence against women because they know they are not likely to be punished.²³⁶ The AIHRC has reported many instances where the police have released perpetrators of violence against women who "enjoy impunity, because of collusion, and in exchange for money."²³⁷ MoWA is therefore unable to effectively pursue cases of violence against women, and perpetrators are released because of corruption within legal and judicial institutions.²³⁸ If their cases will not progress, women have little incentive to report.

²³⁰ *Afghanistan: Fight Rampant Sexual Harassment*, HUMAN RIGHTS WATCH, *supra* note 1.

²³¹ *Id.*

²³² Habib, *supra* note 37.

²³³ Samar, *supra* note 171.

²³⁴ *Id.*

²³⁵ Article 7 of the EVAW Law provides for a code of conduct in investigations made by the police, *huquq* offices, courts and other relevant offices.

²³⁶ Habib, *supra* note 37.

²³⁷ *Id.* It is unclear from the source whether the perpetrators were released after conviction or after arrest but before investigation and a hearing.

²³⁸ *Id.* (citing Fatana Gailani, chairwoman of the Afghanistan Women's Network). There are also criticisms that MoWA appointed regional heads on the basis of "connections rather than merit."

Box 1-8. Baseline Survey: IDPs Lack Awareness of Women’s Rights and SGBV

According to DRC’s June 2014 survey of 187 Afghan returnees and IDPs in Kabul’s Alisghan area, and Bagh-e-Dawood and Kodakistan, two of the Kabul Informal Settlements, awareness of women’s rights and SGBV is low among displaced Afghans, and males tend to have more awareness than females of women’s rights because males have greater mobility and access to the community.²³⁹ The survey also revealed that men’s awareness of women’s rights is based primarily on Islamic principles with limited knowledge of the national and international laws that protect women.²⁴⁰ Although most displaced Afghan men and women surveyed have never attended trainings on women’s rights and SGBV issues, they indicated they are generally receptive to attending such trainings.²⁴¹

Even among both men and women who indicated awareness of women’s rights, knowledge on the topic is poor.²⁴² The majority of displaced Afghan men and women surveyed have not heard of SGBV,²⁴³ and among both men and women who have awareness of SGBV, understanding is very low.²⁴⁴ Displaced people also reported a lack awareness of services available to women experiencing violence; for example, a high percentage of displaced women did not know how to access legal assistance because they did not believe such service providers exist.²⁴⁵ Of the small number of women who are aware of services, according to survey, many had incomplete information about available services.²⁴⁶ Domestic violence among displaced Afghan women remains underreported as women are reluctant to report violence due to “fears of stigmatization, social exclusion, reprisals, and threats to life.”²⁴⁷

²³⁹ *Sexual and Gender-Based Violence among Afghan Refugees in Tajikistan and among displacement and returnees in Afghanistan: Baseline Study 2014*, DRC & UNITED NATIONS TRUST FUND TO END VIOLENCE AGAINST WOMEN (OCT. 26, 2014) [hereinafter DRC Baseline Survey 2014]. DRC Baseline Survey 2014 reports that only a quarter of men and 18.7% of women surveyed reported awareness of women’s rights; 40% of women reported no awareness of women’s rights.

²⁴⁰ *Id.*

²⁴¹ *Id.* Nearly 90% of men and women surveyed by DRC had never attended trainings on women’s rights or SGBV issue. Eighty percent of Afghan men surveyed expressed interest in attending such a training.

²⁴² *Id.* More than half of the respondents who reported awareness of women’s rights indicated their knowledge was poor.

²⁴³ *Id.* Only 20% of men and women surveyed indicated they were aware of SGBV.

²⁴⁴ *Id.* Due to cultural barriers, a large number of women declined to respond to DRC’s question about their understanding of SGBV.

²⁴⁵ *Id.* DRC Baseline Survey 2014 reveals that nearly 90% of displaced Afghan women surveyed lacked any knowledge as to how to access legal services. Seventy-one point four percent of those who did not know how to access legal services responded that there were no such services available, 16.96% responded that no such services were available in their area, and 9.82% indicated that their families would not allow them to seek such services. The DRC Baseline Survey 2014 reports that only 12% of displaced Afghan women interviewed responded that, yes, there were effective services available to women experiencing violence, 86% responded no, and 2% did not respond.

²⁴⁶ For example, the majority of survey respondents indicated that MoWA provided assistance, and some also believed community elders and humanitarian NGOs provided assistance, but very few indicated that they understood the family courts and police could provide assistance. Interestingly, more respondents felt no one had responsibility to assist (9.8%) than family courts (8%) or the police (6.3%). *Id.*

²⁴⁷ *Listening to Women and Girls*, NRC, *supra* note 41. The DRC Baseline Survey 2014 reported that if violence occurred, 50% of displaced women respondents would do “nothing, keep it to myself,” 15% would talk to female

C. Shelter availability and controversy

The availability of emergency shelters, in the short- and long-term, is essential for ensuring the safety of women fleeing violence. Shelters are particularly important in cases involving domestic violence where women have no other option but to remain in the home with their aggressors or wind up homeless. Long-term shelters that provide more comprehensive services for survivors can end the cycle of violence and provide women with more permanent solutions free of violence. The EAW Law recognizes the importance of shelters and centers where women survivors can seek protection and remain safe, but this provision has been met with strong opposition.²⁴⁸

Opponents of the EAW Law view the right of women fleeing domestic violence or forced marriage to seek shelter as “the most controversial” provision in the Law, and describe shelters “as places where women get raped and prostituted.”²⁴⁹ Predominately funded by western donors, shelters provoke this reaction, it is understood, because they enable women to make their own choices, undermining traditional and deep rooted patriarchal control over women. Conservatives view shelters as an assault on Afghan culture and Islam.²⁵⁰ There are reported cases of women who sought protection in shelters, but when they returned to their families, the families killed them and—despite involvement of MoWA—no charges were pressed against alleged perpetrators.²⁵¹ There is the perception that after a woman leaves her family, others can do whatever they want to her, including sexual acts, and an honor killing is the only way to eradicate the shame she has brought to the family.²⁵²

The controversy over shelters resulted in the introduction of a bill in 2011 for the Afghan government to manage all women’s shelters. If passed, this bill would have required women to appear before a panel comprised of members of the Afghan MOJ to determine if they should remain in the government-controlled shelter, be sent to jail, or returned home where they might face further abuse or death by honor killing.²⁵³ If the panel found a woman qualified to stay in the shelter, she was required to remain for life or face imprisonment if she defied

relatives, 12% felt it was a personal matter that should not be discussed outside the family, and 11% would talk to female friends. Only 1% would report to the police. Eleven percent of women surveyed did not respond to the question.

²⁴⁸ EAW Law, Art. 8(3). MoWA in cooperation with other ministries is to adopt protective and supportive measures for “[p]aving the ground for protection and safe keeping of the victims of violence or exposed to violence at the protective centers or in case no shelter is available, in other save [sic] places for control and supervision.” The EAW Law does not explicitly provide for the creation of shelters.

²⁴⁹ Borhan Osman, *The EAW Law – an Evil Law? The backlash at Kabul University*, AFG. ADVOCATES NETWORK (May 26, 2013), <https://www.afghanistan-analysts.org/the-evaw-law-an-evil-law-the-backlash-at-kabul-university/>.

²⁵⁰ An influential senior imam is reported as stating: if a woman “tries to leave the family, she is breaking the order of the family and it’s against the Islamic laws and it’s considered a disgrace.” Alissa J. Rubin, *A Thin Line of Defense Against ‘Honor Killings*, N.Y. TIMES (Mar. 2, 2015), http://www.nytimes.com/2015/03/03/world/asia/afghanistan-a-thin-line-of-defense-against-honor-killings.html?_r=0.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Eric Wilson, *Homes of Refuge: Women’s Shelters in Afghanistan*, AQUILA STYLE (Mar. 18, 2015), <http://www.aquila-style.com/focus-points/homes-of-refuge-womens-shelters-in-afghanistan/96202/>.

confinement.²⁵⁴ Under the bill, women would also have to undergo “forensics examinations” to assess sexual activity, and those determined to be sexually active would be charged with adultery.²⁵⁵ The bill was defeated, but prominent politicians continue to seek the closure of women’s shelters. Judge Nazir Ahmad Hanafi, a member of Parliament representing Herat, the second largest city of Afghanistan, and head of Parliament’s Legislative Commission, is one of the most prominent voices against the ERAW Law and shelters.²⁵⁶ According to Judge Hanafi, “these so-called ‘safe houses’ are very bad,” and in his view, “[t]hey protect people who are doing wrong things and give them immunity . . . [and] open the gates to social problems like AIDS.”²⁵⁷ Judge Hanafi further believes that shelters are “actually ‘brothels’ and could prompt a ‘revolution’ that could kill millions.”²⁵⁸

Women’s lack of access to shelters impedes implementation of the ERAW Law; if a woman has no safe space to turn to pursue a complaint, she is likely to remain in precarious circumstances.

D. Reliance on the informal justice system

Another problem facing the implementation of the ERAW Law is reliance on the informal justice system and rejection of the formal criminal justice system called for in the ERAW Law.²⁵⁹ Even when a woman reports violence to the institutions specified as authorities in the ERAW Law, and charged with prosecution, such institutions refer the woman to informal local councils, such as tribal councils (*jirgas*) or consultation councils (*shuras*) that exist throughout the country. In many instances, a woman may express that she prefers to resolve the matter through traditional dispute resolution (for reasons detailed above). In other instances, authorities pressure or coerce women into resolving their claims in this way.²⁶⁰

Powerful, conservative males typically dominate these councils and are not receptive to changing women’s roles within Afghan society and take little account of the ERAW Law and the formal justice system even though the ERAW Law prevails if there is a contradiction between its provisions and other enforced laws.²⁶¹ Instead, they make decisions “based on a mix of tradition, varying interpretation of Islamic law and local power relations sometimes contrary to law or religious principles.”²⁶² Informal local councils often possess little or flawed knowledge of

²⁵⁴ *Id.*

²⁵⁵ *Afghanistan: Government Takeover of Shelters Threatens Women’s Safety*, HUMAN RIGHTS WATCH (Feb. 13, 2011), <https://www.hrw.org/news/2011/02/13/afghanistan-government-takeover-shelters-threatens-womens-safety>.

²⁵⁶ Rahim & Bruton, *supra* note 201.

²⁵⁷ *Afghanistan: No Country for Women*, AL JAZEERA, *supra* note 40.

²⁵⁸ Rahim & Bruton, *supra* note 201.

²⁵⁹ A full discussion of the tension between customary and Islamic law and the ERAW Law and other domestic Afghan laws is beyond the scope of this report. For further discussion, see Hamid M. Khan, *Islamic Law, Customary Law, and Afghan Informal Justice*, United States Institute of Peace Special Report 363 (Mar. 2015), <http://www.usip.org/sites/default/files/SR363-Islamic-Law-CustomaryLaw-and-Afghan-Informal-Justice.pdf>.

²⁶⁰ Samar, *supra* note 171.

²⁶¹ Smith, *Afghan Women 2014*, *supra* note 9; Dubay, *supra* note 200. Article 43 of the ERAW Law states: “The provisions of this law shall prevail if they contradict the provisions of other enforced laws.”

²⁶² *A Way to Go*, UNAMA, *supra* note 168, at 21.

Sharia or Islamic legal principles, and base their resolutions under customary laws and traditional practices that may vary among ethnic groups and communities.²⁶³ This has resulted in vulnerable populations, including internally displaced and returnee women and children, facing further victimization.²⁶⁴

Discrimination against women and the continued reliance on the informal justice system, rather than the formal system, is demonstrated in the leniency and lack of penal sanctions in cases of honor killings, which are not specified as a crime under the EVAW Law.²⁶⁵ Evoking honor as an offense to custom and tradition is often an accepted defense for the perpetrator in cases of murder of women and girls.²⁶⁶ However, most cases of honor killings do not come before the formal judicial system, as families often carry out punishments sanctioned by a community justice mechanism such as the *shuras* or *jirgas*.²⁶⁷

Government authorities who receive complaints from women also refer women to legal aid organizations to mediate disputes.²⁶⁸ As discussed in section III.C, there are instances where informal mediation may be in the best interests of the woman. However, frequently, referral for mediation conflicts with the Afghan authorities' general duty to fully investigate and prosecute crimes as outlined in the Criminal Procedure Code (CPP). Neither the EVAW Law nor the CPP include mediation as an alternative to criminal prosecution where a crime has been allegedly committed and there are no guidelines for how mediation should be used to ensure protection for women in cases of violence within the family.²⁶⁹ Rather, most mediation proceedings result in reunification of a woman with her perpetrator to preserve family unity and do not necessarily provide enforcement mechanisms to protect women from further violence and accountability of the perpetrator.²⁷⁰ The EVAW Law outlines specific criminal penalties for cases of violence against women, but mediation may be used to circumvent any of these legal consequences, and therefore prevent effective legal enforcement of actions criminalized under the EVAW Law, even in cases involving the most serious crimes.²⁷¹

²⁶³ Khan, *supra* note 259, at 7.

²⁶⁴ *A Way to Go*, UNAMA, *supra* note 168, at 21.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* The use of *baad*, as reported on by the New York Times, is also another problematic example of use of the informal justice system in lieu of the formal. See Alissa J. Rubin, *For Punishment of Elder's Misdeeds, Afghan Girl Pays the Price*, N.Y. TIMES (Feb. 16, 2012), http://www.nytimes.com/2012/02/17/world/asia/in-baad-afghan-girls-are-penalized-for-elders-crimes.html?_r=0.

²⁶⁸ *A Way to Go*, UNAMA, *supra* note 168, at 21.

²⁶⁹ *Id.*

²⁷⁰ *Justice through the eyes*, UNAMA, *supra* note 152, at 3.

²⁷¹ Boggio-Cosadia, *supra* note 75, at 6.

E. Additional obstacles for IDP women

Conflict, natural disaster, and human-made disasters forcibly displace women from their homes and expose them to additional vulnerabilities and protection challenges when faced with violence. Security risks for displaced women vary throughout Afghanistan and vary by province and district. For example, deterioration of the security situation in various districts in Ghazni, Maidan Wardak, Kapisa, Kunduz, Faryab, Badakshan, Helmand, Khost, Farah, and Uruzgan due to on-going armed conflict has caused increasing instability for IDP families in those areas causing further displacement.²⁷² IDP households tend to be larger than the general population with an average of nine members per family, increasing the vulnerability of households faced with economic challenges, which particularly impacts the women and children.²⁷³

In general, IDP populations are disadvantaged in securing livelihoods, facing obstacles such as lack of stable work opportunities, relevant skills, information about the local labor market, and support from the local government.²⁷⁴ IDPs may also face discrimination because they are from outside of a particular community or belong to an ethnic minority.²⁷⁵ Higher levels of illiteracy and less access to education among displaced women limit their skills and ability to obtain employment and generate income to support themselves and their families.²⁷⁶ In certain areas, such as Herat, men migrate to Iran to seek work, increasing the vulnerabilities and protection concerns for the women they leave behind.²⁷⁷ Female-headed households, including widows, who do not have male economic support sometimes resort to begging in the street or selling their underage daughters.²⁷⁸ Lack of identity documentation, such as *tazkeras* and election cards, negatively impacts IDP women as such documents are essential for accessing health and education facilities and many employment opportunities.²⁷⁹

Although Afghanistan has adopted a National IDP Policy (see Box 1-5, page 27), which would mitigate some of the vulnerabilities to violence, the dissemination and roll-out of the policy with local stakeholders has been slow, and only Nangarhar province has taken initial steps to draft a local action plan.²⁸⁰ Therefore, in addition to variable security concerns depending on area, local implementing structures to assist IDPs may also vary by location and affect the implementation of the EVAW Law and the protection of displaced women from violence.²⁸¹

²⁷² *Afghanistan Conflict-Induced Internal Displacement Monthly Update*, UNHCR 3 (May 2015), <http://www.refworld.org/pdfid/5594f2544.pdf>.

²⁷³ *Displacement Dynamics*, SAMUEL HALL, *supra* note 61, at 34.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 41.

²⁷⁶ *Id.* at 84.

²⁷⁷ *Id.* at 15.

²⁷⁸ *See generally id.*

²⁷⁹ *Id.* at 52.

²⁸⁰ Glatz, *supra* note 97.

²⁸¹ For additional barriers for IDP women, see Tyler & Schmeidl, *supra* note 117; Hennion, *supra* note 113; Khalid Koser, *Afghanistan 2014: A Crisis of Internal Displacement*, BROOKINGS (Aug. 30, 2013), <http://www.brookings.edu/blogs/up-front/posts/2013/08/30-afghanistan-internal-displacement-koser>.

F. Article 26 of the Criminal Procedure Code rolls back implementation of the EVAW Law

In June 2013, the lower house of Afghanistan’s Parliament passed a new draft CPP that includes a controversial Article 26 prohibiting relatives of the accused from testifying in criminal cases.²⁸² This provision of the draft law covers cases of women who are victims of domestic violence, which—if put into effect—would have made the prosecution of those cases even more difficult given that most witnesses to abuse in the home are relatives.²⁸³ In 2014, former President Karzai signed into law the new CPP. However, due to widespread pressure and criticism from women’s rights activists, he issued a separate presidential decree modifying Article 26, making the testimony of an accused’s relatives voluntary rather than prohibited. As such, although an improvement as modified by the decree, the amendment still increases the difficulty in successfully prosecuting domestic violence cases because courts are unable to compel witnesses to testify.

Article 26 of the CPP is not aligned with Afghanistan’s obligation under the EVAW Law to its citizens to discover, investigate and prosecute crimes, and bring perpetrators to justice.²⁸⁴ Afghanistan is obligated to take all measures to investigate and gather all relevant evidence, which is essential in the determination of a perpetrator’s criminal act, the establishment of guilt or innocence, and the determination of punishment. Witness testimony and collection of evidence in general have been highlighted as “important pillars” in Afghanistan’s new CPP.²⁸⁵ Yet, in the violence against women context, Medica Afghanistan observed in its 2014 report that the decision to accept witnesses’ refusal to testify “can bend the truth and leave crimes unresolved and unpunished,” which “can only reinforce insecurity and people’s lack of confidence in the State and its justice system.”²⁸⁶

V. Conclusion

Passage of the 2009 EVAW Law was a positive step towards recognizing the rights of all Afghan women to live a life free of violence. Efforts by organizations working with women have increased the awareness of both men and women regarding the EVAW Law and the criminal consequences for committing acts of violence against women. Legal service organizations are using creative methods to incorporate the EVAW Law into informal mediation agreements and alternate forms of dispute resolution in an attempt to protect women and prevent further violence. While this produces positive outcomes for some women, others become more vulnerable to violence as their perpetrators escape criminal liability, signaling to society that there are little or no consequences for committing crimes against women. Displaced women, who face difficulties accessing even the most basic services such as water, health, and shelter,

²⁸² Afg. Crim. Pro. Code, Art. 26; Boggio-Cosadia, *supra* note 75.

²⁸³ Smith, *Afghan Women 2014*, *supra* note 9; Maiwandi, *supra* note 9.

²⁸⁴ *Id.*

²⁸⁵ Boggio-Cosadia, *supra* note 75, at 7.

²⁸⁶ *Id.*

and are at heightened risk of violence, are particularly limited in their ability to seek legal recourse for criminal actions perpetrated against them. Regional insecurity leading to increasing numbers of women living in displacement in Afghanistan, deeply entrenched views that tolerate and continue to encourage the subordination of women to men, preference for informal justice mechanisms, and women's own reluctance to report violence or pursue criminal charges against their abusers prevent the EVAW Law from being fully implemented.