

Intrusions, Invasions, and Interventions

Histories of Gender, Justice, and Governance in Afghanistan

Afghanistan during the Karzai presidency (2001–14)—the setting of the greater part of the events in this book—evolved into a fairly extreme example of legal pluralism, with a number of legal systems functioning side by side. This pluralism was by design as well as by default and, in part, reflected the country’s turbulent history of “state building.” The official legal framework was a patchwork of codified laws derived from sharia, secular laws, and uncoded Islamic jurisprudence. Often, judges, prosecutors, and lawyers were uncertain about which laws took precedence, and at other times, they simply applied whatever applicable law they preferred. Naturally, this had great bearings on how gender violence was regulated. The meeting referred to in the introduction, at which local women’s rights activists and international aid workers attempted to get clarity on which laws trumped which after the president had signed the controversial Shia Personal Status Law, is a case in point. Not only did the meeting reveal an acute confusion about which of the statutory laws—the 1970s Civil Code, the Shia law, or the EVAW law—overrode the others, but participants in the meeting also disagreed on the reference points for their arguments. Was it possible to counter the problematic provisions of the Shia law by reference to the human rights commitments in the new Constitution? Or would only arguments based on sharia suffice? The disagreement among expatriates was as strong as that between Afghans and internationals. When a Canadian advisor to the Ministry of Justice and advocate of feminist reinterpretations of sharia gave a lengthy explanation on why it was possible to make the case that the Shia law represented a regressive understanding of Islamic law, she was eventually interrupted by a senior U.N. official. This official, with more than a hint of impatience and frustration, stated, “But it’s human

rights that must be foundational. Human rights are sufficient [to make an argument], and they're inalienable. And that's there in the Constitution, in article 22."¹ Few in the audience seemed convinced by her intervention, and the conversation returned to a hither-and-thither discussion about which channel would be most effective for getting their views on the Shia law heard and making sure that the EAW law would neutralize it. One woman, an Afghan activist working for an international NGO, offered to approach President Karzai personally, claiming that she currently had the ear of the president. Others argued that Parliament would be the most appropriate target of lobbying, although everyone agreed that this had to be done in an inconspicuous way, without any overt involvement of foreigners.

The multiplicity of legal frameworks and channels for influencing them was, in many ways, a mirror image of the fragmented politics of the Karzai era. The sharp ideological shifts of the preceding decades—from the authoritarian, secular socialism of the Soviet period to the (at least) equally intrusive reign of the Islamists—had left behind traces in the country's judiciary and laws that were constantly pulling in very different directions. Upon the installment of the Karzai administration, female judges who had started their professional life during the socialist period (only to be cast out by the Islamists) were reinstated and found themselves working side by side with Taliban-era judges who felt that referring to the country's statutory laws was optional and less important than their knowledge of uncoded *fiqh*—traditional Islamic jurisprudence.² Combined with the strong international interference in the justice sector during the post-2001 period, this made for a legal landscape that—much like the politics of the country itself—was extremely heterogeneous.

Even within the Western community, there were strong dividing lines. One, as shown above, was over whether the promotion of women's rights had to be anchored in Islamic law. Another disagreement was perhaps more fundamental. Around the same time that part of the international community in Kabul—primarily U.N. human rights staff, NGOs in the gender field, and sections of the NATO embassies—were working to support the EAW law and the infrastructure of formal courts to implement it, another part of the expatriate community was promoting the country's informal legal practices based on customs. This initiative, which I have discussed in some detail elsewhere (Wimpelmann 2013), generated strong reactions among local women's rights advocates. They felt it was an attempt to return Afghanistan to the unequal and unaccountable rule of patriarchs and tribal strongmen, with problematic consequences for women. Although those who favored giving formal recognition to the informal justice processes argued that safeguards for women would be incorporated, in making their argument they certainly drew upon political symbols and ideas that differed starkly from those employed by the international supporters of the EAW law. Whereas the latter advocated formal "state building," the supporters of a larger role for informal

justice invoked notions of Afghanistan as a stateless, traditional society where reconciliation between parties, rather than the imposition of standardized laws, was true to local culture and therefore appropriate policy. These arguments did not come from nowhere; they drew upon established historical and political notions of Afghanistan's presumed unique statelessness and tribal nature that had roots going back to colonial times. The image gained prominence at a time during the NATO operation when military leaders, frustrated with the slow progress of the formal state-building process, turned to what they saw as traditional leaders for political allies. The result alienated a large part of the women's rights community.

This chapter provides crucial context to the contestations over gender violence analyzed in the rest of the book by dissecting the contemporary legal system in Afghanistan. It shows how its fragmentary nature can be traced back to the multiple intersections of politics, justice, and gender of the past while, at the same time, being a product of the political settlement of the post-2001 order. It also shows that the post-2001 era was not in any way unique in the way that particular political agendas were reflected in, and sometimes fought through, the regulation of gender relations. Since Afghanistan's inception as a modern state, the country's gender policies have mirrored—and have often been at the heart of—broader political fault lines.

MODERNIZING KINGS

In the historical chronicle *Siraj al Tawarikh* (Torch of Histories), Qazi (Judge) Abd al Shakur in Kandahar receives a royal reprimand for having “impulsively sentenced to death by stoning” an adulterous couple. The issue at hand is the failure of the *qazi* to have asked witnesses to testify twice, once on account of the act of adultery by the man, Qamar al-Din, and once on account of his unnamed female accomplice. Instead, the *qazi* had ordered both Qamar al-Din and the woman to be stoned on the basis of testimony by witnesses of the adultery of Qamar al-Din alone. This made the stoning of the woman illegal, and, “since from the current authoritative books of jurisprudence it is abundantly clear and understood that the act of adultery is a singular act as far as men and women are concerned,” the stoning sentence of Qamar al-Din was also “completely irregular and totally unacceptable” (Kâtib 2013: 1427–28). In other words, if there was to be a stoning, both parties must be stoned, and since the stoning of the woman was not just, the stoning of the man was not just either. Moreover, the letter continues, the *qazi* had failed in other requirements promulgated by royal decree, such as giving an account of a proper investigation of the witnesses' integrity. Unless the *qazi* could present “reasonable and citable evidence and proof” that his actions had been within the commands of the Lord and the Prophet, he was liable to pay blood money to the relatives of the executed Qamar al-Din.

The year of the execution of Qamar al-Din and the unnamed woman was 1895, when Amir Abdul Rahman Khan, ruler of Afghanistan since 1880, was fifteen years into an unprecedented and often brutal project to consolidate the power in the country into a central state. Pivotal to his centralization efforts was the development of a unified justice system (Tarzi 2003; Ghani 1983). The ulema—the Muslim clergy—who previously had adjudicated in a semiautonomous fashion, were turned into salaried bureaucrats subject to standardized rules and royal oversight. As the story of Qazi Abd al Shakur shows, they could no longer rely on their own knowledge of Islamic jurisprudence (*fiqh*) to arrive at judicial decisions. Instead, they were instructed to apply government manuals in which preestablished and government-authorized rulings of law and procedures were set out (Ahmed 2015: 286). This was, in effect, a first attempt at “codifying Islamic jurisprudence of the Hanafi school as the official law of the state,” quite possibly modeled on similar modernist efforts by Ottoman rulers (287). At the same time, a network of courts was set up throughout the country for the purpose of establishing a government monopoly on the dispensation of justice.

Olesen points out that enlisting religious clerics in the administration of justice had less to do with a desire to foster closer adherence to religious doctrine and more to do with the amir’s drive to consolidate power (1995: 66), which he did by claiming divine right to rule—and through the application of considerable coercive force. Abdul Rahman Khan’s appointments of the ulema as state-employed justice officials were also part of his agenda to curb their influence. Having played an important political role by inciting the population to jihad against British invasions during the nineteenth century (Kamali 1985), the religious leaders had become powerful political actors. This had further increased their role in legitimizing the ruler (Nawid 1999).

As other Afghan rulers had attempted before him, Abdul Rahman Khan assumed jurisdiction over serious criminal cases—offenses against the state and whatever other cases he felt it pertinent to preside over—thus asserting the monarch’s supremacy in the dispensation of justice (Olesen 1995: 65). He operated as an absolute ruler. Unencumbered by a constitution, the amir could proclaim laws and issue verdicts as he deemed necessary. Numerous laws were promulgated, some of which attempted to bring women and family under closer government regulation (Ghani 1983; M. M. S. M. Khan 1980). All marriages were to be registered with the authorities, a ceiling was placed on bride-price, and underage (prepuberty) marriage (when against the will of the girl) and levirate (marrying a widow to her deceased husband’s brother) were prohibited. It is difficult to assess to what extent these laws were implemented, although the work of Ghani (1983) suggests that they were systematically enforced in courts in at least some provinces. Abdul Rahman Khan’s attempt at judicial centralization also had a sectarian dimension. Mobilization for his conquest of Hazarajat, the central highlands where the Shia

Hazaras lived largely autonomously, took place through a call for jihad to forcefully convert the Hazaras to Sunni Islam. As part of this campaign, he appointed Sunni judges to all Hazara areas and instructed them to apply Sunni Hanafi jurisprudence (Ibrahimi 2009).

Unlike Abdul Rahman Khan, the next great reformer, his grandson Amanullah (reigned 1919–29) had neither the backing and subsidies of the British nor a strong army to enforce his visions. Revered as national hero by some and ridiculed as pompous dreamer by others, Amanullah's failed attempt to modernize Afghanistan—particularly its women—continues to figure as a key moment in Afghan historiography. At first, Amanullah gained great popularity among both nationalist and religious groups when he could claim to have defeated the British in 1919 during the Third Anglo-Afghan War. The brief confrontation, which had started when Amanullah proclaimed a war of independence in a bid to rid Afghanistan of its status as a British protectorate, ended with a treaty between the two countries that recognized Afghanistan as a sovereign state (Barfield 2010). Emboldened by his newly attained status as a defender of nation and religion against imperial forces, Amanullah embarked upon a series of ambitious legal and social reforms. At that point, splits between the modernizing monarch, inspired by Ataturk's Turkey and anti-imperial nationalism and an ulema concerned with defending Islam against infidel rule and Westernization became apparent.³

During his reign, Amanullah promulgated 140 regulations known as *nizam-namas*, as well as Afghanistan's first Constitution.⁴ Among the *nizam-namas* were several versions of a new marriage code, first published in 1920. A more exhaustive version was published in 1923, requiring the registration of all marriages. Polygamous marriage was made subject to the court's permission, and marriages in which the bride had not yet reached puberty were banned outright (Nawid 1999; Gregorian 1969). Compared to subsequent legislation in the decades that followed, these were radical steps.

The Constitution of 1923 placed few limits on the power of the king, although it had some modest provisions for consultative government. It named Islam as the official religion but made no mention of the Sunni Hanafi school—an omission designed to appeal to the Shia minority, which Amanullah had also released from slavery by decree. The Constitution recognized both secular and religious law and made no specification as to the authority of one versus the other (Olesen 1995: 122). It also bestowed equal rights on all citizens, a significant breach of earlier practices. The Pashtun Durrani elite would no longer be granted privileges, and non-Muslim minorities would no longer be treated differently (Olesen 1995; Nawid 1999). Amanullah also set out to codify Islamic criminal law and prescribe set punishments, resulting in the first Afghan criminal code (1924–25). The code classified crimes based on the four categories of classic Islamic criminal law: *hadd*, *diat*, *qisas*, and *tazir*.⁵ The crimes covered by *hadd* prescriptions⁶ and major crimes

such as murder and bodily harm were to receive set punishments, whereas for lesser crimes, the judges were to give discretionary punishments (*tazir*) (Gregorian 1969; Kamali 1985). The ulema were deeply unhappy with Amanullah's reforms in the field of criminal law, as they reduced the number of crimes for which the Islamic judges could impose their own discretionary (*tazir*) punishments based on their knowledge of Hanafi *fiqh*. Moreover, the very specification of set punishments beyond those set by God (in crimes of *hadd*) was seen as contrary to sharia (Kamali 1985).

Many of Amanullah's female family members, including his wife, Queen Soraya, were instrumental to his reform program, which went beyond legal changes to the transformation of women's public and private roles. Queen Soraya gave speeches calling upon Afghan women to educate themselves so they could serve their newly independent nation, and she oversaw the establishment of girls' schools, a government-published women's magazine, and a new association through which women could petition for lawful treatment by their husbands (Majrooh 1989). Arbabzadah (2011) emphasizes that the queen's efforts were rooted in anticolonial and pan-Islamic ideology prominent throughout the Muslim world at the time and should not be understood merely as an attempt at Westernization. Nonetheless, photographs of the queen appearing unveiled and in sleeveless Western dresses, particularly in the company of male European leaders, became a central rallying point for the growing opposition against Amanullah among the country's religious leaders.

With the government facing a rebellion instigated, in part, by the conservative rural mullahs, who perceived Amanullah as an adversary to their values and positions,⁷ the urban ulema seized the opportunity to assert themselves. A 1924 Loya Jirga (grand assembly) confirmed them as important power brokers. Upon the ulema's insistence, Amanullah was forced to retract many of his legal reforms. The Constitution was revised to reintroduce the discriminatory tax for religious minorities and to reestablish Hanafi *fiqh* as the official and sole religious law. A new criminal code in Arabic and based exclusively on Hanafi *fiqh* was to be compiled, and the right to determine *tazir* punishments was returned to the judges (Nawid 1999).

But upon successfully defeating the rebellion, Amanullah turned to face down the ulema with another attempt at legal reform. This time, he tried to sideline the ulema completely, perceiving them as an obstacle to the progress of the nation. In the end, however, Amanullah's confrontational stance toward the ulema—combined with the announcement a new series of reforms, his increasingly authoritarian style, and his lack of coercive resources to back it all up—led to his overthrow (Nawid 1999).

The next king, Nadir Shah, who rose to power following a brief interregnum, was beholden to eastern tribes and showed less personal disposition toward radical reforms. He made significant concessions to the ulema and tribal powers. The

Constitution of 1931 reinstated the Hanafi *fiqh* as the official religious doctrine and, in general, gave precedence to sharia over statutory law (Moschtaghi 2006). In addition, the clergy was given influence through the governmental Jamiat-al Ulema (literally, the society of religious scholars, the ulema council), who were entrusted with reviewing laws and government policies for adherence with Islam (Olesen 1995: 184). Not only were religious scholars now partly co-opted by the state, but Sufi networks also moved closer to state power with *pir* (spiritual leaders) taking up government positions such as minister of justice.

Nadir Shah was assassinated in 1933. His only son, Zahir Shah, ascended to the throne, but executive power was largely in the hands of his paternal uncles in the first three decades that followed. In this period of “limited guided modernization” (Sharani 1986), wide-ranging developments in education took place. Secular education was expanded, and a number of the government madrassas was established in order to formalize higher religious education and train judges in sharia. “The new modus vivendi which was established between the state and the traditional groups whose economic and political interests were being observed while the gradual reform measures (educational, administrative etc.) catered for the interests of the new elite of bureaucrats and educated middle class. A gradual transformation of Afghan society hereby took place which above all was characterized by its outward form of continuity but laid the basis of power political and ideological confrontations among the state supporting groups” (Olesen 1995: 172).

The legal system became increasingly bifurcated. Civil and criminal cases were adjudicated in sharia courts, whereas a number of statutory courts in each province had special jurisdiction over fields such as administration and business (Weinbaum 1980). This division also manifested itself in legal education. Two faculties at the newly established Kabul University taught law: the secular Law and Politics Faculty and the Faculty of Sharia. The Faculty of Law was based on the French model and supplied many of the civil servants. The Faculty of Sharia was influenced by Egypt’s Al-Azhar University, where many of its lecturers had been educated. Then, as now, a degree from either faculty was not a requirement for appointment as a judge, who could also be appointed if he held a license from a government madrassa (Moschtaghi 2006). From the late 1960s onward, however, the government actively recruited graduates from the Faculty of Law for the judiciary, and, in line with the expansion of secular education more generally, the religious establishment gradually lost its monopoly on the state judiciary (Kamali 1985: 207).

In the 1960s Zahir Shah assumed full power for himself, resulting in the 1964 Constitution. A comprehensive and relatively liberal document (which was to serve as the model for the 2004 Constitution), the 1964 Constitution confirmed the dual court system that had been evolving since Amanullah’s time.⁸ The primary courts (*mahkama-ye ibtidaya*) continued to be staffed by scholars trained

in Islamic law and had general jurisdiction over civil and criminal cases. In addition, there was a number of statutory courts in each province with special jurisdiction over fields such as administration and business (Weinbaum 1980). Provincial courts (*mahkama-ye murafia*) had original jurisdiction and also functioned as appellate courts for the primary courts. What was new in the 1964 Constitution was the establishment of an independent Supreme Court (*Stera Mahkama*) in Kabul, with authority to review all lower-level decisions as well as administrative power over the courts. The move toward an independent judiciary reflected the relatively liberal period in Afghan history under Zahir Shah.

The 1964 Constitution introduced another new institution, that of the attorney general (*Loy Saranwol*) to investigate and prosecute crimes. The attorney general's office was to be independent of the executive power of the government, reporting only to the executive. The judicial branch was not to interfere in its activities (Yassari and Saboory 2010). Compared to previous legal provisions, the 1964 Constitution also favored statutory law over Hanafi sharia. Only when no provisions in the Constitution or law existed for a case under consideration could the courts apply Hanafi jurisprudence, and then only within the limitations set forth in the Constitution. In the view of some, this effectively made Afghanistan a secular state, even while paying lip service to Islam (Dupree, quoted in Saikal 2004: 148).

The 1964 Constitution also made the cabinet accountable to an elected parliament. Two parliamentary elections were held, in 1965 and 1969. Voter participation was low and the intelligentsia could not compete with the traditional power holders, who formed the majority of those elected. As a result, Parliament and the elections functioned mostly according to patronage politics. There were no formal political parties (the King had refused to ratify a bill that would have permitted them), and this hampered the emergence of a political opposition, which continued to operate clandestinely, setting the stage for political developments in the years to come. Rather than the Parliament, it was Kabul University that emerged as the arena for oppositional politics (Dorransoro 2005). Here, leftist student groups clashed with Islamic radicals over the path to modernization most appropriate to their society.

AUTHORITARIAN EMANCIPATORS

In 1973, political liberalization came to a halt when Zahir Shah was overthrown by his cousin (and former prime minister), Mohammad Daoud, in a military coup. Daoud, who had come to power with the backing of pro-Soviet communists, proclaimed Afghanistan a republic, dismantled the nascent gains in representative government, and took the country in an authoritarian direction. Despite its authoritarianism, the Daoud period nonetheless left some enduring footprints when it came to women's legal status and protection.

Prior to the Daoud period, urban women had been entering the workforce and higher education in increasing numbers for more than three decades. Initially working as teachers, nurses, and secretaries, by the mid-1970s, women were employed in public administration, at the universities, in Parliament, and in the courts, though they were few in numbers and rarely held high positions. Largely, the changes that had come about—such as the right of women to vote, in the 1964 Constitution—were the result of top-down initiatives led by men, as opposed to being the result of an organized women’s rights movement (Dupree 1984). However, toward the end Zahir Shah’s reign, a few events foreshadowed the more substantial mobilization of women that was to follow during the years of socialist rule. For instance, in 1968 hundreds of women took to the streets to protest a proposal by conservative members of Parliament to prohibit unmarried women from pursuing studies abroad (Zulfacar 2006). Two years later, several thousand women demonstrated in front of government ministries after a series of assaults on schoolgirls by a man opposed to the nascent changes to women’s position in urban areas (Ehmadi 2002).

Reforms in the legal field went some way in supporting this change. In the Afghan year of 1354 (1975), separate family courts were established in Kabul, Kunduz, and Kandahar to deal with issues related to family law. They were intended to give women and female judges (most of whom worked in the field of family law) easier physical access to the courts. It appears that the main objective of this change was to uphold propriety rather than to radically alter gender relations. The regular courts were located within the governors’ compounds, together with pretrial detention centers and security staff, and were considered masculine places where women would be uncomfortable.⁹ Then, in 1976 and 1977, respectively, Daoud enacted new criminal and civil codes by decree. These remain in force today. The codes had been in the making for some time. The Civil Code included a section on family law, based mainly on Hanafi *fiqh* (Etling 2004). In some respects, the 1977 Civil Code was Afghanistan’s most modernist legislation in this field since the time of Amanullah. It abolished child marriage of girls under the age of fifteen, introduced some restrictions on polygamy, and specified provisions for divorce, which had previously been regulated by reference to uncodified Hanafi *fiqh*.¹⁰

The Penal Code also proceeded from Islamic law. Its enactment, in 1976, followed decades of vacillation over whether *hadd* punishments (the set punishments such as amputation, lashing, and stoning for specific crimes, including adultery) should be included in the penal law. According to Kamali (1985), a 1971 version of the law had been discarded by the cabinet because it detailed such punishments. By contrast, the 1976 version merely referred to *hadd* without spelling them out. In its introduction, the Penal Code says, “This law regulates the Tazir crimes and penalties. Those committing crimes of Hudood, Qassas and Diat¹¹ shall be punished in accordance with the provisions of Islamic religious law [Hanafi religious jurisprudence].”

The criminal code thus recognized *hadd* punishments, but also provided set *tazir* punishments for crimes that are included under *hadd*, such as adultery and theft.¹² This conformed with legal practice at the time—during the decades leading up to the 1976 code, adultery had not been punished by stoning or lashing, but by imprisonment (Kamali 1985). The code did not, however, distinguish clearly between adultery and rape, but used one word, *zina*, to apply to both. Nevertheless, in some ways, the law introduced new protections for women; it made forced marriage a punishable offense (for men and women of majority age—eighteen and sixteen, respectively), with an increased punishment if the marriage was an arrangement of *baad* (a woman or girl given in marriage as a compensation for an infringement).

A new 1977 Constitution consolidated power in the hands of the executive and effectively made Afghanistan a one-party state. It was a prelude to Daoud's purge of his erstwhile allies, members of the People's Democratic Party of Afghanistan (PDPA), but the competing factions in the PDPA then united in a bloody military coup against Daoud in April 1978. The junior officers who had carried out the coup handed power to a revolutionary council and Afghanistan was proclaimed a democratic people's republic. Intending to transform the country socially and economically along socialist lines, the revolutionary council enacted a number of decrees, most notably regarding land reform, compulsory education, and women's emancipation. Decree number 7, "Dowry and Marriage Expenses," banned underage and forced marriage, as well as excessive wedding celebrations and dowries, and it specified a punishment of six months to three years in prison for violators. The decree gained notoriety as a particular provocation to religious and tribal groups and as the cause of large-scale public outcry and the galvanization of support for the mujahedin insurgency (Malikyar 1997).

The PDPA's revolutionary zeal proved short-lived, and the Western-backed insurgency led by the mujahedin mounted. Fearing chaos on its southern border, the Soviet Union invaded the country in December 1979. By that time, at least twelve thousand people had been killed in political purges. The Soviets installed a more moderate government and another Constitution was promulgated in 1980. The new Constitution upheld the Supreme Court and provided for a Parliament, but its formation was to be decided by subsequent laws. "Less and less was said about Decree number 7" (Dupree 1984: 325), which faded into the background. In fact, women's legal rights came to be of relatively low priority for the PDPA government and party cadres. Women's emancipation was a central goal both to the leadership of the party and to its many female members, but the focus was on women's labor participation and education. The strategy appeared to have emerged out of a combination of the bitter experience of decree number 7 and a socialist inclination toward material empowerment. A former female PDPA member spoke with me, drawing comparisons between the PDPA era and the present period of American dominance.

Taraki [a PDPA leader deposed and killed in 1979] introduced some progressive legislation, but it was imposed too quickly. It was done in a rush, without preparing the ground, [and] imposed on a traditionalist society. So decree number 7 backfired. . . . It would have been better to do it slowly and prepare society for it.

Today there is a free market economy. There is no focus on poverty or economic opportunities. The talk about “women’s rights.” . . . It’s formal; it’s about violence against women, about legislation. But what about removing constraints [on women]: income, access to jobs, access to education? . . . The PDPA had an ideological commitment to change. Women were to have equal status. We focused on the work environment, on women’s salaries and on childcare so that women could stay in the workforce. Children would be fed in the kindergartens, and a teacher would be provided for them. We even had subsidies on diapers and on clothing for children up to five years old. There were special shops for this. We focused on the foundational issues; we had five-year plans and so on. Compare the time of the Soviets with that of the United States. The Russians built factories, but the Americans are leaving nothing behind; there is nothing visible from them. Even their military bases they are taking back with them!¹³

Women party members and government officials were reluctant to attempt to reform the 1977 Civil Code, which was based on Hanafi *fiqh* and therefore seen as unassailable. They did, however, begin a systematic campaign to strip party membership from polygamous husbands and women who had married as second wives.

On the whole, the PDPA era saw limited progress in terms of how the justice system treated women. The family courts founded in 1975 were in operation until 1987, when they were merged with the district city courts under a new court system based on the Soviet model. There are few indications that the family courts took particularly revolutionary or even reformist positions during the PDPA. Cases reported in the weekly column “Women, Society and Life” in the *Kabul Times* suggests that most of the caseload was made up of women seeking a divorce. Interestingly, the women who approached the courts for divorce generally had independent means of income, and many were already living separate from their husbands. Nevertheless, unless the husband agreed to the divorce, the courts tended to turn down the woman’s request, even if beating and violence were alleged. Despite that lingering conservatism, women who worked as justice officials at the time recall a justice system much less interested in pursuing moral crimes than was the case under subsequent regimes. No women were prosecuted for running away from home, as they would be during the mujahedin, Taliban, and Karzai governments. There was also a cautious approach to prosecuting adultery. In the large cities, at least, adultery would be prosecuted only if a couple was caught red-handed or if one party had been deceived—typically a woman entering a relationship upon a promise of marriage that did not eventuate. In cases like that, the courts would normally use an adultery charge to pressure the man to uphold his promise.¹⁴

As the Soviet leadership lost faith in the possibility of defeating the mujahedin militarily, they engineered a transfer of power to Dr. Najibullah, who was tasked with overseeing a process of national reconciliation under which the Soviets could withdraw. Najibullah set out to downplay the party's Marxist ideology, reverting to more conventional frameworks of nationalism and Islam. Another Constitution, one that made no reference to Marxism and made Islam the official religion, was ratified in 1987. The Soviet military completed their withdrawal in 1989. Najibullah's government managed to stay afloat until 1992, when a sudden cut off of funds led to fatal defections and the takeover of the capital by mujahedin factions. It would mean a radically different gender regime. As one woman recalled, "Our generation was free and open. We went to the office in miniskirts. But in the last days of Najib [Najibullah], we heard that the mujahedin would punish those without [long] pants, so we kept a pair with us in our bags whenever [we were] going out. The day when the mujahedin came to Kabul, a woman called out, "Ladies, put on your trousers! The mujahedin are coming."¹⁵

ISLAMIST RULE

Seizing control over Kabul in April 1992, a loose coalition of mujahedin leaders formed a government and declared Afghanistan an Islamic republic for the first time in its history. The new government, under Burhanuddin Rabbani, issued an edict: "Now that . . . our Islamic country is free from the bondage of atheist rule, we urge that God's ordinances be carried out immediately, particularly those pertaining to the veiling of women. Women should be banned from working in offices and radio and television stations, and schools for women, which are in effect the hub of debauchery and adulterous practices, must be closed down."¹⁶ This was followed by a decree by the Supreme Court in 1994, which stated that women should not leave their houses unless absolutely necessary and should not wear attractive or revealing clothing.¹⁷ It was during the mujahedin government that the practice of incarcerating "runaway" women first started. As the capital collapsed into infighting, however, there were few possibilities to implement judicial administration of any kind.

By contrast, the Taliban—who rapidly established control over much of the country, which was fractured by rival mujahedin fighters and banditry—made Islamic justice and order the cornerstone of their claim to legitimacy to rule (1996–2001). The exact composition and workings of the Taliban government remains opaque. At its core were Pashtun rural mullahs and men—former refugee boys—educated in conservative madrassas in Pakistan. Although unevenly applied, their restrictions on women's movements and visibility were so extreme as to impose a virtual state of curfew on women (Kandiyoti 2007: 175). Apart from health workers, who were allowed to treat only female patients, women were banned from

working, and girls were largely excluded from school. Women were only permitted to venture outside dressed in the all-enveloping *chadari* (known as *burka* in the West) and escorted by a male relative.

The restrictions were intended to prevent immorality and adultery and revealed an obsession with female sexuality as a danger to be contained at all costs.¹⁸ In the 1996 *Ordinance Concerning Women's Rights and Duties*, issued by the Supreme Court in Kabul, the government concluded that "in brief, it is obscene and unlawful for women to go to school." Even if women were fully veiled and their teachers were Muslim, the edict continued, "experience has proved that such deeds have had evil effects on women and have resulted in corrupted morality." The edict stated that women were even forbidden from learning to write, "for writing is a tool for sedition and corruption. Literate women write about their unlawful wishes and desires to strangers." It was concluded that while there were some benefits to women becoming literate, the seditious effects far outweighed them. The edict also prescribed, in great detail, the manner in which women should appear in public. They were to be veiled in a manner that made the contours of their bodies undetectable, and they were to refrain from using perfume, makeup, or any kind of adornment; from speaking loudly or to strange men and from a number of other actions presented as offensive or even threatening to public order. In any case, women were not to go out at all, unless they were obliged by religion to do so.

While the Taliban's gender policies bore similarities with those of the rural Pashtun milieu many of them hailed from, they also differed in important respects. As Cole argues, the Taliban's policy constituted a counter-modernity vision rather than a return to the past (2008). Their Islamic Emirate of Afghanistan envisioned itself as instituting an Islamic order, novel in Afghanistan's history, taking inspiration from the Taliban's notions of an Islamic golden age rather than a reinstatement of Afghan traditions. Their use of state technologies to violently enforce infractions against this order was similarly a novel thing. Another rupture was the ban on *baad* and levirate (Cole 2008), which signaled that the Taliban, like Afghan rulers before them, attempted to subordinate tribal power to central control to some degree.

The Taliban never promulgated a new Constitution but declared their commitment to sharia and decreed a number of laws, particularly in the later phase of their rule. They established a notorious "vice and virtue" religious police modeled on and reportedly funded by Saudi Arabia (HRW 2001), who enforced, often violently and arbitrarily, the government's prescriptions for religious observance and the complete seclusion of women. The preexisting three-tier court system remained in place, but the Taliban eliminated the independent function of the Attorney General and ignored many aspects of the Penal Code (Tondini 2009; Hartmann and Klonowiecka-Milart 2011). Often, cases would be decided on the basis of testimony only, without the use of any other evidence. Sentences were

typically meted out on the basis of the judge's knowledge of sharia, without reference to statutory law. The arbitrariness of the application of justice was shocking to many—and not just those who had supported the PDPA government. In Herat, members of the ulema council repeatedly tried to get the Taliban government to enforce due process,¹⁹ according to which executions and corporal punishment such as amputations and lashing were to be approved by the primary court and two higher courts, as well as the supreme leader of the country, Mullah Omar (United Nations Commission on Human Rights 1998). This pressure had no effect, and implementations of those punishments continued to be carried out upon the orders of local judges, some of whom were military commanders with no judicial background. These punishments generally took place on Fridays as a public spectacle and included the flogging and execution of women, unprecedented in recent Afghan history (Coomaraswamy 2000).²⁰ In addition, the Taliban accelerated the practice of detaining women for running away, a practice that was to be upheld during the next government, with severe consequences for women's relationship with the law.

Despite all this, in some aspects, the Taliban did uphold women's legal rights. Compared to the mujahedin period, rape was severely punished, and public safety increased. Moreover, one judge reported that the Taliban would sometimes enforce women's inheritance rights. Her mother had obtained her inheritance from her father through the support of a Talib justice official, who stated it was in accordance with sharia.²¹ Nonetheless, to a great number of Afghan women, the segregation imposed by the Taliban was unprecedented. Overt resistance was unfeasible, but many circumvented the new gender regime as best they could, most prominently by attending the substantial number of home schools set up in response to the ban on female education. Outside the country, members of the Afghan diaspora in France, the United States and beyond mobilized against Taliban's gender policies, thus contributing to the government's increasing international isolation during the final years of its rule.

GENDER AND JUSTICE IN THE NEW ORDER

In 2001, once again, a novel order ushered in a new set of conditions under which negotiations over women's positions and their protection against abuses took place. In the following, I sketch out the political alignments and fault lines of the post-Taliban period, and how they came to shape legal frameworks and infrastructure. This account forms the backdrop to the more detailed discussions of contemporary public regulation of gender violence discussed in the rest of the book.

When the collection of material for this book commenced, in the summer of 2009, Afghanistan was almost ten years into a radical disjuncture set in motion by the attacks in the United States on September 11, 2001. The U.S.-led military

invasion that followed produced a drastic realignment of political forces in the country, which until then had been almost completely under the control of the Taliban. To remove the Taliban, the U.S.-led military coalition relied on a bombing campaign plus Afghan militia forces grouped in the so-called Northern Alliance. As the name suggest, this alliance was a collection of military factions from the northern parts of Afghanistan, who had their constituencies among the northern ethnic groups that had formed a temporary alliance against the Taliban when the latter first emerged in the mid-1990s (Pohly 2002). Members of these factions, particularly the Shura-ye Nazar (supervisory council), dominated by Tajiks from the Panjshir Valley, came to feature prominently in the political settlement that emerged after the invasion (Giustozzi 2009). This was a reversal of the historical dominance of the Pashtuns. The Pashtun aristocracy had ruled Afghanistan almost continually until the outbreak of war in 1978, and Pashtuns had also formed the backbone of the Taliban, though they were not from the traditional Pashtun ruling class.

The blueprint for Afghanistan's new political landscape was drawn up at the Bonn conference in December 2001, where a power-sharing agreement set out a political framework for the transition that was to follow. In an attempt to broaden the base of the settlement beyond the Northern Alliance, the chief intervening power, the United States, wanted to install a Pashtun head of state, and the choice fell on Hamid Karzai, who belonged to the Pashtun aristocracy and diaspora. Absent in the new coalition were members of the Taliban (Dorrnsoro 2012).

In significant ways, the new order was shaped by the expanding international presence in the country, on which the Karzai government was militarily and financially dependent. Initially, Western military operations were focused on capturing and killing members of Al Qaida and the Taliban, who had melted away or fled. The United States mobilized a number of its allies, who gradually deployed troops across the country, some aiding the U.S. hunt for Taliban and Al Qaida members and others forming part of an U.N.-mandated stabilization force, the International Security Assistance Force (ISAF). Alongside the military engagement, a broad state-building agenda was pursued in line with an evolving international state- and peace-building blueprint overseen by the United Nations (Chesterman 2004). This blueprint entailed ambitious transformation of politics, the economy, and society more generally. In Afghanistan, the transformative agenda would famously include the liberation of the country's women. Yet the international "project" in Afghanistan contained within it tensions and contradictions from the outset (Suhrke 2011). The focus on capturing military adversaries led to alliances with armed commanders and so-called strongmen, alliances that ran counter to attempts to monopolize the use of violence and build a unified state. Pledges to end corruption and to support human rights and good governance often had to cede ground to the demands of short-term political stability and intelligence gathering.

These tensions also affected the reform of the legal framework and the justice sector, which formed a central part of the international state-building exercise. A number of legislative changes were undertaken, starting with a new Constitution in 2004. In the more optimistic climate of those early years, the Constitution was acclaimed as a momentous achievement and decisive step forward in the Western-led reconstruction of post-Taliban Afghanistan, even though the process surrounding its drafting and promulgation was not as democratic and inclusive as was claimed at the time.²² The Constitution declared Afghanistan, once again, an Islamic republic. Article 3 stated that no law could be passed that contradicts “the beliefs and provisions of the sacred religion of Islam,” and article 130 stated that Hanafi (Sunni) *fiqh* should be used in cases where there are no provisions in the law, within the limits set in the Constitution.²³ As detailed in chapter 4 below, article 130 would frequently be invoked by judges who claimed that as long as their verdicts were in accordance with Hanafi jurisprudence, they were free to impose punishments beyond those prescribed in the penal laws.²⁴ Significantly, for the first time in Afghan history, the Constitution recognized Shia jurisprudence, stating that members of the Shia sect could use Jafari (Shia) jurisprudence in personal law (article 131).

At the same time, noteworthy provisions were made to safeguard women’s rights. Article 22 stated that “the citizens of Afghanistan—whether man or woman—have equal rights and duties before the law.” In addition, quotas were set for female representation in the government—women would be guaranteed roughly 25 percent of the seats in the lower house of Parliament and 17 percent of the seats in the upper house, as well as two seats in each provincial council.²⁵ The Constitution also made frequent references to human rights. The preamble declared respect for the Universal Declaration of Human Rights and the Charter of the United Nations, article 7 stated that “the state shall abide by the U.N. charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights,” and article 58 obliged the government to establish an independent human rights commission, although with no independent powers.

The 2004 Constitution thus contained components from across the broad spectrum of Afghanistan’s past legal traditions: the Islamist orientations of the mujahedin and Taliban period, the emancipatory goals of the communist government, and the strong executive that had been a consistent feature of the country’s institutional design. Like many constitutions, it was open to contradictory interpretations. It was especially ambiguous on whether Islamic jurisprudence or the principles of human rights—including gender equality and principles of legality—took precedence.²⁶ Similar questions had been a matter of debate through much of the nineteenth century. Then as now, the resolution of these questions had important ramifications for whether punishments such as stoning would be permitted and for whether acts not defined as crimes in the statutory laws could nonetheless be prosecuted and punished with reference to sharia (Kamali 1985).

The constitutional clauses providing for strong presidential powers were a victory for President Karzai. The president, who had been seen as an isolated leader dependent on foreign support, gradually built a substantial power base. The issue of a presidential versus a parliamentary system had been bitterly contested, with representatives of non-Pashtun groups—the Uzbeks, Hazaras, and Tajiks—wanting a parliamentary system with stronger checks on executive power and central state power more generally, which historically were both Pashtun domains (B. R. Rubin 2004). With support from the U.S. administration, which wanted to see a strong executive (Suhrke 2011: 163), the presidential system prevailed. Equipped with significant means to expand and consolidate his power, Karzai set out to gradually displace the dominance of northerners in the central state apparatus, many of whom gravitated toward the opposition.

In 2005 the first parliamentary elections produced a legislature with almost 30 percent female members—a percentage higher than in many Western countries, though this was due to the quotas established by the 2004 Constitution. As detailed in the next chapter, women MPs were largely unable to establish alliances that could pursue gender issues—or, in some cases, they were not interested in doing so (Azarbaijani-Moghaddam 2006; Larson 2016). Many were beholden to powerful male patrons or were seeking to position themselves as the go-to champion of women's rights for Western embassies.

Two partly overlapping groups became particularly visible in the new National Assembly—a northern-dominated opposition group and a group made up of former mujahedin commanders. The first group was centered around the Tajik speaker of Parliament, Yusus Qanooni, and Dr. Abdullah—who would be Karzai's chief challengers in the 2004 and 2009 presidential elections, respectively. The former mujahedin commanders had originally risen to power as a result of the Cold War rivalry that played out in Afghanistan after the Soviet invasion of 1979. Western countries, Saudi Arabia, and Pakistan had quickly stepped up their support to the anti-Soviet resistance, which coalesced under the banner of jihad, with its fighters calling themselves *mujahedin* (Dorransoro 2005: 105). The mujahedin groups were subsequently discredited in the eyes of much of the Afghan population, however, after their failure to establish order after the collapse of the Soviet-backed government, descending instead into infighting, chaos, and banditry—a development that paved the way for the Taliban government. But their fate was not sealed by that failure. When the United States chose them as allies to overthrow the Taliban government, the mujahedin received an opportunity to restore their credentials and positions. The Bonn agreement in December 2001 reflected the mujahedin's restored power and was an early indicator that participation in the jihad against the Soviets would once again constitute a key mark of legitimacy. The preface of the agreement stated, “*Expressing* their appreciation to the Afghan mujahidin who, over the years, have defended the independence, territorial integrity and national

unity of the country and have played a major role in the struggle against terrorism and oppression, and whose sacrifice has now made them both heroes of jihad and champions of peace, stability and reconstruction of their beloved homeland, Afghanistan.”

Their rehabilitation contributed to an ideological field where the defense of the nation was equated with the defense of religion, and where the mujahedin could stake out a claim to superiority by virtue of their status as national liberators, whereas an openly secular orientation was tantamount to treason. But already in 2001, protests had been voiced against the Bonn agreement’s rehabilitation of the mujahedin, who had committed serious crimes, especially during the civil war of 1992–95. At the 2003 Constitutional Loya Jirga, one of the female delegates, Malalai Joya, strongly denounced the proceedings for giving a platform to warlords and war criminals, upon which her microphone was silenced and she was temporarily made to leave the Loya Jirga tent (Kuovo 2011). Nonetheless, human rights actors, including the Afghan Independent Human Right Commission (AIHRC), invested much of their efforts in a campaign to investigate and prosecute war crimes. Given the dominance of war criminals in the post-2001 order, this amounted to an attempt to fundamentally change the political status quo. These efforts received a serious blow in 2007, when a number of MPs—former military commanders, most of them with mujahedin backgrounds, put forward a law that would grant themselves amnesty from prosecution of war crimes. Those who had embraced the vision of a new order based on human rights saw the law as a definite proof of the government’s real power base—and the muted protests from Western embassies as evidence of the hollowness of Western pledges toward supporting a human rights agenda in the country (Suhrke 2011: 174). The episode also illustrated in stark terms that the mujahedin had solidified as a powerful political bloc. This was clearly expressed in a warning uttered by Abdul Rasool Sayyaf, a former commander of one of the mujahedin parties, during a rally against the amnesty law: “Whoever is against the mujahedin is against Islam, and they are the enemies of this country.”

The efficiency displayed in passing the amnesty law was not representative of the overall workings of Parliament. Seldom did it exercise its authority to propose legislation (Ahmadi 2016). This did not mean, however, that legislation was not produced; over two hundred laws were promulgated between 2001 and 2010 alone.²⁷ Most of these laws were presented to Parliament by government agencies or as presidential decrees, typically drafted by small groups of actors outside the government, who then used their connections to get the law tabled. This led to an extraordinary fragmentation of the legal framework, with a number of stand-alone pieces of criminal legislation on issues such as money laundering, terrorism, corruption, and violence against women. The law about violence against women (the EVAW law), which is the subject of the next chapter, embodied many of the

contradictions that this kind of fragmentary lawmaking produced, such as inconsistency in the legal corpus as a whole. It also illustrated an opaque legislative process in which informal political connections took precedence over open debate.

Legal reform also entailed programs to rebuild and reform the administration of justice. At first, the justice sector had been somewhat neglected by the donor community, who instead focused their efforts on health, education, and strengthening the security forces. But donors soon came to believe that the justice sector had been overlooked and constituted a weak link in the international attempts to restructure the country—partly due to the pathetic efforts of the Italians who had been in charge in the early years after the U.S.-led invasion. A period of more extensive aid and a proliferation of activities intended to strengthen the rule of law followed, but it quickly led to Western disillusionment, as rapid results failed to materialize.

The 2004 Constitution had largely confirmed the three-tier court structure and the historical positions of the three justice institutions, the Supreme Court, the Attorney General, and the Ministry of Justice. The Supreme Court proved an assertive counterpart to the often chaotic international attempts to reform the justice system. As an institution, it wielded considerable power. It nominated judges for presidential appointment, oversaw court administration, ran the professional training course (the *stage* course²⁸) for judges, served as the final court of appeal, and had the right to interpret the Constitution. A high percentage of criminal cases was appealed to the Supreme Court. As a result, the head of its criminal division presided over the outcome of almost all serious criminal cases in the country, making the division a powerful actor and potentially a target of attempts of bribery and other undue influence. During my fieldwork, I often heard about cases that had proceeded through due process at the lower courts, only to be obviously influenced at the Supreme Court level, resulting in acquittal or reduced sentencing.²⁹ This was particularly obvious when a government official stood accused of a crime.

The Supreme Court was generally considered a bastion of conservatism, at least by Western reformers, and especially during the tenure of Fazal Hadi Shinwari, the chief justice from 2001 to 2006. As testimony to the fact that the close relationship between the justice system and the religious establishment was still in place, Shinwari was also the leader of the national ulema council. The council was generally supportive of the president, and Shinwari had close ties to Abdul Rasool Sayyaf, a jihadi commander and Wahabist-inspired religious scholar with considerable power in the post-2001 settlement, and an important ally of Karzai. During his tenure, Shinwari—who had no formal qualifications beyond a madrassa education—established a religious council within the Supreme Court. The council issued a number of fatwas (binding religious opinions) that horrified liberal Westerners and Afghan human rights advocates.³⁰ In 2006, the donor community and

some of its Afghan allies succeeded in placing a more moderate person, Abdul Salam Azimi, in the position as the chief justice. Azimi nevertheless proved disappointing to many of his backers. He spent a lot of his time abroad and was unable to carry out the substantive reforms his supporters had hoped for, including countering cronyism in judicial appointments and reorienting training and staff appointments in a more secular direction. It was evident that the Supreme Court exhibited a certain degree of esprit de corps. It was able to guard its autonomy against outside attempts to redesign criteria for professional requirements for its cadres, and it resisted encroachments on its jurisdiction. It proved less inclined to resist influence from the executive and proved a reliable ally to President Karzai, particularly in his attempts to sideline and influence Parliament. The profession as a whole was heavily dominated by men. In 2008, it was estimated that around 7 percent of sitting judges were female, a number that had increased to almost 8.5 percent by 2013 (IDLO 2014). Most female judges were presiding over family and juvenile courts (O’Hanlon and Sherjan 2010).

The attorney general’s office (AGO) was also a powerful institution, appointing and overseeing prosecutors at all levels. Under the executive arm of the government, the office was responsible for investigating crimes, preparing them for trial, and prosecuting in court. The office had not undergone “restructuring” (as civil service reform was called)—as had the judges—and, as a consequence, had much lower salary levels. (An exception was the prosecutors working for the specialized units for crimes of violence against women (see chapter 3), some of whom received top-up salaries from their international supporters.)³¹ Of the three justice institutions, the Ministry of Justice was the minor actor, tasked with overseeing the administration of the justice system and with drafting and reviewing laws through its *Taqnin* (legislation) department. But that role of the Ministry of Justice makes it central to many of the processes analyzed in this book, as will be explored in chapter 2.

After 2001, defense lawyers and legal aid featured as relatively new elements of the justice system. A national bar association was reestablished in 2008, and an Advocates Law promulgated, with the support of the International Bar Association. Numerous national and international organizations provided representation in court or legal advice for defenders, funded by international aid money. Although lawyers often complained that they received little respect—and sometimes faced outright hostility—from judges and prosecutors, the idea of legal representation appeared to gain traction over time. In general, lawyers had a noticeably different background than the other legal professions. Most were graduates from the secular law faculties, and many spoke English and held positions in foreign-funded NGOs. Some had gained reputations as fearless defenders of human rights, although a few of the legal aid organizations were perceived as mostly motivated by financial gains.

Expatriate advisors frequently lamented the lack of coordination that characterized the justice sector reform, but this state of affairs was, in large part, a product of the proliferation of aid. As Tamanaha points out, justice sector aid is not a field with an internal logic; it is better understood “as an agglomeration of projects perpetuated by motivated actors supported by funding” (Tamanaha, cited in Mason 2011b). More often than not, external support to the justice sector in Afghanistan took the form of what aid organizations and private contractors were able to secure funding for, rather than what national strategies or needs dictated. By 2010, Kabul was swamped with a number of short legal-training courses provided by various donors and organizations—many of which were criticized for being superficial, supply-driven, uncoordinated, and overly focused on criminal law. This kind of training was rarely evaluated and was typically conducted without a baseline, making it difficult to assess its impact. Generous per diems (daily allowances, ostensibly to cover travel, but in reality serving as a monetary incentive for staff to attend) made many institutions keen to secure training places for their staff, and this reinforced the appearance of a training *industry*. The three justice institutions often competed for funds and influence and, to a certain extent, succeeded in playing donors against each other. Most assertive was the Supreme Court, which blocked an attempt to establish a joint *stage* course for all legal professionals and, instead, negotiated a bilateral agreement with one of the donor agencies.

At the same time, the entire justice system was eroded from within by the proliferation of organized crime and the profitable narcotics trade—and, more generally, by a political system characterized by informality and patronage. As Giustozzi writes, Karzai, in expanding his power, was “not so much interested in institution building, as in the centralization of patronage” (Giustozzi 2009: 96). He and his family largely followed a kingly recipe of equating the expansion of state power with that of increased influence of the ruler and his inner circle (Forsberg 2010: 21). No group was permitted to become too strong or too independent from the government. The government’s (or Karzai’s) tenuous control over the countryside was achieved through a series of deals and accommodations with local power holders, many of whom had initially established their position as military strongmen in the immediate post-2001 period, often with the backing of international military forces.

Karzai repeatedly clashed with Western embassies and officials over appointments and policies as he worked to strengthen his own powerbase. The technocrats favored by Western donors, and who had often professed an ambitious reform agenda targeting nepotism and corruption, lost ground to more political actors, particularly members of *Hizb-e Islami*³² and northern power brokers. The expansion of ISAF forces to the south of Afghanistan also brought tensions to the relationship between the Afghan president and his foreign allies. Karzai strongly condemned the civilian casualties caused by NATO military operations

and resented what he saw as NATO countries' tendency to override his wishes and infringe upon the country's sovereignty.

When the Obama administration took office in 2009, it was evident that the NATO-led military coalition was in trouble. Attacks, primarily against coalition and Afghan forces and government officials, had risen yearly, and by the summer of 2009, more than half the country—including three of the four main roads out of the capital—was considered unsafe. The U.S. Defense Department was arguing for an expanded military operation (referred to as a "surge"), accompanied by higher levels of development aid to underwrite the military campaign. Others in Washington argued for a smaller U.S. military presence and a reduction of stated aims in Afghanistan—the abandonment of broader goals of development and state building. The outcome was a compromise, which gave the military much of its troop expansion, but on a limited time scale, with the U.S. president declaring that he wanted to start troop withdrawals after two years, in July 2011.

The military escalation took place under a particular counterinsurgency doctrine calling for all aspects of the international activities to support military efforts. As a result, international—and, in particular, United States—assistance was increasingly put in the service of a security agenda of stabilization and political outreach. The justice sector became conceptualized as a cornerstone of the war effort, with the U.S. military claiming that government shortcomings in this area were an important driver of the insurgency. The insurgents, for their part, were targeting justice officials as part of an overall campaign against the government. In many districts, posts went unfilled, and in many provincial capitals, judges and prosecutors were working under siege, holed up in fortified compounds and in fear for their lives. Paradoxically, it was in these areas that much of the aid agencies funded by the United States were told to focus their effort. One USAID official complained that they were instructed only to work in the south and east of the county, where it was impossible to get anything done because of insecurity. Judges were so afraid that they never left their compounds, and they spent their nights in the courthouse. Yet aid agencies had to continue to focus on these areas: "It's the military. They say, 'We want you there.'" Frustrated, the official said that he was hoping to be do something in north, but "low profile, so we don't upset the military guys."³³

But the security situation continued to worsen, and the "state building" that was now considered integral to the war effort was bringing few results, at least not according to the military schedule. A considerable blow came with the Kabul Bank scandal in the autumn of 2010, when it emerged that supporters and officials in the Karzai administration had received close to a billion U.S. dollars in fraudulent loans from one of Afghanistan's main commercial banks. As Western frustrations grew, there were calls for the abandonment of professed goals of institution building, democratization, and development. It was claimed that Afghan culture and society were inherently unsuitable to "Western" institutions of governance,

an argument that also absolved the West of any responsibility. The military, in particular, experimented with “traditional” institutions such as tribal councils. The urgency invested in reforming the legal system led to reinforced calls for international support to informal justice processes, amid claims that there was simply no time to wait for the formal system to develop. This saw the proliferation of international, ad hoc attempts to cultivate justice provisions through traditional councils and to formalize their status through a national framework. Overall, however, the objective of military victory was gradually replaced by one focused on enabling Afghan security forces to take over responsibility.

CONCLUSIONS

In late 2014, a considerably more pro-Western government, less inclined to publically question NATO’s warfare, was inaugurated in Kabul—the so-called national unity government headed by Ashraf Ghani. The new government had been formed after a long and unusually disputed election process, characterized by high levels of fraud and uncertainty. Rather than arriving at a final result, the two contenders, Ashraf Ghani and Abdullah Abdullah, agreed to a power-sharing government brokered by the United States. Despite the unconstitutional nature of the arrangement, initial expectations of the new government were high. The new president, in particular, had run a campaign promising reform, economic development and to address corruption. Women activists found much hope in his rhetoric on gender issues and in the fact that his wife immediately took up a public role as the First Lady, whereas Karzai’s wife had been secluded from public life. In the justice sector, some attempts at change were made. New appointments to the positions of chief justice and attorney general generally found favor with reformists. Ghani also made an attempt to uphold his election promise to appoint a female Supreme Court judge, but this pledge was left unfulfilled when Parliament refused to approve his nominee, Anisa Rasouli. In general, however, much of the first year of the new administration was spent wrangling over appointments, while the economy and the security situation deteriorated drastically. As I was writing this book, it remained to be seen to what extent Ghani presidency would be substantially different from the Karzai era when it came to gender politics and the legal sector. Karzai’s presidency had been characterized by attempts to appease both conservative power bases and the demands of women’s rights advocates and international donors in a highly personalized and unpredictable way. The starkest example was President Karzai’s approach to the ERAW law, which is the subject of the next chapter.

One of the structuring assumptions of this book is that the ways in which gender relations are publically regulated are not determined by religion, culture, or other fixed societal attributes but are contingent on situational politics. Indeed, the

historical sketch provided in this chapter shows close relations between attempts at sanctioning specific gender relations and broader political projects, whether it was the state centralization of Abdul Rahman Khan, the modernization of Amanullah, the socialist transformation of the PDPA, or the Islamist agenda of the Taliban. The infrastructure that the more routine regulation of gender relations depends on—the legal system—has similarly been shaped by specific historical trajectories. It is only by looking back at the tumultuous state-building history of Afghanistan that we can comprehend the origins of the unusual heterodoxy of the contemporary legal system, a heterodoxy that would prove to have important bearings on individual fates. By keeping a historical perspective, we can also more easily appreciate what was novel about the post-2001 order—an unprecedented international or external interest and intervention into the detailed working of the legal system, including its treatment of women. That such an interest did not translate into absolute power and often produced paradoxical outcomes will be detailed in the chapters that follow.