

## MEMORANDUM

To: Emily Wann, Rule of Law Advisor

cc: Saeed Murad Rahi, Project Management Specialist (Rule of Law Advisor)  
Eddie Gonzalez, Ph.D., Democracy and Governance Officer, Rule of Law Team  
USAID/Afghanistan/Office of Democracy and Governance

From: Eric Bartz, Senior Technical Advisor  
Lenny Linke, Traditional Justice Advisor  
Lise Liezenga, Reporting Specialist  
Basir Malakzai, Senior Program Advisor  
Wais Wardak, Traditional Justice Advisor  
Rule of Law Stabilization Program – Informal Component (RLS-I)

Date: 27 May 2013

Re: Domestic violence, informal justice, and RLS-I

---

### Background

One of the most prevalent forms of violence against women in Afghanistan is violence within the household. Pashtun tribal custom, or *Pashtunwali*, which holds care and protection of the family as a primary tenet, has historically considered such violence a sign of weakness bringing shame on the perpetrators and, potentially, indebtedness to the wife's blood relatives. For example, "... in terms of domestic violence, a husband who beats his wife and thereby 'breaks a bone, injures a body part or kills her,' creates an entitlement for the wife's father to claim *poar* [blood money]."<sup>1</sup> Hence, such abuse, though reportedly common and condoned within many families, even by most women<sup>2</sup>, is likely reflective more of degenerate or misguided practice than anything normatively and publically sanctioned.<sup>3</sup> Nonetheless, some argue that the socio-economic and psychological legacy of war has exacerbated the practice. Most certainly, domestic violence is perpetuated by the subordinate status of wives within many households and the primacy of family privacy.

---

<sup>1</sup> Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 Colum. J. Transnat'l L. 349, 2004

([http://www2.law.columbia.edu/faculty/franke/Gender\\_Devel/Rights.%20Culture%20and%20Crime%20-%20Afghanistan.pdf](http://www2.law.columbia.edu/faculty/franke/Gender_Devel/Rights.%20Culture%20and%20Crime%20-%20Afghanistan.pdf); accessed 18 May 2013).

<sup>2</sup> Donna Clifton, Population Reference Bureau, *Most Women in Afghanistan Justify Domestic Violence*, September 2012 (<http://www.prb.org/Articles/2012/afghanistan-domestic-violence.aspx>; accessed 25 May 2013).

<sup>3</sup> Some conservative Afghans cite Islam in justifying domestic violence. Most Islamic scholars agree, however, that Sura 4:34 of the Holy *Qur'an* endorses beating of wives in very rare circumstances and as a last resort after two remedial measures (admonishment and withholding of sex) have been taken, and then lightly. See Arlandson, James M., *Domestic Violence in Islam: The Qur'an on beating wives* (<http://www.answering-islam.org/Authors/Arlandson/beating.htm>; accessed 18 May 2013). It is unlikely that local, uneducated perpetrators of domestic violence are aware of the Holy *Qur'an's* restricted and qualified endorsement of beating of wives. Even if they were, it is clear that in most cases RLS-I has documented the offenders would have grossly distorted the Sura's intention.

In practice, various factors influence domestic violence in Afghanistan. Because men are usually the providers for and "maintainers" of women, the wife is often viewed as dependent and subordinate, and is expected to obey her husband at all times. In cases where this obedience is resisted, the wife's behavior is seen as disrespectful and outside acceptable local gender roles. This results in domestic tension which could be met with disciplinary action, including psychological abuse and beating by the husband and/or in-law relatives, including mothers- and sisters-in-law who often abuse or encourage abuse of the wife. In some cases this situation is exacerbated, even approaching slave-like status for the wife, when, for example, the husband and in-laws harbor resentment and aggression toward the woman for having paid a high bride price<sup>4</sup> to her family.

These dynamics may also be exacerbated by household circumstances. Divergent expectations of what constitutes acceptable gender roles, e.g., adequate provision (from the husband) and performance of domestic duties (by the wife) may lead to disputes, which could result in beating. Poverty and the husband's inability to meet the wife's expectations could result in tension, with the husband, possibly ashamed of his financial position, lashing out violently. Another example involves the in-laws blaming the daughter-in-law, overwhelmed by the family's size, for inadequately fulfilling her household duties. At times this is exacerbated when the girl or young woman, married off for the bride price, is unprepared to care for her large in-law family. Additionally, making oneself visible to unrelated men without locally acceptable head and body coverings could also result in beating. An ironic example involves husbands in "love marriages" becoming jealous on the assumption that "if you loved me, you could or *could have* loved another" and taking it out on the wife.

Facilitating and perpetuating domestic violence is the shame associated with exposing private family matters to the outside community, especially state and formal justice sector actors. So unless violence is severe and results in significant injury, most cases will not be exposed to outsiders, or even, in many cases, the woman's blood relatives. The result is isolation and the woman's tolerance of the treatment. However, when the abuse is extreme enough, and the wife is confident in her position, she may "run away" to her blood relatives, thereby exposing the abuse to the broader community. Though undoubtedly justified, this could either shame the husband and in-laws, the woman's family, or both, as running away is considered a matter of family honor and a punishable offense in many communities. In this way, household violence could at times escalate to another form of violence against women, "honor" violence.

Far less common, yet uniquely egregious, honor violence is punishment or killing inflicted on a woman for dishonoring the family through public behavior defined as inappropriate or immoral and beyond the realm of acceptable local gender roles. Though it does not condone violence, *Pashtunwali*, places an obligation on fathers and husbands to "protect" women from violating cultural boundaries in defense of her own and the family's honor. In *Pashtunwali*, *namus* or *purdah* is often referred to collectively as gender boundaries, which Pashtun men identify as "defense of the honor of women."<sup>5</sup> When those boundaries are violated with, for example, adultery or premarital

---

<sup>4</sup> A somewhat common but illegal and un-Islamic payment to the father or other relative of woman married.

<sup>5</sup> Kakar, Palwasha. Tribal Law of Pashtunwali and Women's Legislative Authority (undated) (<http://www.law.harvard.edu/programs/ilsp/research/kakar.pdf>; accessed 18 May 2013).

illegal sex or perceptions thereof, the husband and male relatives are generally expected to restore the family's honor, which could include violent punishment or honor killing.

## Domestic violence cases and *jirgas/shuras*<sup>6</sup>

When a case of domestic violence is exposed beyond the immediate family walls, it usually goes only as far as the woman's immediate blood relatives, and, at times, the village *malik*<sup>7</sup> as a member of the extended family. Most commonly, elders of the two families then pursue reconciliation through the typical traditional fashion - discussion, mediation, compromise, and an application of third-party reason and instruction on appropriate behavior. This reason, of course, usually complies with local understandings of gender roles. That said, RLS-I's district assessment data indicates that in most cases the elders will support the woman if the husband's or in-laws' expectations of the wife and subsequent behavior are unreasonable. In many cases, if the husband or in-laws are found to be at fault, the elders may warn the husband not to repeat the abuse. In some severe cases, the elders may place the wife under her father's care until the husband has pledged to cease abusing her. Similarly, when the husband is found to be inadequately fulfilling his expected roles by, for example, not providing food or sex or failing to impregnate her, elders may find a solution in favor of the woman, even, on rare occasions, assisting her in seeking a divorce with formal justice sector actors. As indicated above, the cases that have reached elders, even elders of the immediate families, have risen to a fairly high level of seriousness, so it is common for elders to support the wife as there is not much she could have done to warrant the serious violence against her. The larger issue is the less severe, but nonetheless violent, abuse that goes unreported to anyone outside the immediate household. In practice, this is accepted to a certain degree by both husbands and wives.

If the wife feels she is being unfairly and/or cruelly treated, however, she may take the issue to her father or brothers, who would nearly always defend her and seek through elders a solution acceptable to both sides. For example, this could be to instruct the husband to provide food for the wife to cook rather than beating her for not providing meals from food he has not provided. At other times the husband may actually report his beating of his wife to her father or brothers, accusing her of inappropriate or immoral behavior. If the woman's family believes the husband, they would be unlikely to support their daughter or sister, believing she has dishonored the family.

In any case, and as indicated above, resolution of the situation is largely dependent on local expectations of appropriate behavior under traditional gender roles and is very rarely reported to the formal justice system.

---

<sup>6</sup> *Jirgas* are *ad hoc* bodies of traditional dispute resolution practitioners and other leaders established to resolve specific disputes. *Shuras* are standing bodies of elders and other leaders at times responsible for resolving disputes.

<sup>7</sup> A *malik* is the elected or appointed village leader responsible at times for resolving disputes or facilitating the dispute resolution efforts of elders. *Maliks* are usually also the primary points of contact for state actors.

## Formal justice mechanisms

While essential components of deterring domestic violence, formal legal and institutional mechanisms dedicated to the issue are insufficient to address the vast number of cases across Afghanistan, especially in conservative and/or rural areas beyond the state's reach. Furthermore, the courts, the Directorate of Women's Affairs, the Afghan National Police Family Response Units, and the Afghan Independent Human Rights Commission all rely heavily on mediation and reconciliation, including through the informal justice sector, to address cases of domestic violence they receive. While mandating prosecution in five of the most severe domestic violence types, the presidential decree on the Elimination of Violence Against Women (EVAW)<sup>8</sup> of August 2009 allows for mediation in 17 other case types.<sup>9</sup> Complicating the matter further, the future of EVAW came into question when the *Wolesi Jirga* (lower house) of the Afghan National Assembly shelved discussion of the legislation after some conservative MPs objected to articles they consider un-Islamic. (The current decree retains the force of law unless and until Parliament amends or rejects it.)<sup>10</sup> Therefore, improved awareness among traditional dispute resolvers, women, and the general public at the community level is essential to effectively reduce violence against women in Afghanistan.

## RLS-I programming, traditional justice, and domestic violence

### Education

To address these challenges as realistically and effectively as possible, RLS-I aims, through education and solutions-oriented programming, to evolve the status quo at the household, village, and district level toward greater respect for women's rights, including to be free of physical abuse. Legal education workshops for elders, *maliks*, *mullahs*<sup>11</sup>, local officials, and women convey women's rights through *Shari'ah* and Afghan law – intentionally drawing parallels between the two – in a way that resonates with local audiences. Several workshop materials, developed by RLS-I and Kabul and Nangarhar University Law and *Shari'ah* Faculty members, include explicit references to violence against women and extensive legal information on women's rights generally. The family law workshop section on "Wife's rights over her husband" points out that, "A man is obliged to live a happy and good life with his wife. Almighty Allah says, 'Behave and live well with your wives'" and that husbands should "ignore [their wives'] mistakes." More explicitly, RLS-I family law training also includes the Sunan Abu-Dawud *Hadith*<sup>12</sup> (as narrated by Mu'awiyah al-Qushayri):

---

<sup>8</sup> Official Gazette (No. 989), published on 1 August 2009.

<sup>9</sup> United Nations Assistance Mission in Afghanistan (UNAMA), Office of the High Commissioner for Human Rights (OHCHR), A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan. November 2011 ([http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_Nov2011.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf); accessed 18 May 2013).

<sup>10</sup> "Afghan legislators block law protecting women." *Associated Press* 18 May 2013. CBCNews Web. (<http://www.cbc.ca/news/world/story/2013/05/18/afghanistan-women.html>; accessed 25 May 2013).

<sup>11</sup> Local religious leaders with varying levels of education and inconsistent interpretations of Islamic teachings and *Shari'ah*. Local mullahs are often known to perpetuate misconceptions of local custom as *Shari'ah* compliant.

<sup>12</sup> 1) A narrative record of the sayings or customs of Muhammad and his companions. 2) The collective body of traditions relating to Muhammad and his companions.

*I went to the Apostle of Allah (peace be upon him) and asked him: What do you say (command) about our wives? He replied: Give them food what you have for yourself, and clothe them by which you clothe yourself, and do not beat them, and do not revile them.<sup>13</sup>*

Several articles of Afghan law addressing violence are included alongside *Shari'ah* in RLS-I materials. Article 4 of EAW defines domestic violence as a crime punishable under law.<sup>14</sup> RLS-I family law training also includes EAW Article 23, addressing battery and laceration, to clarify that beating short of serious injury is also a crime subject to prosecution. The Constitutional law workshop topics include respecting women's right of human dignity.

More generally, RLS-I legal education promotes women's rights, status, and dignity extensively, including in most areas EAW Article 5 defines as violence (and thus crimes). This broad education aims to elevate women from a subjugated status to a more equal footing under *Shari'ah* and Afghan law and to transform expectations of gender roles to remove rationales for violence or abuse. RLS-I Constitutional law training includes women's equal status, right to vote, rights to education and health, etc. Family law includes an explicit prohibition of *baad* (the act of giving a girl from a guilty party's family in marriage to a member of the victim's family) and other forms of forced marriage by highlighting the requirement of women's consent to marriage under *Shari'ah*, the Afghan Constitution, and Afghan law, citing Article 517, Paragraph 2 of the Criminal Code and Article 25 of EAW. EAW Article 25 identifies family members giving a girl or woman in *baad*, the husband, and those facilitating the decision, including dispute resolution representatives, mediators, and witnesses, as subject to criminal prosecution. The Article also specifies that upon the woman's appeal, the marriage can be nullified. Criminal law training defines crimes as personal acts - that no innocent third party (a girl or woman in the case of *baad*) may be punished for the crime of another, including her relative.

*All Islamic scholars agree that this custom [giving women in baad] is totally in contradiction with Islam because a girl or woman would never consent to marry with an enemy of her family. Nor would a boy or man consent to marry with a girl who is the daughter of his enemy and related to the murderer of his father or brother. It will logically result in the man believing he must be cruel to this girl or woman who will be his wife. And this is my second point: we studied in the family law workshop that nikah [religious Islamic marriage ceremony in which a marriage contract is agreed upon] is forbidden or not legitimate when someone will be cruel to his wife.*

Qazi Abdul Aziz, a tribal elder and former jihadi commander, Discussion session on alternatives to *baad*, Zhari district (Kandahar province), 7 January 2013

---

<sup>13</sup>Sunan Abu-Dawud, Book 11, Marriage (*Kitab Al-Nikah*), Number 2139.

<sup>14</sup> RLS-I clarifies in Constitutional law and criminal law workshops and during state-TDR coordination meetings (discussions between elders and district formal justice actors to develop agreed protocols for collaborating in resolving disputes) that resolving criminal cases, prosecution, and punishment under Afghan law and *Shari'ah* fall solely under state jurisdiction.

Other examples in RLS-I materials of protections for women under *Shari'ah* and Afghan law include forbidding the sale or purchase of women (EVAW, Article 24), legal marriage age, right of dowry (marriage payment solely to wife for her financial security), prohibition of bride price, women's rights to inheritance under *Shari'ah* and EVAW Article 33, women's right to own property, etc. Consultation on a daughter's marriage is also included as a mother's right in the family law materials. RLS-I illustrated public outreach materials and radio and TV broadcasts include similar messaging on women's rights, including women's access to and participation in the justice system and *baad*.

### **Action-oriented activities**

In addition to legal education, RLS-I sponsors solutions-based activities for both male and female elders. The structured forums facilitate a collective assessment of challenges and development of and commitment to solutions. For example, the "Women's participation and access to justice" and "Alternatives to *baad*" discussion sessions for men and women allow participants to develop ways to improve women's access to justice and identify alternatives to giving girls and women in marriage to reconcile disputants. During the discussion session on "Ethics and best practice in traditional dispute resolution (TDR)," elders and district formal justice actors discuss and commit to best practice in fair, transparent, and equitable justice, including avoiding legal violations of and respecting women's rights in resolving disputes. In capstone activities culminating the first six months of core programming in a district, nearly all participants reconfirm and sign written pledges to honor these commitments.

*This program helped us solve many women's cases (family, property, inheritance, etc.) in our villages. For example, a widow's case in Ghazni province was referred to us (Logar province elders). The woman's relatives wanted to marry her by force, while she did not want it. When the case was referred to us, we resolved the case through a jirga in favor of the woman. We told her relatives that it is against Islam and Afghan law to marry her without her consent. We gave authority to the woman to marry (with her consent) whenever she wishes.*

Unidentified male elder, Discussion session on women's participation and access to justice, Puli Alam district (Logar province), 15 January 2013

Additionally, facilitation of women's dispute resolution, or *spinsary* ("white-headed woman"), groups bolsters women as dispute resolvers, including as resolvers of women's disputes, significantly improving women's access to justice. Most importantly, RLS-I has observed numerous examples of *spinsary* group members applying and advocating the Afghan legal and *Shari'ah* awareness obtained in RLS-I legal education workshops, including in cases of domestic abuse or violence. As women, the *spinsary* members enjoy much greater access to women inside homes and can act to educate husbands, in-laws, and wives on women's rights within marriage. Far from timid, RLS-I participants, confident in their new knowledge – especially that anchored in *Shari'ah* – often take bold action when they learn of injustice in the community and within families. Significantly, this access also helps to expose domestic injustice to women's family members and the community *malik*, who, as discussed, will nearly always defend her rights when she is being treated unjustly.



*We are able to solve most of the disputes in our villages successfully. I recently solved a dispute between a wife and her husband. A woman wanted to divorce her husband because her husband and mother in-law used violence against her and treated her like an animal. One day her mother came to my home and shared her life story with me and she told me that her daughter decided to commit suicide. I immediately went to her daughter's home and asked her what the problem was and she told me: 'I have two possibilities in my life: death or divorce.' Then I, together with the wife's mother, referred this case to the chief of the Shura, Haji Mohammad, and through his coordination we took the girl to the district governor. After a month she received her divorce in the local court. So I could make decision on this matter in accordance with what I learned in RLS-I workshops...*

Babo Golam Farooq, a *spinsary* from Nawi Mazria village, Handover district network meeting, Arghandab district (Kandahar province), 12 November 2012

More often than not male elders welcome women's assistance in dispute resolution.

*Women have a positive and worthy role in the informal justice sector, especially in family disputes. Elders cannot directly talk to women in such cases. First, women (spinsary groups) try to solve family cases. If it does not work, they refer the case to elders to be resolved. So we can say that role of women as resolvers, mediators, or referrers to elders is very valued and important in dispute resolution.*

Unidentified male elder from the Ahmadzai tribe, Discussion session on women's access to justice and their role as justice actors, Puli Alam district (Logar province), 15 January 2013

During RLS-I program activities, including "dispute prevention" discussion sessions, women also speak frankly about their own roles in instigating and perpetrating abuse and violence among or against women. They nearly always pledge to reform their behavior and advise other women to forgo fighting with or abusing other women.

*Now I am fully capable to resolve the village disputes. However, in the past I was so bad. I was enjoying fighting. Once I fought a woman who was pregnant. I hit her in the stomach and as a result she lost her five months on baby. After participating in your programs, I now feel really guilty for the disputes I did in the past.*

Sharifa Said, Discussion session promoting *spinsary* group sustainability, multiple districts, Nangarhar province, 7 April 2013

RLS-I finds that when empowered with resonant knowledge, both male and female participants are eager to comply with statutory and Islamic standards in resolving disputes and in determining social behavior generally. RLS-I participants regularly apply and advocate for women's rights, including that women should not be beaten and the principle of women's consent to marriage in forgoing and using alternatives to *baad*. RLS-I monitoring and evaluation data suggest that even more than awareness of *baad* as un-Islamic and illegal, RLS-I's collective education and discussion or "mass

witness" activities have given them political and cultural cover among their peers to reform harmful traditional practices. Several quotations illustrate the point:

*Now I know that when a conflict arises between a wife and husband we can resolve this rather than beating the women or chasing them away from their homes.*

Haji Khan Bandy, a tribal elder from Cheena village, Workshop on family law, Acheen district (Nangarhar province), 2-3 December 2012

*During the workshops we learned about the right of women in society. Before no one cared about women and their rights during dispute prevention, but we understood in the workshops that women also have rights in all parts of life. Now we know that women have the right to select their future husband, women have the right to be educated, they have a share in inheritance, and they are half of society; we should respect their rights and their presence. Now, when a dispute concerns a woman we directly or indirectly ask her about the dispute, and inquire whether the elders selected to represent her and sit on the jirga are acceptable to her or not. Another big achievement that we had during this project was that the customary practice of baad is now completely removed from our district and in almost one-and-a-half years we have not had a case of baad across the district, and I think it is a big change in our society. But we still need much work about women rights in the traditional justice system. We should make an environment where women can come directly to elders and share their disputes, we should encourage the education of women to make them aware of their rights. For these goals both elders and the government should cooperate with each other so they will succeed in achieving their goals.*

Haji Dawood Abdul Karim, a tribal elder from Fuladgai village, State-TDR coordination meeting, Tarnak wa Jaldak district (Zabul province), 3 February 2013

*Due to these workshops we have learned a lot of good things. Our men understand too. It has had a good impact on our lives.*

A local housewife, Workshop on family law, Tarnak wa Jaldak district (Zabul province), 12-13 December 2012

Formal justice in Afghanistan remains nascent, the government's reach to rural areas is limited, and traditional cultural sensitivities over the privacy of family-related matters dominate. Nonetheless, RLS-I has found some success in promoting a local culture shift toward greater respect for women's rights within families and local communities. With continued progress from the grassroots up, these efforts will help improve understanding by local communities of the government and its laws in support of women's rights and prevention of domestic abuse.