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ACCES TO JUSTICE

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Access to Justice in Afghanistan (fundamental rights/Human Rights Violations)

Introduction:

Afghanistan throughout history has remained as one of the conflicting states where there has always been war.¹ Thus, Access to Justice has remained as an unresolved or ignored issue. Because, government has always given more attention to their stability, dominance, and internal and external conflicts. Prior the establishment of new government in 2000, the justice institutions were almost dissolved and they had to start from zero. During the Past two decades, there have been lots of improvements towards establishment of justice and judicial institutions that are basically aimed to provide access to justice. However, still there are many problems seen as obstacle towards people's access to justice, specifically mentioning, women and children. As mentioned by Professor Ali Wardak, professor of criminology at the university of South Wales "Getting justice in Afghanistan is a complicated business" and he puts existence of legal pluralism as the main obstacle towards access to justice which would be later described in details.² While, UNDP points out structural weaknesses, institutional corruption and insufficient capacity as main challenges and problems towards current justice system in Afghanistan.³ Therefore, in order to find a precise data for my project I decided to collect data and conduct a research in six provinces of the country. Each province is representing a zone which gives us a wholistic approach towards the country. I decided to conduct this research because this was an opportunity for me to conduct my own research relevant to the topic that I have worked for almost five years. There are many problems and challenges mentioned as an obstacle towards access to justice but in order for me to have a precise data about the current situation of access to justice, existing challenges and people's recommendations, it was necessary to have the first hand data from the ground. So, this paper would initially analyze the current condition of access to justice in Afghanistan, focus on the associated problems and finally give possible solutions and recommendations for improving the people's access to justice. it has to be mentioned that the upcoming information is based on my analysis of the data which had been received during the interviews.

¹ <https://www.usip.org/sites/default/files/SR314.pdf>

² <https://theconversation.com/afghanistan-how-to-widen-access-to-justice-109381>

³ <https://www.af.undp.org/content/afghanistan/en/home/projects/AA2J.html>

In order to have a precise data about the topic, a research had been conducted in six target provinces of Afghanistan which are listed as follow:

- Kabul the capital of Afghanistan
- Nengarhar one of the eastern provinces of Afghanistan
- Khust one of the south east provinces of Afghanistan
- Balkh one of the Northern provinces of Afghanistan
- Kunduz, northern province of Afghanistan
- Kandahar, one of the southern provinces of Afghanistan

Why the mentioned provinces? The mentioned province had been chosen for this research because of their population, existence of different ethnicities, different languages are spoken in these provinces, and verity in the culture, custom and tradition. Also, the research had covered areas that were conflict sensitive and had security problem, only to have an inclusive perception towards Access to Justice in Afghanistan.

In order to have almost everyone's opinion, the target group for the research included: representatives of court, AIBA (Afghanistan Independent Bar Association), AGO (Attorney General Office), DOJ (Directorate of Justice), Community representatives, and informal justice actors. Not everyone had been interviewed in all of the target provinces, because some of the target groups were either not willing or un able of to give interview.

As mentioned above, the research had basically covered three main parts which are current situation of Access to Justice, existing challenges towards justice system, and recommendation for resolving the existing challenges. There are several sub questions under each category that basically focus on women and children's access to justice, because they are the two marginalized categories everywhere, especially in Afghanistan.

Current situations of Access to Justice in Afghanistan:

There were six main questions asked under this category and the responses to each main question were as follow:

What does Justice mean and what is your definition of Access to Justice?

Based on respondents, there were several definitions of Justice and they had taken different meaning from Justice. Some were saying that justice is rule of law and giving everyone's right in the community and not violating their rights is considered as justice. Also, some were considering respect for Human Rights of all citizens in an equal manner and standing against brutality, power, and wrong doings is justice. There was also an Islamic definition for justice, which was to put everything in its proper place is justice, so this could be interpreted as giving everyone their deserved rights. peace and security were other two factors there were related to justice, because they said without security and peace, justice couldn't be obtained.

When it comes to access to justice, respondents mentioned obeying the law itself is leading to access to justice, while having equal access to justice in a democratic society. In this part interviewees give more value to the independence and impartiality of justice and judicial institutions which means that these institutions should consider the citizen's civil, political, economic, social, and cultural rights. as a result, justice could be interpreted in any way, there isn't any standard meaning for justice. Everyone could have their perception of Access to Justice.

To what extent people in your area have access to justice?

When it comes to geographical areas and having access to justice, they could be differentiated based on the following characters: secure and insecure, rural and urban, traditional and civil. So, people living in secure areas are having more access to formal justice rather than those living in insecure areas, because in those areas the court are not active. In case, where justice and judicial institutions are available, people are warned by the insurgent groups for not referring their cases to formal justice system but instead they resolve the cases through Sharia Law.⁴ When it comes to rural and urban areas, this is obvious that Afghanistan is a developing country with a below average economy, so the state can't afford to have justice and judicial institutions in rural areas such as villages and districts but only in big cities. So, thus people can only have access to justice if they live in cities; meanwhile, judicial and justice institutions are mostly operating there. At the same, people's access

⁴ Sharia Law: the course for resolving the disputes through Sharia law are Quran and Hadiths, however, the versus need to be interpreted and this interpretation is done by the insurgent groups. As a result, there is possibility of misinterpretations.

depends on their civilization, because still most of the people in Afghanistan live in a traditional way and they prefer to resolve their cases through informal and more traditional mechanisms such as: Shura (council)⁵, Jirga⁶, and other alternative dispute resolution mechanisms. Despite the challenges and difficulties, there are some progress in people's Access to Justice specially in more developed and populated provinces of country.

Do people refer their cases to formal justice system or informal justice system? And why?

Most of the respondents about referral of cases to formal and informal justice system had given similar opinion, they have related the issue to the context, subject matter, area, and economic power of the parties to the conflict. The contextual situation of area is very important because in urban areas people refer their cases to formal system and in the rural areas people refer their cases to informal system. Subject matter is important in referral of cases to formal and informal justice system, mostly people don't want to refer their family related issues to the court and if it is an economic or commercial case, they would like to refer it to the formal justice system. Meanwhile, it depends, on the family's level of awareness from the court procedure and their economic ability to afford the expenses. Because, the informal justice system is easy, cheap, accessible, and known for them therefore they find it more convenient. one of the respondents from community representative mentioned that:

“in a case of family violence against a woman in their community, the court employees indirectly asked for 1000 USD as bribe to resolve the case, thus the family didn't have the money to pay and referred the case to informal justice system, Jirga.”

At the same, there are several problems affiliated with informal justice system such as: lack of capacity, women and children's rights violation, decision based on the tradition and customs, focus on resolving the conflict not on bringing people to justice. Overall, both systems have their pros and cons; however, according to the respondents mostly people refer their cases to informal justice system.

⁵ Shura is a traditional mechanism for resolving disputes in Afghanistan, where a group of elders get to gather and resolve the issue through their general and non-binding advices. Mostly the actors are not highly educated but they have gained relevant experience by solving different disputes.

⁶ Jirga, the most famous method used for resolving disputes and very common in Afghanistan, where odd number of people come to resolve a problem and the decision would be binding.

How about women's access to justice?

In the past two decades there is a comparable positive change seen in women's access to justice, but still comparing to men women have lesser access to justice. That might be because Afghanistan is a men dominant country and there is less attention given to them. Therefore, most of the women are not aware of their rights and obligation based on the law. Though in some provinces there are directorates or offices to work on violence against women related cases and matter but still because of the custom and culture these offices can't be more effective to deal with all cases. So, women have problem with both formal and informal justice systems, both systems are designed in a way to not give a special care to women but rather treat them in a way that they shouldn't have asked for their rights. In some parts, women are even not permitted to take part in sessions which at the end take a decision regarding them. Also, women are considered as second gender and they are marginalized. Thus, lack of knowledge, in security, men dominance, culture, and tradition are the barriers that deprive women from having meaningful and proper access to justice. As one of the female respondents mentioned "I got separated from my husband while having a three-year-old son, my husband, I wanted to take the custody of my child from my husband and asked the judge that if legally I am allowed to ask for this. The Judge told me that even if you are not legally in the position to take the custody of your child, I can help you with that but for that you have to fulfil my sexual desires too". Likewise, there are several cases where women and girls are harassed by different institutions and the good policies and laws in favor of women are only applicable to an elite category of women not women who are marginalized in different ways. If it was about men, based on their case they can analyze the which system formal or informal would be better for them to refer their cases but when it comes to women, none of the systems work properly for them.

Do you have juvenile courts in this province and how are they functioning?

In addition to women, children as another marginalized group who are not having proper access to justice. Based on the respondents, in some of the provinces there isn't juvenile court and children bellow the age of 18 are tried in normal courts and the same procedure applies to them, or they are brought from one province to another province to be tried. Therefore, it indicates the inaccessibility of children to justice; meanwhile, in provinces where the juvenile courts exist, that's only named the juvenile court but the procedure is the same. Therefore, juvenile are suffering from lack of access to justice in both formal and informal systems and there has to be a proper system established for juvenile. Even in some provinces there are not juvenile prisons and children are put in the same prison with adults or they are sent to the capital to be put in detention center.

At the end of this part, respondents have also shared some experiences regarding the current situation of access to justice in their areas:

- a) A person who raped an eight-year-old girl was sentenced for 16 years in the first trial and eight years imprisonment in the second trial in Khust province.
- b) People are not aware of their rights and obligations under the law, therefore, they refer their cases to informal justice system
- c) There is lack of trust on the formal justice system and informal justice system is unprofessional and violates human rights
- d) There are several cases resolved by informal justice system that had given a girl as a compensation for murder
- e) For months the courts and formal justice institutions were closed and the court was active in the neighboring province; therefore, people were supposed to travel to another province in order to resolved their cases.

Existing challenges towards justice system that Prevents People from Having Access to Justice

The second of the part of the questionnaire was mainly focusing on existing challenges towards people's access to justice in different areas such as: rural or urban, secure or insecure, developed or not developed. Meanwhile, this part focused on the grassroot problems towards justice and judicial systems and specially concentrating on women and children. Also, this part had slightly touched upon that which rights are being violated, how and by whom.

- **Legal Gap:** In regard to Legal Gap, starting from the constitution of Afghanistan and other Laws, the body of Law is very well written; however, the problem could be found with contextuality of the Law and lack implementation of International treaties that Afghanistan is bound to. Looking at the list of ratifications for almost every treat, name of Afghanistan would appear at the top of the list; however, when it comes to obedience from these laws, the justice system is even not aware of their international obligation.
- **Rule of Law:** Despite having good laws and regulations, rule of law is very weak because there are many other challenges such as corruption, existence of warlords, none-state actors, informal

justice system and so on. All these existing challenges prevent the national and international law to be implemented properly. One of the example could be in Access to Information Law of Afghanistan, according to Amnesty International, Afghanistan has good access to information law but it is not well implemented; therefore, citizens, journalists, and media channels are not properly able to obtain information from institutions (especially when it comes to justice and judicial institutions).⁷ Therefore, the respondents pointed out lack of rule of law by several actors such as war lords, non-state armed groups, community leaders, religious leaders, and in some cases the governmental officials, as one of the major problems towards people's access to justice.

- **Corruption:** according to most of the respondents who were not working with justice institutions, corruption in most of the justice institutions are considered as one of the major problems. For that, participants mentioned two major issues which were the main cause of corruption. First, low salary and less benefits are provided to justice institutions' employees, and they have no other option but to ask for bribe from people who refer to them. Second, there are anti-corruption institutions to prevent corruption but these institutions are not very effective and, in some cases, the anti-corruption commissions are also involved in corruption.
- **Level of Awareness:** Afghanistan as one of the developing countries, is still suffering from low level of awareness, specifically in the rural areas. Almost, all of the participants during their interview pointed out low level of awareness as major challenge towards people's access to justice. People in most of the provinces don't know about their basic human rights that are guaranteed under the national laws. They don't know about the laws and procedures; therefore, people struggle while following up their cases in the formal justice system. When it comes to justice institutions' employees, they are also not very well aware of their international obligations towards human rights but they take their decision based on Sharia Law.
- **Security Challenges:** according to Taliban (non-state militant group) they are having control over 52% territory of Afghanistan⁸; thus, it is very hard for formal justice institutions to operate in insecure areas. Meanwhile, the armed groups in insecure areas are directly warning people under their jurisdiction to refer their cases to them and if they would refer their cases to formal justice system, they will face harsher punishment. One of the respondents from Kunduz (northern province) mentioned that in order to resolve their issue in the court; they have to travel from their own province to the neighboring province. As a result, insecurity in most of

⁷ <https://www.amnesty.org/en/latest/news/2020/02/afghanistan-implement-access-to-information-law/>

⁸ <https://tolonews.com/afghanistan-169977>

the provinces is one of the biggest problems towards people's access to justice (formal justice system).

- **Existence of Legal Pluralism:** according to interviewees, one of the biggest struggle towards people access to justice is existence of informal justice system (traditional justice system) which leads. People for several reasons choose to refer their cases to informal justice system;
 - a) The formal justice system procedure looks very complicates and time consuming for them
 - b) The formal justice system in time consuming and costly
 - c) They feel very comfortable with informal or traditional justice system because they have prior experience or have better knowledge of the system
 - d) In some cases, this is the only accessible system
 - e) In family related cases (honor related cases), people prefer to have their issue resolved within their own community and they don't want to refer it to formal justice system.

Therefore, existence of legal pluralism and practice of void customs and traditions has become a major challenge towards people access to justice in most of the area, especially in rural areas and areas where people are not much familiarized with the formal justice system. while there are several Human Rights violations done by informal justice system because this system is also influenced by community leaders, war lords, and rich people. In most of the cases the informal justice system actors are acting discriminators against women, children and others in favor of those who are rich, have relationship with them, have power or any other factor. As a result, the informal justice system is also not solely independent, impartial, and proportionate.

- **Problems related to women and Children:** despite the existing challenges, women and children as minorities are the first hand victims of the existing challenges in Afghanistan. It is really hard for women in a man dominated society to raise their voice and ask for justice. Specially, in a community which is highly influenced by religion⁹ and void cultures; therefore, women always remain financially dependent to men. Basically, parents put a lot of difference between their boys and girls, they try hard to educate their boys but prevent their girls from education, they support their boys in every aspect of their lives but girls need to be very patient because they wouldn't be given second chance if they miss something, and that's how the discrimination starts in the families that lead to community and country against women. Women are not able to refer their cases to formal justice system because they are not allowed

⁹ Here by mentioning the religion, respondents were indicating the misinterpretation from religion and putting more restrictions on women rather than men.

to go out of their homes without Mahram¹⁰ in rural areas. Meanwhile, in urban areas there are some families that are very radical and they don't let women to get out of home for education, work, or taking part in litigation process. One of the respondents who was working in informal justice system, if one of the parties to the case is women, on their behalf a male representative is taking part in the session. This indicates that women are even not allowed to take part in sessions that are taking decision about them. Based on Afghan laws, women are not allowed to ask for divorce and this right is only given to men, but they can ask for separation on several bases. The problem with separation is that if the woman asks for separation, she will be denied all rights and benefits that she was entitled in the family of her husband.

When it comes to children, they are also faced with the same kind of problems and discriminations like women because the concept of children rights is very new in Afghanistan and when it comes to rural areas people don't have any idea about it. Most of the time the children cases are resolved by informal justice system who are not qualified to resolve such cases. Also, children in Afghanistan suffer from child labor, moral pressure, child abuse and many other problems, and the main cause for these problems are low level of awareness from children's rights and poverty. Families during the past decades of war have lost their homes, businesses, families, and supporters; thus, children had been used as a mean of survival. Also, participants mentioned that there are lack of professional employees related to children in the justice institutions and also they have pointed out the non-existence of juvenile court in the district level or in some cases at the province level.

- **Other challenges:** participants have also pointed some minor issues as challenge towards access to justice, one of them was lack of political will by the government. They mentioned that currently the government is paying more attention to its external politics and peace process but they have somehow forgotten about justice and people's access to fair, impartial, and independent justice system. There is a huge lack of coordination between the detective, justice and judicial institutions, while the good synergy and coordination between these organizations are very vital and important for resolving the cases.

So far, we have discussed the main challenges towards people's access to justice but this important to know that what people think are the main actors behind all these challenges and why. As a result, they found the following as the main actors towards existing challenges:

¹⁰ Based on Islamic Sharia Law women are not allowed to go out of home but with a male (who is a close relative such: husband, father, brother, son, and so on).

- Community itself as one of the main challenges towards people's access to justice, because through the history the communities have developed lots of void customs and traditions. So, these traditions are not easily removable and there is need for a lot of work to remove such void customs. Also, these void customs are benefiting the community leaders, because they can interpret the custom in their favor and impose their decisions on the community members. Such actors are more visible in rural areas and especially where the level of awareness and literacy is lower.
- Religious leaders who used the verses of Quran and misinterpret them in a way that favors them. There are people found under this category who are strictly against formal justice system and they ask people to always resolve their cases on the bases of sharia law and their interpretation. Even in some cases there are conflict between these religious scholars on interpretation or rulings in Islam.
- Insurgent groups as major actor that ban people from having access to justice in insecure areas. They, always try to resolve people's cases under their jurisdiction and weaken the formal justice system. there are also some armed groups that are putting pressure on formal and informal justice system to undermine their impartiality and fairness.
- Legal practitioners and governmental officials are another category of actors that are making people's access to justice very hard. They ask for bribe and make the process very complicated by misusing their power; thus, it leads to lack of trust between judicial institutions and people. Most of the time these legal practitioners are using their personal relationship which undermines the conflict of interest in justice and judicial institutions.

Overall, the above-mentioned actors need to be targeted by the organizations that are working for access to justice in Afghanistan. It is clear that not all of the mentioned actors could be targeted, because some of them are out of scope for an organization or even for government to have control over it, take for example the insurgent groups (Taliban). One of the examples in Khust province was that Taliban killed father of a family only because of not paying Ushur,¹¹ the family members complained detective organs and the person who killed was also identified but the government was not able to arrest the accused. Therefore, the last part of the

¹¹ Ushur is an specified amount of money determined by Taliban as a tax which people should regularly pay to them.

questionnaire was focusing on recommendations and opinions that could ease people's access to justice.

Recommendations and Suggestions Based on Existing Challenges

As indicated earlier the third or last part of the questionnaire was concentrating on interviewees' recommendation based on the existing challenges towards people's access to justice. There were several recommendations and opinions given by the participants that are highly helpful and contextual.

- **Awareness raising:** low level of awareness from the rights, laws, procedures, duties and obligations has caused that people would not have access to justice. In order to remove this problem, people should be given awareness using different means. As recommended, by the interviewees use of media and social media for increasing their level of awareness would be highly beneficial, because in every home there is a television and smart phone; thus, it could be one of the easiest ways of reaching out people and making them aware of their rights. It could be a short clip, a short message, or a role play in TV or radio, but the aim should be to reach our message to people and raise their awareness. Interviewees were also naming the religious scholars and community leaders as people with high influence in the community, because people listen to them. So, if these two categories of people would be persuaded to increase people's awareness regarding their rights and obligations under the law, it would be highly beneficial. Billboards and brushers were another alternative to deliver the messages to people in the cities and in some cases in rural areas; while, some of the respondents mentioned awareness raising regarding rights and obligations should be done in schools for children, so that this would change the mindset from earlier stage. Meanwhile, capacity building workshops for employees of justice and judicial institutions regarding new laws and amendments being it national laws or international laws should be organized in order to keep them updated.
- **Corruption:** corruption as the major problem in both formal and informal justice system has turned to a tradition in Afghanistan. Thus, participants were emphasizing on systematic elimination of corruption because it can't be eliminated at once. The salary

of judicial and justice institutions' employees should be increased, they should be given good retirement benefits, anti-corruption commission should work effectively and efficiently, and the community themselves should refrain from giving bribe. So, if the issue of corruption would be solved in formal justice system, around 90% of the cases would be referred to formal justice system which would indicate mutual trust between people and state, especially justice and judicial institutions.

- **Coordination and synergy:** there is a high need for establishment of coordination between detective, justice and judicial institutions. During the interviews, respondents from one organ was blaming the other organ. So, in order to remove this problem, the mentioned institutions should monthly or quarterly organize coordination meetings to establish good synergy between them. Meanwhile, such coordination is recommended to be established between the formal and informal justice system, because, the informal justice system should refer the cases which are very sensitive and vital to formal justice system.
- **Rule of Law:** in order to better implement the laws, there has to be rule of law in a indiscriminatory manner. Currently, also the laws of Afghanistan are being implemented but there is distinction based on people's economic condition, age, gender, language and social status. Thus, law should be implemented equally on every members of the community without any distinction. Meanwhile, the government should change amend the laws and policies that are discriminatory and against the international law or pass new laws that better protect the rights of citizens. As recently, the new penal code of Afghanistan was introduced in 2017¹² as an act for modernizing the body of law. As Article 7 of the Afghanistan constitution talks about Afghanistan's international obligation. "The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights. The state shall prevent all kinds of terrorist activities, cultivation and smuggling of narcotics, and production and use of intoxicants".¹³ Which means that government has the duty to abide all ratified international laws and treaties either directly or through passing laws.
- **Implementation of Relevant Projects:** there is high need for assistance of international organizations to implement long term project for people's access to justice in

¹² https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=105003&p_count=9&p_classification=01

¹³ Afghanistan constitution article 7.

Afghanistan. Government itself is neither having the capacity nor the budget to resolve worked on the mentioned recommendations for easing people's access to justice. One of the important activities done by NGOs and INGOs is lobby and advocacy for people's access to justice and against human rights violation. This could be directly done by the civil society or indirectly capacitating the community or beneficiaries to do lobby for their rights. Thus, respondents were emphasizing on implementation of project relevant to the topic, in order to bring a sustainable change towards people's access to justice, especially minorities' rights.

Sustainability of the change brought through the project should be always kept into account, because it is very important to keep the change sustainable and people would lobby for their rights after the implementation of the project or without external support.

- **Court Case Monitoring:** Media and civil society members should be given the opportunity to take part in court session and make not of human rights violations so that they could do a better advocacy based on the collected cases. The same procedure should be followed with the informal justice system, so that they could not violate women and children's rights which taking decision or during the procedure. If any human rights violation or discrimination is found the decision of formal or informal justice system, it has to be followed up and the victim should be properly supported through the civil society, media, and community.

Conclusion

Looking at the current situation of access to justice in Afghanistan and considering the women and children rights, there isn't any major improvement seen. Still women are tried in the desert by insurgent groups for the crime of adultery and stoned till date. Still children are forced to work on the streets and deprived from education. Still, there is a huge discrimination between men and women which deprives them from having access to their basic rights. The level of corruption increases day by day and people has lost their trust over formal justice system, because there are lots of paper work which need time and money while people in Afghanistan suffer from poverty. Still people suffer from illiteracy and low level of awareness; therefore, they are manipulated by others. Government is not paying attention to justice and judicial institutions to make them strong, independent, and impartial; however, the executive branch is rather trying to have control over judiciary. There isn't check and balance between the governmental branches, as stated in the constitution which indicate lack of rule of law. Custom, tradition and sharia law is still playing a vital role in resolving cases; while we have state laws and

international laws. Afghanistan is party to seven international human rights treaties but when it comes to practice, there is no practice at all, because either the country does not have the capacity or does not have the willingness to apply these laws.¹⁴ Security challenges still exist in the country with no positive assumption and people living in insecure areas are suffering from lack of access to their rights. despite implementation of several project by different national and international organizations, access to justice to a is seen as a mystery for the people of Afghanistan. As a result, access to meaningful justice in Afghanistan is still problematic and there is need for work by government, national organizations and international organizations to improve the situation.

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Sharia Law: the course for resolving the disputes through Sharia law are Quran and Hadiths, however, the versus need to be interpreted and this interpretation is done by the insurgent groups. As a result, there is possibility of misinterpretations.

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Afghanistan constitution article 7.

<https://www.af.undp.org/content/afghanistan/en/home/projects/AA2J.html>

¹⁴ <https://www.af.undp.org/content/afghanistan/en/home/projects/AA2J.html>