A CLOSER LOOK

The Policy and Law-Making Process Behind the Shiite Personal Status Law

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Cover Photograph: Fakhria Ibrahimi. Shia women are confronted by counter-demonstrators during an anti-Shiite Personal Status Law rally in Kabul.

About the Author

Lauryn Oates has worked on human rights, gender and education issues in Afghanistan since 1996, and currently manages a teacher training program in Kabul Province for Canadian Women for Women in Afghanistan, as well as working as a freelance consultant. She helped found the Dara Village Library in rural Afghanistan, sits on the board of the Canada Afghanistan Solidarity Committee, and regularly writes in the Canadian and international media on women's human rights issues. Lauryn is also completing a doctorate in language and literacy education at the University of British Columbia.

About the Afghanistan Research and Evaluation Unit

AREU is an independent research organisation based in Kabul. AREU's mission is to conduct high-quality research that informs and influences policy and practice. AREU also actively promotes a culture of research and learning by strengthening analytical capacity in Afghanistan and facilitating reflection and debate. Fundamental to AREU's vision is that its work should improve Afghan lives.

AREU was established in 2002 by the assistance community working in Afghanistan and has a board of directors with representation from donors, the United Nations and other multilateral agencies, and non-governmental organisations. AREU currently receives core funds from the governments of Finland, Norway, Sweden, Switzerland and the United Kingdom. Specific projects have been funded by the Foundation of the Open Society Institute Afghanistan (FOSIA), the Asia Foundation (TAF), the European Commission (EC), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Development Fund for Women (UNIFEM) and the World Bank.

Acknowledgements

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Glossary

Fiqh	Jurisprudence
Hadiths	Oral traditions recording the sayings, habits and actions of the Prophet Muhammad, and serving as an important source to the *sunnah*, and to *fiqh*
Hanafi	The Sunni school of Sharia thought used in Afghanistan
Mahr	A gift given by a husband to his wife at marriage that forms a mandatory part of the Muslim marriage contract, which might consist of cash, material, investments or other forms of wealth
Meshrano Jirga	The upper house of Afghanistan's national assembly
Mujahiddin	"Holy warriors"; men who fought the Soviets during the Soviet occupation (1979-1989)
Mu'ta	Temporary marriage, for as little as one hour according to some interpretations, allowable within the Shia sect only
Nikanamah	Marriage contract
Qawm	Clan
Sharia	Islamic law
Sunnah	The part of Islamic law based on the sayings and living habits of the Prophet Muhammad
Ulama	Islamic clergy
Wolesi Jirga	The lower house of Afghanistan's national assembly

Executive Summary

Since 2007, a bill had been quietly making its way through Afghanistan's parliamentary system. It was virtually unmentioned in the country's media until it was signed into force by President Karzai in March 2009. At that point, news of the law reached leaders of the donor governments to Afghanistan's state-building effort who were assembled in London for the G20 conference. A handful of the law's 249 articles also caught the attention of the international media, which included several restrictions on the rights of Shia women, causing it to soon be dubbed the "rape law" by Western journalists. The issue exploded in the international press and galvanised heated responses from a variety of stakeholders.

This study seeks to examine another angle of this story, that of the process by which the Shiite Personal Status[1] bill became a law: from its inception to when it was placed under review by the Ministry of Justice.[2] Through an investigation of the process, the aim is to understand what it has to tell about lawmaking in post-Bonn Afghanistan and the political culture and capacity surrounding the experience of making law in this context, as perceived by parliamentarians, civil society, the national media and the international community. The roles of each of these groups are examined within the paper. The study draws insights on the Shiite Personal Status Law (SPSL) as a policymaking process by focusing on the inputs of the main stakeholder groups that were involved in the process, the frictions between them and what this means for the lawmaking procedure.

Findings from the study uncovered a number of important irregularities in the procedure behind the SPSL. As a law that drew from religious values, different groups within the Shia sect had different expectations of what should be included in the law's content. Key figures with an interest in influencing the SPSL sought to capture the agenda and to control its journey through parliamentary channels, meaning that the process lacked transparency. Their ability to do so was derived from alliances rooted in power bases not linked to their roles as parliamentarians or as members of political parties, but more often to disbanded militant or ethnic-based factions. The continued currency of these de facto political strategies demonstrates some important vulnerabilities in the legislative system, in that a lawmaking practice was subverted by interest groups to end up well outside of the normal procedure. Irregularities in practice consistently failed to be flagged by those charged with monitoring the process (such as the speaker of the house and the parliamentary secretary), speaking to the continued influence of those interest groups in parliamentary politics.

Despite the uneven playing field, however, competing views and challenges to the ownership of the SPSL ultimately led to highly visible opposition to the law's content and to active debate and discussion among a variety of interest groups. Amid the plethora of views on the content of the SPSL, there was generally a consensus among respondents that the law itself was a positive development, giving rights and recognition to a historically excluded and persecuted minority. Indeed, the SPSL was drafted in response to Article 131 of the 2004 Constitution that extends the right to the Shia minority to have their own personal status law that reflects Shia jurisprudential sources. The experience of making this law, however, attracted competing actors, who held differing views over what should be in the law as well as who has the right to speak for the Shia community in Afghanistan. Missing from the process entirely was public inclusion, and the SPSL clearly revealed the weak links between

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1   In general this report uses the term "Shia", although the law itself is referred to as "Shiite", in line with the official government title.

2   On 7 July 2009, the *Afghanistan Times* reported that the Ministry of Justice had concluded a review of the SPSL, omitting 12 articles and bringing further amendments, and that the revised law had been approved by the Council of Ministers. On 9 July civil society groups issued a joint open letter to the President's office arguing that the changes were ambiguous and many of their recommendations were not taken into account. The president had nonetheless approved the revised version and the law was published in the Official Gazette no. 988 on 27 July 2009, effectively becoming enforceable as law. This report focuses specifically on the time period between the law's inception until it was first placed under review by the Ministry of Justice, following the controversy that erupted in response to its initial approval.

policymakers and their constituents, and a continued emphasis on ethnicity, sect and faction as a basis for political alliances and organisation, rather than on partisan platforms that speak of issues of public interest.

The SPSL also highlights problems in the engagement of the international community on such issues, with civil society respondents frustrated at what they perceived as characteristic passivity on the part of key institutions like the United Nations, and an international community increasingly wary of being perceived to be interfering in cultural questions. When the international community did respond, a promise to review the law came swiftly from the Afghan government, garnering approval from civil society as well as accusations of external interference from those in support of leaving the SPSL unchanged. In the end, many still questioned the actual impact of the Afghan Government's response to the international and domestic controversy, when a revised law that left critics of the original draft largely unsatisfied was pushed through to publication amidst the presidential elections of August 2009, where opportunities for full debate and media coverage were minimal.

The divided views, contentious content and the uproar from donor governments and their publics make the story of the SPSL as a process in lawmaking exceptional in some ways. At the same time, it conveys much about political culture in Afghanistan's current legislative context as well as weaknesses in the technical procedures of lawmaking. Future contentious laws that draw from religious sources or are perceived to contradict Islamic values in some way are also prone to these weaknesses. The SPSL also illuminates an evolving relationship between a fledgling civil society that has human rights and gender equity as major items on its agenda, a clergy vying for authority over lawmaking and recognition in the new political system, and a political elite originating in the mujahiddin era for whom partisan politics has yet to find a foothold.

The SPSL highlights the persisting legacies of Afghanistan's political past. It demonstrates the continued power of patronage networks and behind-the-scenes deal-making in Afghan politics, as well as the complex roles of powerful mujahiddin figures from the Soviet resistance era, like Abdul Rasul Sayyaf and Mohammad Asif Mohseni, who continue to dominate on the basis of allegiances. As such, the SPSL illustrates ongoing challenges to and characteristics of Afghanistan's democracy building efforts, and is further linked to multiple social development issues. Interviews with respondents often led to discussions of education, media development, religious leadership, sectarian divisions and the desire for an open society and engaged representative leadership, among other issues. Repeatedly, those Afghan respondents critical of the process by which the law made its way through the legislative procedure linked the weaknesses in political culture to issues of education, legal awareness and literacy. The law thus gives insight into broader development and policy processes occurring in a state with an identity still being molded by a variety of competing forces.

An examination of the lawmaking process of the SPSL is timely in light of several pieces of legislation making their way onto the parliamentary agenda. Perhaps of most relevance is the preparation of the Sunni family law code expected to be presented to parliament in coming months. Drawing from Sunni jurisprudence from the *Hanafi* school, this bill is likely to be similarly prone to competing interpretations of Sharia law as well as to ownership claims over the right to interpret and legislate based on holy law. Another bill in progress that will bring to the fore gender issues in lawmaking is the Elimination of Violence Against Women bill, drafted by the Ministry of Women's Affairs and its civil society partners, which includes bold articles that criminalise violence against women. As of July 2009, the bill had been approved following minor amendments by the Council of Ministers and President Karzai and was awaiting a vote in parliament.

The first section of this paper situates this study as part of a series by the Afghanistan Research and Evaluation Unit (AREU) focusing on policymaking in Afghanistan and describes the methodology behind the study. The second section provides background details and context to the SPSL and describes the process by which it was legislated, listing key events and identifying deviations from normal procedure.

The third section looks at problems and tensions in the lawmaking process, drawing from the events surrounding the SPSL to provide some analysis of the lawmaking environment, within the Wolesi Jirga in particular, and identifies vulnerabilities in the system as it stands. Here, several findings emerge that help explain these vulnerabilities, including the means by which influential political actors influence the legislative agenda, such as patronage networks, and how this is facilitated by a political environment that allows continued emphasis on ethnicity and sect over public interest partisanship. The fourth section reports on the actions, reactions and influence of some of the key stakeholder groups in the making of the SPSL, and highlights some of the faultlines erupting between these various groups and what it means for differing visions of the future of the Afghan state. It comments on the agendas emerging from different voices seeking to influence a law that draws from religious values. These voices include the Shia community, civil society, religious actors, the international community and international and national media, and each are described in turn. A key stakeholder group missing from the SPSL process was the public, symptomatic of the political process' weak links to constituents. Thus, the ability of these various stakeholder groups to organise, wield influence and represent interests (and the basis on which interest groups are organised) is important, and is investigated throughout this section. The concluding section synthesises key insights arising from the findings and proposes some priority responses for moving forward.

This study's findings include strengths that can be built upon, such as the evident buy-in to parliamentary politics by MPs regardless of their views on the SPSL. It also identifies changes that can be made to the management of parliamentary procedure that would help to mitigate some of the weaknesses in the lawmaking process that will be described. These include more control over recording and monitoring discussion and voting in the parliament through a better ledger system and encouraging national media to be proactive in monitoring and exposing irregularities in proper procedure. Strengthened civil society access to the policy process through constructive relationships

between MPs and civil society should also be a priority on an interim basis, with a longer term goal being to create an environment where MPs are more accountable to their constituents. This will happen when domestic laws support stronger public interest-based and ideological political parties, when individual MP voting is documented and publicly accessible, and when MPs have means of greater access to, and more meaningful interactions with, voters.

Recommendations:

The study's conclusions led to several key recommendations, drawn from respondent interviews and the synthesis of findings. The recommendations seek to strengthen a few specific mechanisms in order to further entrench democratic process and culture in Afghanistan. We also reiterate recommendations made in previous AREU studies[3] that also emerged from this study, such as the need to review the single non-transferable vote system (SNTV) and to strengthen political party development and an ideas-based politics.

1. ***Facilitating a peaceful pluralism in matters of*** fiqh ***(jurisprudence)***: The Religious Affairs Commission, or the Ministry of Hajj and Religious Affairs, should create formal opportunities for dialogue between members of the Sunni and Shia clergy and civil society organisations, and in particular, with women's organisations. Such opportunities should be forums where constructive discussions might occur between the two groups and where each might offer the other specific roles, such as serving on advisory boards or facilitating community consultations. Such opportunities are needed to reduce hostility and build trust between the ulama (clergy) and secular civil society.

2. ***Reforming the party system***: Reinforcing earlier recommendations,[4] the SPSL case also

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3 See recommendations from Anna Larson, *Afghanistan's New Democratic Parties: A Means to Organise Democratisation?* (Kabul: Afghan Research and Evaluation Unit, 2009); and Anna Wordsworth, "A Matter of Interests: Gender and the Politics of Presence in Afghanistan's Wolesi Jirga," (Kabul: Afghan Research and Evaluation Unit, 2007).

4 Larson, *Afghanistan's New Democratic Parties*.

highlights that the Government of Afghanistan must seriously reconsider the merits of the single non-transferable vote system for parliamentary elections and create the legal environment for a form of proportional representation or party list system. Under the SNTV system, used only in three other countries in the world, candidates run as individuals rather than as party members, resulting in the marginalisation of political parties, vulnerability to vote-buying and manipulation, and a potentially unrepresentative parliament, among other problems.[5] Removing the SNTV system and building a stronger party system would facilitate better representation of the public will in parliament, encourage political parties to develop platforms that appeal to the public interest, and help parliament hold government accountable.[6]

3. *Financing and supporting political parties:* International donors should provide technical assistance and funding to strengthen democratic political parties and support them to develop platforms responsive to the electorate and to find means to engage on legislative issues that emerge. This recommendation also echoes earlier work with similar findings, pointing to the critical need for funding to new democratic parties.[7]

4. *Improving parliamentary procedure:* The Ministry for Parliamentary Affairs should re-evaluate its ledger system for recording discussion and voting in both houses, and introduce a computerised, instant transcription system. Transcripts and records of parliamentary decisions should be posted to the parliament's website and made available to the media and public, to facilitate public awareness and scrutiny of parliamentary discussion and voting.

5. *Refining and enforcing parliamentary rules:* The Ministry for Parliamentary Affairs should introduce specific rules that govern how bills of varying length are to be considered, to help prevent discussion and voting being bypassed or co-opted, and should further modify parliamentary procedure to record how individual MPs vote. This will facilitate greater accountability by making voting in the national assembly more transparent to the electorate and to the media.

6. *Supporting the media's role in good lawmaking:* Training opportunities should continue to be made available to all types of national media outlets that specifically target the media's role in democratisation by sharing tools and techniques for journalists to question and scrutinise political figures and activities inside parliament and to play a monitoring role over parliamentary affairs. Trainings should include the need for sensitivity and awareness of how exclusion as a result of identity play out in lawmaking, considering the impact of laws on women and minorities, and these groups' participation in lawmaking.

7. *Growing links between MPs and civil society:* The Women Parliamentarians-Women Activists Network should be explored as a model for other sectors or issues to instigate constructive communication channels between civil society organisations and MPs. Similar networks could be formed for issues (such as media, education, legal reform, and minority rights, among others) as well as on the basis of constituencies (for example, NGOs and MPs working in the same province or representing common constituents).

8. *Encouraging accountability from lawmakers:* International and donor organisations working on parliamentary development issues should explore how MPs' interactions with constituents can be better facilitated and should share concrete ways in which MPs can invite input from constituents on legislation and communicate issues of concern.

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5 See for instance: International Crisis Group, "Political Parties in Afghanistan," Asia Briefing No. 39, (Brussels and Kabul: International Crisis Group, 2 June 2005).

6 Ashley Elliot, "Policy Options for State-Building in Afghanistan," The Paul H. Nitze School of International Studies (SAIS), April 2009.

7 Larson, *Afghanistan's New Democratic Parties*.

1. Introduction and Background to the Study

This study on the process behind the Shiite Personal Status Law (SPSL) is part of a series of studies investigating policy processes in post-Bonn Afghanistan that AREU is conducting. The policy studies seek to understand the nature and dynamics of policymaking in Afghanistan to build understanding of what policy is,[8] the processes by which it has been made and the underlying interests, discourses and practices that have driven it. Better understanding of policymaking is not just an end in itself but a necessary step in contributing to the development of the policy agenda and policymaking practices and subsequently hopefully contributing to learning, improved practice and change.

As a study concerned primarily with a particular lawmaking experience, this research is concerned with governance institutions, political processes and the roles of the multiple stakeholder groups attempting to influence lawmaking. These include parliamentarians and politicians; civil society and its social change movements, in this case the women's movement; national media; the religious community; and the international community in Afghanistan consisting of diplomats, international organisations and multilateral agencies.

Methodology

This study sought to answer the following research questions:

A. What were motivating factors behind the initiation of this proposed legislation and its quick approval by the president's office?

B. What was the specific process by which the law was initiated, and how does it fit within the broader rule of law and development of governance and lawmaking procedures in the new Afghan state?

C. What role has Afghan civil society played in various stages of this law's development and passing?

D. What was the impact of the reaction of international leaders and foreign media to the law?

The data analysed for this study is drawn from individual, semi-structured interviews with 51 respondents. The interviews mostly took place in Kabul in May and June 2009, and the data therefore focuses primarily on events up to that period, though the SPSL process continues to evolve at the time of writing. Data was also drawn from a focus group with the organisers of the protest against the SPSL in April 2009. The interviews included nine members of parliament (five women and four men; eight from the Shia sect); eight academics from the Shia community in Afghanistan; 17 civil society representatives drawn from women's, legal reform and human rights organisations that were active on the issue; six representatives of the international community (including two UN agencies); five Shia women who organised the demonstration against the law in April 2009; two representatives from independent in-country media outlets; a representative from the Ministry of Justice; and a judge with the Supreme Court.[9] The study also included an analysis of both Afghan and international media coverage of the law, consultation of parliamentary, ministerial and other government documentation, and observation of a coordination meeting between the international community and Afghan civil society regarding the SPSL.

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8 A broad interpretation of policy is assumed—it may be defined as a set of defined intentions and resultant practices (through strategy development, resourcing, implementation, etc.) in the name of the public good. The policy process is the means by which policy is conceived, negotiated, expressed and formalised and the procedures of implementation and practice.

9 Individual respondents are not named in this report due to the heightened tensions surrounding this issue. Every attempt was made to interview respondents with divergent perspectives on the SPSL, though not all MPs we sought to include responded to interview requests, and we were also unable to interview additional Ministry of Justice respondents.

2. The creation of the Shiite Personal Status Law

The following section provides a descriptive account of the main events that led to the creation of the SPSL. Provided is some legal and historical context, and an account of the drafting process of the SPSL, the emergence of opposition to the law from some MPs and civil society organisations, and key events inside parliament. A comparison is included that shows where the SPSL process deviates from normal legislative procedure.

2.1 Legal context

In Muslim majority countries, family law is often contentious and can activate ideological divides. Reforms to family law in Egypt and Palestine have involved drawn out battles between parties demanding a traditional interpretation of holy law and women's organisations and democratic parties calling for family law to reflect international standards for women's human rights.[10] Indeed, in Afghanistan under King Amanullah in the 1920s, resistance to his attempts to reform family law contributed to his fall from power.[11]

Afghanistan's family law is currently derived from the country's 1977 Civil Code, which is based on the Hanafi school, one of four Sunni schools of jurisprudence. Over the years, various reforms have been introduced (such as women's freedom to choose their marriage partner), but some discriminatory elements remain. Efforts have been underway for some time in the Ministry of Women's Affairs to draft a reformed family law, which would continue to be based on Hanafi jurisprudence but which would introduce significant protections for

women, including the introduction of a standard marriage contract (the *nikanamah*). At the time of writing, there continues to be no separate family courts in operation in Afghanistan, except in Kabul;[12] and in practice, family and personal status issues are often governed by customary practice that varies by location or clan (*qawm)*. Family law illustrates the many gaps between the country's evolving formal laws and de facto practice, as well as the competing interests of different stakeholders to the state-building process. For instance, Afghanistan is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women and its Constitution also outlaws discrimination on the basis of sex. The version of the SPSL drafted by the Shia Mullahs Council was thus immediately problematic in light of both Afghanistan's international and domestic legal commitments, highlighting how adherence to the international legal framework is found on paper but has barely penetrated into the awareness or observance of those who seek to drive policy.

Afghanistan's 2004 Constitution introduced official recognition to the Shia sect for the first time by providing the right to apply Shia jurisprudence in personal status matters. No previous legal codes in Afghanistan have provided for differentiated *fiqh* (jurisprudence) by sect, and many respondents reported that the SPSL has been a long-time demand of the Shia and Hazara community in Afghanistan.[13] Article 131 (Chapter 7) of the 2004 Constitution stipulates:

> *The courts will apply the Shia school of law in cases dealing with personal matters involving the followers of the Shia Sect in accordance with the provisions of law.*
>
> *In other cases, if no clarification by this constitution and other laws exist and both sides*

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10   Essam Fawzy, "Muslim Personal Status Law in Egypt – the current situation and possibilities for reform through internal initiatives" in *Women's Rights & Islamic Family Law: Perspectives on Reform*, edited by Lynn Welchman (London and New York: Zed Books, 2004), 15-94; and Penny Johnson and Lynn Welchman, "Islamic Law and the Transition to Palestinian Statehood: Constraints and opportunities for legal reform" in *Women's Rights & Islamic Family Law,* 95-176.

11   Senzil Nawid, "Religious Response to Social Change in Afghanistan 1919-29: King Aman-Allah and the Afghan Ulama" (Costa Mesa, CA: Mazda Publishers, 1999).

12   Family law cases are treated in the primary or appeal courts in a few provinces outside of the capital.

13   The majority of Afghanistan's Shia population are Hazara by ethnicity.

of the case are followers of the Shia Sect, the courts will resolve the matter according to the laws of this Sect.

When the Constitution Drafting Committee was active, political leaders of the Shia community lobbied for this article. Efforts eventually came to be led by Mohammad Asif Mohseni,[14] an Iran-educated Shia cleric and one-time leader of an armed Shia resistance faction turned political party, Harakat-i-Islami. The article came to be interpreted as meaning that an autonomous personal status law would be drafted for the Shia population, but without specifying from what jurisprudential source, of the many schools of thought from which Shia law can be derived, it would draw.

2.2   Drafting of the SPSL

While specific reports conflict, it can be deduced from respondents that the bill was first drafted at some point between 2004 and 2007 by members of the Shia Mullahs Council, under the leadership of Mohseni, seemingly without any formal directive from the government. Many respondents suggested that the drafters were Afghan mullahs in Mahshad (in Iran), who drew heavily from a single *fiqh* source, Ayatollah Khomeini's *Tahrir-ol-vasyleh*, the late Iranian Supreme Leader's two volume book of Islamic jurisprudence. Mohseni then presented the draft to the president, who issued a decree instructing the Ministry of Justice to begin drafting the SPSL.

According to MP and civil society respondents, when the law came before the Wolesi Jirga, the lower house of parliament, MP Abdul Rasul Sayyaf proposed passing it "as a package" rather than reviewing it article by article, as per the normal procedure. This proposal followed Sayyaf's initial resistance to the law in whole, until it was reviewed against Sunni law and the main contradictory articles removed. These articles included *mu'ta* (temporary marriage) and the right to marry two women from the same family (such as an aunt and a niece). The bill was subsequently revised from over 700 articles to 249.

2.3 Resistance to the law

As the Shiite Personal Status bill made its way to parliament there was remarkably little public engagement on the issue, due to low media coverage and little encouragement of public debate. Elements of civil society were the main agents representing those with concerns over the law's content. Their role in seeking to instigate debate and influence the process from outside parliament was thus considerable. Prior to the vote on the bill in parliament, originally slated for 2008, several civil society organisations, through their links to supportive MPs, learned of the bill and obtained a copy. They began mobilising on several fronts to communicate their concerns over some of the content, and to propose specific amendments. This occurred both within Shia institutions, namely the Kateb Institute of Higher Education and later the Marefat High School in western Kabul, as well as within mainstream women's organisations[15] and other social justice groups. Later, they were joined by educated Shia women not affiliated to any particular institution. They met with the Speaker of the House, the Shia Mullahs Council, and both Sunni and Shia members of parliament. They reported that several Shia MPs were not supportive of their efforts and felt that the majority of Sunni MPs were unengaged from the process altogether.

The main concerns emanating from civil society centred around articles that discriminated against women by restricting their freedom of mobility and requiring them to obey their husbands, the sexual obligations of wives to their husbands, the marriage age for girls (age nine, in the original draft) and the age of children when custody is granted from the mother to the father.[16] Other concerns were also discussed, such as a reference to a fifth wife in one article, allowing the use of *mu'ta* (temporary marriage, for as little as several hours), and other

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14   Sometimes referred to as "Ayatollah Mohammad Asif Mohseni" or "Sheikh Mohammad Saif Mohseni."

15   For example, the Afghan Women's Education Centre, the Humanitarian Association for Women and Children in Afghanistan (HAWCA), and others. See Section 2.4 for full details.

16   In Hanafi Sharia law, custody over children in the case of divorce is arranged so that the mother has custody for the child's early years, before custody is transferred to the father. The exact age for the transfer varies according to different bodies of jurisprudence.

issues. Working with allied MPs, civil society organisations succeeded in delaying a vote on the bill normally to have occurred in February 2008, according to the parliamentary schedule, while they reviewed the bill in detail and researched amendments drawn from other Shia jurisprudence sources.

During this delay, the Afghan Independent Human Rights Commission (AIHRC) and several civil society organisations worked with the Kateb Institute of Higher Education, which organised a three-day seminar to review and modify the law.[17] They invited religious scholars from Qom (Iran) as well as civil law experts,[18] who provided input, and the event produced a revised draft of the law. An official from the AIHRC described the event:

> *We had information that Mohseni drafted this with his students who were in Mahshad, because they have a good relationship with Iran. So we wanted to hear for ourselves the knowledge of the Shia scholars from Iran. They also invited some Afghan scholars from Iran. The seminar was very interesting. There were also people from parliament, Shia scholars, from the Council of Shia Scholars. Finally, they made a decision that this law has a lot of defects. They brought a lot of changes. After that, we made a new draft. Most of the changes were about marriage, marriage age, child marriage,* mahr; *quite a lot of changes were proposed.[19]*

While the bulk of their recommendations were rejected by allies of Mohseni's in parliament according to MP respondents, civil society groups worked with allied MPs and succeeded in bringing changes to four articles. The changes included raising the marriage age to 16 for girls and 18 for boys, raising the age for paternal custody of boys to seven years (from two years) and girls to nine (from

seven) years, and bringing several conditions to the clause that wives must seek the permission of their husbands to leave the home. While much of the draft was left intact, these changes were significant and curtailed some of the more discriminatory elements of the law.

Early on, a letter signed by several civil society organisations was sent to the President's office requesting amendments to the law, but their request was apparently rejected, and by 8 March 2009 concerns were again raised in a meeting with President Karzai over the bill.[20] The organisations seeking amendments to the law reportedly decided that if they were unsuccessful in working with the Wolesi Jirga, they would then focus their lobbying efforts on the upper house. The Meshrano Jirga, the upper house, sent the law to the president for signature, apparently after a review by the Supreme Court that left it unchanged. In March 2009, with 15 days left for the president to sign before the law would come into force automatically, civil society turned to the media. They felt this was a necessary last resort, though it drew frustration from President Karzai in light of the swift international condemnation that followed.

2.4   The vote in parliament

It was this unchanged version that returned to the parliamentary agenda in February 2009. A vote occurred in the Wolesi Jirga, but there was significant confusion among members of parliament around whether the text of the bill itself was voted on or whether a vote occurred only on a one page proposal put forth by MP Sayyaf that there would be no separate court system for Shias. It has since been confirmed that neither house actually voted on the law in whole or in part,[21] but rather, the lower house issued a statement that read as follows:

> *On Saturday, 30 January 2009, the Lower House approved the Law on Personal Affairs of Shiites with the following:*

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17 A recently established post-secondary institution formed by progressive Shias who have both religious and secular higher educations.

18 Several Afghan religious scholars based in Iran attended, as well as an Iranian high clergyman Ayatollah Adous, and Iranian civil law expert Dr Hekmatya.

19 Author interview, Kabul, 10 June 2009.

20 Author interview, Kabul, 17 June 2009.

21 Afghan Parliamentary Assistance Project (APAP) Legislative Session Summary, June 2009.

With the agreement of a committee of Sunni and Shia scholars on the omission of some issues, and in accordance with Article 131 of the Constitution, the Supreme Court shall pave the way for implementation of the Law on Personal Affairs of Shiites consisting of 249 articles. The implementation of the law does not require separate courts and judges.[22]

In the Meshrano Jirga this statement was not debated, but approved by party leaders, apparently without the knowledge of other representatives, many of whom did not learn of the bill at all until much later. One observer called this deceitful, noting that the statement's wording "was written to make it sound like the bill was passed, when it had not."[23] It would seem that the statement's purpose was to serve as an *advisory* to the Supreme Court to begin applying the law's principles in the courts, despite parliament having not actually voted on the law, and the lack of any precedent for using a short statement in place of an approved law. From there, the Supreme Court forwarded the law on to the President's office, where it was signed by President Karzai, apparently on the advice of one or more advisors.

The following table lists the main steps in the lawmaking procedure in Afghanistan (left column)[24] and the process that the SPSL followed (right column):

	Lawmaking Procedure	Shiite Personal Status Law Procedure
1	A proposal for a law is drafted by a minister, agency head, independent government department or members of the National Assembly.	2004-2007: Law is drafted by the Shia Mullahs Council, led by Mohseni, reportedly by a group of Afghan and Iranian mullahs in Mahshad.
2	The drafted law is then sent to the Ministry of Justice to be included in the Council of Minister's Annual Legislative Work Plan (but is not always included, in which case the following is needed: Consent of Ministry of Justice; or suggestion of Minister of Justice; or initiative of Council of Ministers; or order of the president or vice president).	25 June 2006: President issues a decree for the law to be drafted and approved by the parliament.
3	The law is then forwarded to ministries of Planning and Finance to be approved.	2006: Draft bill of 750 articles is prepared. A version of it is published in a monthly magazine of the Ulama Council's, *Mahnama-e-Marefat Denee*.
4	If the Law was drafted by the National Assembly, it needs approval from 20% of the chamber from which it came, and is then administered by the chamber's Internal Rules of Procedure. If approved by the chamber that originally drafted the law, it is then sent on to other chambers for approval. If these chambers do not agree on the drafted law, a joint commission must be formed to solve the issues. If the issues become resolved, the law needs a 2/3 majority approval from the Wolesi Jirga. If unresolved, the draft can be re-submitted to Wolesi Jirga at the next session.	2007: Law is given to the Ministry of Justice's lawmaking department. Technical changes are brought to bring legal terminology to the draft.

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22   As translated in the APAP Legislative Session Summary, June 2009, 5.

23   Author interview, by telephone, 29 June 2009.

24   The left column derives from the legislative process table prepared by the Afghanistan Parliamentary Assistance Program, of State University of New York (SUNY).

	Lawmaking Procedure	*Shiite Personal Status Law Procedure*
5	The National Assembly then presents the approved proposal to the president who has 15 days to approve or reject it. The president then either approves, rejects, amends the proposal or takes no action. If it is approved or no action is taken within 15 days, the draft is considered law. If the president rejects or amends the draft, it has to be re-submitted to Wolesi Jirga who then has to re-approve it. If it is not re-approved by at least a 2/3 majority, the draft does not become law.	Draft sent for review to Kabul University's Faculty of Sharia Law and Faculty of Law, as well Academy of Sciences for review.
6	The Legislation Department of the Ministry of Justice puts the draft through a final review stage.	Draft is sent to the Legislative Committee of the Ministerial Council, where it is approved and then introduced to the Parliament via the Ministry of Parliamentary Affairs and Ministry of Justice, according to the official report from MoJ.
7	Those who drafted the law then present it to the Council of Ministers for approval.	The bill comes to the parliamentary agenda for the first time. Briefly discussed in Wolesi Jirga, but voting is postponed until the following year following intervention by civil society organisations.
8	Once approved by the Council of Ministers, the law is approved by the government. It may require approval from the National Assembly, in which case it is forwarded to the Wolesi Jirga and then to the Meshrano Jirga.	2008: Some recommendations from Kateb Institute of Higher Education and some MPs are accepted in a revised draft reduced to 253 articles, briefly discussed in parliament.
9	An urgent legislative draft can be approved by the president if the National Assembly is not currently in session and this draft is then considered law. The National Assembly must receive the law from the president to approve the decree within 30 days of the next in-session period, and has the ability to reject it. If rejected the decree becomes void.	January 2009: Wolesi Jirga issues a statement implying the bill was voted upon, specifying that there will be no second court system for Shiite Personal Status Law, and advising the Supreme Court to apply the law.
10	When no there is no need for the National Assembly to approve the drafted law, it is then published within the Official Gazette, resulting in the draft becoming law.	February 2009: Meshrano Jirga sends the law for review to the Supreme Court. Supreme Court sends the draft unchanged back to the Meshrano Jirga. Meshrano Jirga sends the law unchanged to the President for signature, without discussion or voting in the house.
11	The president has 15 days to sign it, or it comes to force automatically. If president sends it back to the parliament for revisions or rejection, it can pass unchanged if 2/3 of MPs vote against the president's recommendation.	March-July 2009: The law is signed by President Karzai. Subsequent criticism from the international community and Afghan civil society results in a promise to review the law. In July a revised version of the law is announced by the Ministry of Justice, following a review process, though containing some of the contentious articles of the original. This version is published in the Official Gazette no. 988 on 27 July 2009 (http://www.moj.gov.af/?lang=da&p=lable69).

3. The Making of the SPSL:
Problems and Tensions in the Lawmaking Process

3.1 Deviations in technical processes

The consensus which emerged from nearly all stakeholders who were consulted as part of this study was that the SPSL failed to follow the legal procedures that regulate lawmaking in Afghanistan. While the experience starkly illustrated critical weaknesses in the enforcement of procedure, respondents also largely agreed that this was a particularly deviant case. Several conditions colluded that made this law particularly vulnerable to various manipulations, such as its basis in Sharia law, its application to a minority seeking political recognition, its gender aspects and the personalities involved in its creation, among others. At the same time, these vulnerabilities are likely to resurface in other legislation that touches upon any one or a combination of these conditions.

There were numerous irregularities throughout the legislation process. From the very outset, many respondents identified that the first flaw was that the law was drafted outside of a government institution by individuals without relevant legal or legislation expertise.[25] As laws are normally required to be drafted by the ministry most relevant to their content, this could perhaps be seen as a case of sub-contracting lawmaking to a clerical circle by the Ministry of Justice. Some respondents, as well as western media coverage of the SPSL, frequently speculated that the law may have been "given" to the Shia clerical community in an effort by President Karzai to attract political support from Shia leaders in anticipation of the upcoming presidential elections.[26] Others believed that the Ministry of Justice merely rubber-stamped a procedure already underway by an outside interest group of conservative Shia clerics.

At the same time, supporters of the law argued that the process the bill underwent was especially rigorous in the number of groups invited to review it,[27] and that it necessitated expertise outside the government, drawn from Shia jurisprudence. Pointing to the degree of expertise of the clerics who worked on the law, a Shia MP said, "It was not like this law was prepared, approved and enforced defiantly. It required a long process."[28] However, respondents from the academic community criticised the lack of lawmaking expertise of the mullahs who worked on the draft, highlighting three significant problems with this: the absence of appropriate legal terminology; the structure and organisation of the articles; and the content's incompatibility with the Constitution, international human rights law and other sources of Shia *fiqh*.

A second key problem was the lack of input from the majority of the lower house and the failure to vote on the bill article by article. However, while there was minimal discussion in the general assembly, the bill was discussed in committees, with a review led by the Judicial Committee, a committee for whom Mohseni's close ally, MP Alemy Balkhi, was rapporteur. This was cited as justification by some as to why there was not fuller discussion of each article by the general assembly. Among MPs, there were differing accounts of the depth of the discussion. Many said little discussion had occurred and when it did, it was dominated by powerful mujahiddin figures who desired the bill to be left intact, while MPs advocating for the bill insisted there had been thorough discussion involving both male and female MPs.

Perhaps the most glaring deviation in process inside the parliament was the decision to use a broadly worded statement "advising" the courts

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25   Respondents reported it as having been drafted by a group of two Afghan and one Iranian clerics in Mahshad (Iran), or by members of the Shia Mullahs Council, under the leadership of Mohseni.

26   Ben Farmer, "Hamid Karzai signs law 'legalising rape in marriage'," *The Telegraph,* 31 March 2009.

27   The Academy of Sciences, Kabul University's Sharia Law Faculty, Ministry of Hajj and Religious Affairs, the Supreme Court, and the Mullahs Council of Afghanistan were invited to review the draft bill.

28   Author interview, Kabul, 31 May 2009.

to apply legal articles, in place of a law voted on and discussed in full by both houses of parliament. There was a significant level of confusion among MPs regarding the purpose of this statement. Some MPs believed they had voted on the bill proper, some believed they had voted only on a statement that there would be no separate court system to administer Shiite Personal Status Law, and some do not recall having voted on anything at all. One MP recalled, "Many people voted for it without knowing it was the last voting opportunity" to do with the bill.[29]

It is evident that a number of people in parliament elected to cooperate in sidestepping the normal procedures, at behest of the bill's original architects, or were too unengaged, or perhaps in some cases too intimidated to question the lack of due process. One MP argued that several of her colleagues simply did not want the issue on the formal parliamentary agenda for open discussion and voting, and hence manipulated the usual procedure.[30] The Legislative Session Summary of the Afghanistan Parliamentary Assistance Project (APAP) credited people's motivation to "an apparent gesture to the bill's Shia sponsors" and notes that "Assembly membership intended to issue tacit approval of the document as an "advisory" piece to the Supreme Court."[31]

A further important weakness in the process was the failure of the Speaker of the House, Yunus Qanooni, to flag important deviations in process, such as the lack of a proper vote.[32] According to many inside the parliament, Qanooni wields tremendous power over the parliamentary process and there appears to be insufficient checks on his actions. Parliament's General Secretary, Golam Hasan Gran, and other

MPs similarly failed to flag the evident errors in how the bill was being treated. One observer points out that this is not exceptional:

> *It's often not clear if the decree is passed or not. But the parliament just sits there, they don't bring this up and say, "hey, we have to follow a process." There are several laws that were originally decrees but they are now being treated like regular, enforced laws.*[33]

The failure to correct errors in process was likely further facilitated by the lack of a functional bill tracking system in parliament, which could systematically catch anything askew from the normal procedure. Parliament uses a single ledger for recording activity, recording on a CD the activity in parliament and later transcribing it. Documenting parliamentary activity is further confused by a system that is simultaneous as opposed to consecutive: bills are amended by multiple committees at the same time with no hierarchy of jurisdiction, making for a process that is difficult to monitor. Further, having specific rules that govern how each bill is to be considered would help prevent spoilers from bypassing or co-opting discussion and voting. For instance, bills of varying size (by the number of articles) would each necessitate different degrees of discussion prior to voting. These two weaknesses in practice make the system more vulnerable, particularly at a time when there is an uneven playing field in parliamentary politics between those who are backed by political networks from ethnic party factions and those who are independent.

It was also reported that the secretary in the parliament falsely claimed, whether mistakenly or intentionally, that a quorum had not been achieved that would be necessary for the legitimacy of a vote on several reforms that had been negotiated by the bill's most staunch critic, MP Shinkai Kharokhail, and others.[34] In the upper house, several female

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29   Author interview, Kabul, 11 June 2009.

30   Author interview, Kabul, 11 June 2009.

31   Afghanistan Parliamentary Assistance Project (APAP), *Legislative Session Summary*, January – June 2009.

32   It should be noted that Qanooni is closely allied with MP Hossein Alamy Balkhi, after he ran as his Vice-President in Qanooni's "New Afghanistan" party in the 2004 presidential elections, coming in second. Now an independent MP, Balkhi has played a prominent role supporting Mohseni on the Shiite Personal Status bill as well as on other affairs.

33   Author interview, by phone, 29 June 2009.

34   Numerous other inconsistencies were identified by respondents. One MP reported that the Chief Justice of the Supreme Court, Fazel Hadi Shinwari, claimed that he never in fact signed the letter issued by the Supreme Court that assessed the bill as being in conformity with the Constitution. Shinwari reportedly suggested to this MP that

members of the Meshrano Jirga reported having never seen the draft and were unaware whether the house had voted on it or not. They later learnt that it had already been signed by the president, without coming back to the upper house for approval. Two senators reported that the Meshrano Jirga had concerns with the bill and sent it to the Supreme Court for reconsideration. However, the senate Speaker went ahead and approved the bill, without their knowledge or consent.[35] A civil society respondent commented:

> We met with some women MPs and asked about the procedure and why it was passed. And they told us it was a package and it did not follow the proper procedure, like other laws… We don't know how it came to be that no one should read the articles and give comments. If this had happened, there would be many people who do not accept the law.[36]

Despite a visible improvement in parliament's capacity over the last four years, noted earlier, the ability to bypass basic steps of the lawmaking procedure show that important gaps have a detrimental effect on the legitimacy of the system. As one foreign observer of parliament noted, "We have a parliament that's been elected, but every once in a while we can drive a small camouflage truck through the back entrance into parliament and then manage to get Karzai to sign it."[37]

3.2 Lawmaking in Afghanistan's Wolesi Jirga

Despite the evident sidestepping of proper procedure, there is nevertheless an evident buy-in and desire for the rule of law apparent across the spectrum of perspectives on the Shia law's content. This is shown in the desire of all parties for the law to be legitimated through the parliament, even

if this required cutting corners. For example, it is notable that a mujahid and clerical figure like Mohseni used a legal channel by which to pursue his interpretation of Sharia-sanctioned practices for the Shia sect. Customary law[38] continues to hold sway over the everyday lives of Afghans, particularly outside of the capital, and Mohseni might have found it easier and faster on a short-term basis to use this informal framework to impose his reading of the *fiqh* on personal status matters. It is significant that he sought to legitimate the law using formal state structures like the parliament. Yet, alternative support networks were relied upon to pursue the desired outcome, such as utilising alliances and allegedly trading support. The continued use of these tactics as well as the ongoing presence of power-holders carried over from a very different kind of political era, where warmaking superseded the basic obligations of a state towards its citizens, inevitably impacts on the kind of lawmaking which occurs. As one woman, anxious over the precedent set by the Shia law, points out:

> This opens a door for many other such kind of laws to ban women under different tricks, more sophisticated than the Taliban, who just announced what women had to do. These guys are doing this indirectly.[39]

Regardless of their opinion of the law's content, it was noteworthy that all of those MPs interviewed demonstrated a precise knowledge of the lawmaking procedure from a technical point of view, as well as respect for parliament as a forum where rules governing society are legitimated. For instance, one male Shia MP had strongly disagreed with the modifications brought in parliament to the ages of boys and girls for custody to be granted to the father, marriage age and polygamy, but he accepted them once the parliament had voted in favour of these changes.[40] Those who were disappointed with the content of the Shia law still saw parliament

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his signature had potentially been forged.

35   Author interview, Kabul, 17 June 2009.

36   Author interview, Kabul, 14 June 2009.

37   Author interview, Kabul, 29 June 2009.

38   Defined as the "means by which local communities resolve disputes in the absence of (or opposition to) state or religious authority," as put forth by Thomas Barfield, "Custom and Culture in Nation-Building: Law in Afghanistan", *Maine Law Review*, 60, no. 2 (2008).

39   Author interview, Kabul, 14 June 2009.

40   Author interview, Kabul, 15 June 2009.

as able to provide the opportunity for reform of the law and to ensure that lawmaking is subject to the will of the people. One MP remarked, "Within the next two years, we can approve other laws so we don't need to fall back on Islamic laws or customary practices."[41] For almost all respondents to this study, lawmaking was a system for which they held profound faith and perceived to be the primary means that their society could be changed. This is significant in a context where life has long been played out in a vacuum of rule of law, where politicians and citizens have used unofficial systems of governance and law enforcement in an environment where there has been little reliance on the state.

This finding also points to the growth of some indigenous roots in parliamentary rule. Parliament is not new to Afghanistan, and was first introduced in 1964. This is reflected in today's Wolesi Jirga, where there is "some sense of self"[42] as one parliamentary expert noted. MPs are rediscovering the place and value of parliament, rather than starting from scratch. And this, naturally, takes time, though there has been evolution since parliament's re-establishment:

> The warlords are moving towards becoming more real MPs. When this parliament formed, it was a zoo. There were water bottles being thrown, screaming in the plenary, there was a total lack of respect for each other. Today is a vastly improved situation. The quality of debate has not improved exponentially for its intellect, but it is a lot more cordial, and sartorial.[43]

However, while those on the parliament floor give credence to the system that exists on paper, many statements from respondents pointed to a public detachment from parliament and little engagement or awareness of this system among ordinary Afghans. It was evident that most interviewed in this study had little if any sense of what the general public thought about the SPSL. The public detachment

is a potential destabiliser, if not a new one, to Afghanistan's political development. A fundamental step in the process of political institution-building is the establishment of legitimacy, defined as general normative support for political institutions.[44] Specifically, respondents often pointed to little prevalence of the idea of having a constituency to which an elected official is accountable, a finding echoed in other recent research concerned with the Afghan parliament.[45] This was evident in the case of the SPSL, which largely excluded any public debate or input, and was not covered by the national media until it had already been signed into a law by the president. Despite the highly visible conflict over the law, with demonstrations in the street by both those for and against revisions to the law, the actual numbers of citizens who were engaged on the issue consisted of small, specific, urban-based groups. Mohseni's "supporters" are largely the students of his school. He lacks wide support in the broader Shia community, for reasons that will be described further on, but this was irrelevant to his ability to influence lawmaking. Similarly, protests occurred in Kabul only and women's organisations in the capital did not partner in any way with provincial women's organisations.

It is unusual for members of the public to go to their MPs with regards to legal reform or lawmaking issues, and there are few forms of public forum whereby people partake in policy processes. The routes to influence lawmaking are not public and require access to various resources: networks, influence, and wealth for example. As Wordsworth comments, "a complex web of patronage networks exists within (and outside of) parliament, and without consolidated party foundations, the rules of the game are very much determined by the strongest players."[46] The ongoing impact of patronage networks, as shown in the case of the SPSL, is examined next.

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41   Author interview, Kabul, 16 June 2009.

42   Author interview, Kabul, 21 June 2009.

43   Author interview, Kabul, 21 June 2009.

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44   William Maley, "Looking Back at the Bonn Process" in *Afghanistan: Transition Under Threat*, edited by Geoffrey Hayes and Mark Sedra (Ottawa: The Centre for International Governance Innovation and Wilfrid Laurier Univesity Press, 2007), 3-24.

45   Anna Wordsworth, *A Matter of Interests: Gender and the Politics of Presence in Afghanistan's Wolesi Jirga* (Kabul: Afghan Research and Evaluation Unit, 2007).

46   Wordsworth, *A Matter of Interests*.

3.3   The impact of patronage networks in lawmaking

The process behind the SPSL illustrates sharply the legacies of Afghanistan's past conflicts and the resultant heightened role of ethnic politics, which continue to permeate the state's formal political institutions. Part of that legacy is witnessed in the continued currency of patronage networks and behind-the-scenes deal making that fuel Afghan politics. Powerful figures like Sayyaf and Mohseni dominate on the basis of allegiances and power from the era when they led resistance factions against the Soviet occupation. For instance, many respondents speculated that Sayyaf's eventual support for the SPSL and his call to pass it without discussion from the floor in parliament, a move which surprised many given Sayyaf's often anti-Shiism sentiment,[47] may have been a political trade with Mohseni.[48] One respondent speculated that a trade occurred in which Sunni scholars[49] facilitated the approval of the SPSL unchanged, in anticipation of their own personal status law soon making its way to parliament.[50] This shows the importance attached to guaranteeing a meaningful role to Sharia in lawmaking for both Shia and Sunni clerics, who will form cross-sect alliances to preserve the pre-eminence of religiously-sourced laws.

The timing of discussion over bills and voting is also open to manipulation, facilitating quick movement when the bill's proponent is influential:

> We did not know what happened. Neither did the members of the parliament, what day it was voted, who voted for it... What happens sometimes is that they do it in specific situations. For example if someone wants to approve a law, they can call all of their allies to come to parliament on a day when many others are not present. He can speak to people, and say 'the time is short, let's just approve it.' Somehow it became unexpectedly part of the agenda of that day or that week.[51]

There was also much speculation surrounding the SPSL over Karzai's signature, in international media coverage as well as among MPs and civil society. It was suspected that Karzai had struck a deal with Mohseni in return for support from the Shia minority in the upcoming elections. There was distrust within civil society, especially as to whether Karzai's promise to have the law revised would be followed through: "We wanted the changes to be made faster. But we think they don't want this, because it's an election period and they are playing politics."[52] By July 2009 however, the Ministry of Justice announced a revised version, omitting several of the articles that had attracted the most criticism.[53] Incidentally, a faction of the political party still associated with Mohseni was by now supporting another presidential candidate, Dr. Abdullah Abdullah. On 27 July 2009, the revised law was quietly published in the Official Gazette, while the international and domestic media were largely preoccupied with the presidential elections taking place in August 2009. However, it's unclear whether the revised version was ever reviewed by either house of parliament again.

Another respondent commented:

> When the international community raised its voice, Karzai said the law would be revised because he doesn't want to lose the international community's support during an election. But why did the change not happen until now? It

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47   According to Human Rights Watch, Sayyaf's forces were responsible for the mass killing of Shias, raping women and burning homes in the Afshar neighbourhood of Kabul in 1993. His Ittihad-i-Islami Baraye Azadi Afghanistan party is known to harbour anti-Shia sentiment.

48   It is unusual, though not unheard of, for Sayyaf to form alliances with Shia or Hazara leaders. In 2006, he formed an allegiance with Haji Mohammad Mohaqqeq.

49   The bill was reviewed by a joint council of Shia and Sunni clerics at one point.

50   Author interview, Kabul, 10 June 2009.

51   Author interview, Kabul, 14 June 2009.

52   Author interview, Kabul, 10 June 2009.

53   Civil society organisations, however, are unsatisfied with the revised draft, releasing a letter to President Karzai in early July 2009, claiming that most substantive content of the law has been left intact, with only slight wording changes concerning key issues such as polygamy, women's right to work, and wives' sexual obligations to their husbands, according to Heidi Vogt, "Afghan Activists Still Oppose New Marriage Law," *Associated Press*, 13 July 2009.

was two months that the law had been passed. Because if he does something, he will lose Mohseni's support during the election. He has met with Mohseni just after the protest. He is just asking everyone to make changes. He is biding his time. Then he will decide who is more important: civil society and the international community, or Mohseni.[54]

The widespread belief that trades were being made for political support is emblematic of an erosion in confidence that Afghanistan's new political structures can overcome patronage networks and alliances sustained on the basis of sect, ethnicity or tribe. Identity-based politics thus risk subverting *ideas*-based politics,[55] with consequences for how parliamentarians transfer the will of the electorate into the policymaking arena. When policy processes are driven by identity ties and patronage trades, the relevance of decision-making and its outcomes to ordinary people is questionable.

3.4 Identity politics at play in the Wolesi Jirga

Some respondents from the parliament felt that when Sayyaf chose not to openly oppose Mohseni's bill, claiming that it would go against his beliefs to review a Shia law, other Sunni parliamentarians were deterred from engaging in debate over the bill. The bill consequently came to be seen as a strictly Shia issue. The lack of participation from non-Shia MPs helped clear space for Mohseni to lobby for the bill to be left intact, while also utilising his relationships with President Karzai and other Sunni politicians. Discussion in parliament over the SPSL was affected by sensitivity over who had the right to participate in analysis and review of the law. Many reported that Mohseni explicitly engaged a rhetoric of Shia ownership over the law, with some Shia MPs also insisting that this was theirs alone to review. A Sunni female MP explained, "(Male Shia MPs) said there is no space for us to review this law. This is a pure Shia issue. Non-Shia MPs shouldn't comment

on it."[56] Another MP struggled to obtain a copy of the bill, discovering that it had been distributed only to Shia MPs.

Many approached the issue with great caution, in an environment where identity politics eclipsed discussion over the substance of the bill. The Speaker of the House reportedly expressed reservations about speaking out against the law, worried that his opposition would be perceived to be on account of his being a Sunni.[57] Several MPs allegedly avoided discussions over the law, seeing it either as a "Shia issue only," or anxious over being perceived to undermine or interfere with the Shia community's desire to have its own personal status law. Several also speculated over whether the Minister of Justice being a Shia played into his role in allowing the law to proceed forth without the required checks.

3.5 The missing public: Lawmaking in the absence of parties and constituencies

Regardless of the motivations for the acquiescence of a sufficiently broad network of non-Shia MPs, it is clear that certain individuals played particularly influential roles in the Wolesi Jirga. The SPSL bypassed the critical legal steps necessary for its legislation, at the behest of individuals. In doing so, it revealed a procedure that leaves opportunities for co-option by interest groups or alliances, which is normal to an extent in any parliament. However, the vast imbalance in access to these power networks among MPs is particularly pronounced in Afghanistan and is situated in the political legacies of the mujahiddin era.[58] Those whose access is the most unrestricted are, as others have pointed out, mujahiddin figures who amassed in the parliament at its creation. These people use their political resources from the resistance era when they operated in a lawless, hostile environment where

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54 Author interview, Kabul, 11 June 2009.

55 Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga*.

56 Author interview, Kabul, 11 June 2009.

57 Author interview, Kabul, 10 June 2009.

58 Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga*.

factional alliances and patronage networks were the political currency of choice.[59]

This situation raises the question of whether political institutions that are designed to be legitimate, fair and representative can operate effectively when the actors who occupy them use political strategies originating from a vastly different kind of political context in terms of purpose. The bulk of the years of experience of many of Afghanistan's dominant political actors lie in the lawless years of anti-Soviet resistance, not inside a parliament of elected peers. The impact that such actors exercise over the country's ambitions for democratic development have been explored at length elsewhere.[60] Yet questions emerge again from the experience of the SPSL as to whether such actors will ultimately erode the democratically-inclined institutions that house them, or whether those institutions might eventually edge them out as a new generation of politicians move in over time, unbound to the politics of the jihad era. The answer rests in part on the accountability mechanisms in place and to what extent they are monitored and used by the voters, the media and civil society.

For the present, there is little tradition among the Afghan public to visibly demand their representatives be held to account. The lack of public participation in lawmaking is related to limited public access to MPs. One observer shared:

I don't know if MPs have offices outside. Everyone uses mobiles to reach them. But overall people don't make use of their MP. They don't know. If they did, we wouldn't need so many election projects. They are happy to be fed lunch, and then leave. They have low awareness of how much they are needed.[61]

Most MPs remain in Kabul when parliament is in session, limiting potential contact with constituents.[62] One observer, an expert in parliamentary development, noted that there is little sense among parliamentarians of who exactly their constituents are, nor any sense of being public servants who represent people to whom they are answerable. He blamed the single non-transferable voting procedure as being partly at fault[63] for fostering a lack of accountability to constituents.[64] Others have found the somewhat hostile environment for the growth of political parties to indirectly encourage voting along lines of ethnic solidarity rather than in the interests of constituents.[65] Other procedural aspects further hinder accountability. For example, MPs in the Wolesi Jirga raise green or red cards when voting. The public and civil society are unable to monitor how individual MPs vote, and thus cannot hold them accountable for their actions on specific bills. It also fuels resentment from a civil society increasingly critical of the parliament: "They have to know this, that they are sitting there as our representatives, to take our voices from the ground to there. They are us. They should be feeling like us. But most of them are not. They are just sitting."[66]

Religion serves as the dominant ideological connection between different ethnic and sectarian factions, and unites former mujahiddin, rather than strong party platforms that include policy-related promises to the electorate. This is a potentially

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59 Barnett Rubin, "The Fragmentation of Afghanistan: State Formation and Collapse in the International System" (New Haven and London: Yale University Press, 2002).

60 See for instance, International Council on Security and Development (ICOS) "Afghanistan's Presidential Election: Power to the People, or the Powerful?," (London: March 2009); Ashley Elliot, "Policy Options for State-Building in Afghanistan," The Paul H. Nitze School of International Studies (April 2009), http://www.sais-jhu.edu/academics/regional-studies/southasia/pdf/Afghanistan%20Political%20Parties%204ELLIOT.pdf; and Thomas Ruttig, "Islamists, Leftists, and a Void in the Centre: Afghanistan's Political Parties and Where They Came From 1902-2006" (Kabul: Konrad Adenauer Stiftung, 2006).

61 Author interview, Kabul, 16 June 2009.

62 Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga.*

63 Afghanistan uses the single non-transferable vote system and has laws that discourage the formation of political parties. For detailed criticisms, see Anna Larson, *Afghanistan's New Democratic Parties,* and Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga.*

64 Author interview, Kabul, 21 June 2009.

65 Maley, *Afghanistan: Transition Under Threat.*

66 Author interview, Kabul, 16 June 2009.

major destabilising force to state-building.[67] When there is no legitimate mechanism that allows the government to regulate control over the role of Islam in law and politics, "any delegation of this authority to institutions outside the control of the government is liable to create alternative centres of power and political legitimisation."[68] The weak role of political parties was often cited by respondents as a culprit behind the passing of the SPSL.

There are an estimated 105-130 registered political parties, the bulk of which find their roots in either Afghanistan's old leftist parties, or its old mujahiddin militant parties,[69] carrying over into parliamentary politics allegiances, tactics and ideologies that characterised those eras. Those in between, with alternative visions for the future, struggle to access resources, power structures and public appeal from a population that had a three decade break from a parliamentary system and has little history of a robust partisan system.[70] As one respondent, who studies Shia politics in Afghanistan, noted:

> *Smaller parties don't even have money for an office... the current power structure gives a lot of power to radical circles, to people like Sayyaf and Mohseni, at the cost of everyone else in this country. This is a very important law affecting millions of people, and yet it is in the control of these people.[71]*

MPs tend to speak firstly from a sectarian, ethnic or personal belief. "You don't have parties, you have individuals. Some have more influence, leadership, ethnic allegiance, or money than others, that's how they work... this kind of law would never be passed with good political parties."[72] In a situation many

Afghans perceive with urgency, where the huge problems facing the country demand commitment and care from those in office, a political culture that is organised more along ethnic lines than ideological partisan interests is all the more of a disservice. "We need people who are operational, who will work, not there because of their ethnic background."[73]

In the absence of strong political parties, civil society may increasingly, and arguably should, serve as a bridge on an interim basis between the public and parliament, seeking to play a watchdog role over politicians while also lobbying MPs on gender and human rights issues of relevance to their agendas. This is a role that is by no means well consolidated or always effectively applied, but which did characterise civil society's involvement in the SPSL, as well as in other laws.[74] This should be considered in the context of civil society's ongoing development and evolving sophistication. A legal scholar trained in Iran and active in the women's movement said:

> *In general, civil society is effective in influencing lawmaking in Afghanistan. There was a law under the Taliban that if a women's feet showed, she was beat right there in the street. They didn't need courts; the law was doled out right on the streets. There are people who are trying to go back to this and we are preventing them from doing so.[75]*

This puts further onus on civil society's capacity for advocacy and lobbying, and their capability to coordinate effectively and show unity. It also demands some assessment of civil society's own ability to represent sectors of the public and to work on behalf of the public interest in a balanced way; there has been little analysis of this ability of Afghan civil society to date, or their potential role in filling gaps presented by the SNTV system in terms of representation. Further, the implications for civil society in light of the weak role of political

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67   Elliot, Ashley. "Policy Options for State-Building in Afghanistan." The Paul H. Nitze School of International Studies (SAIS), April 2009.

68   Martin Lau, *Islamic Law and the Afghan Legal System,* Yearbook of Islamic and Middle Eastern Law, 2001, http://www.ag-afghanistan. de/arg/arp/lau.pdf.

69   Ruttig, "Islamists, Leftists, and a Void in the Centre."

70   Larson, *Afghanistan's New Democratic Parties.*

71   Author interview, Kabul, 13 June 2009.

72   Author interview, Kabul, 13 June 2009.

73   Author interview, Kabul, 16 June 2009.

74   The Media Law, for example.

75   Author interview, Kabul, 17 June 2009.

parties also demands that civil society have nodes of entry into parliament in order to be privy to the parliamentary agenda, as well as to find channels for their recommendations and priorities. To this end, they depend to a great extent on the modestly sized camp of MPs who maintain links to civil society groups.

3.6 Contesting Sharia terrain: Shifting grounds

When ideological confrontations erupt over laws that speak to religious values, the ownership over religious doctrine and thus the political and cultural dominance of traditional power-holders is challenged. This has led in Afghan politics to a discrete diversification of who endorses sources of interpretation of Sharia and sacred texts and the choice of appropriate schools of jurisprudence. In the case of the SPSL, women MPs, MPs without clerical backgrounds and secular organisations like the Kateb Institute for Higher Education sought out alternative interpretations of religious scholars and challenged the ownership over lawmaking of the *mullahs* and clerical MPs. A small group of MPs partook in drawn out negotiations with proponents of the law who ultimately agreed to several modifications, while rejecting numerous others. On issues that were left unchanged, according to women MP respondents, Shia male MPs engaged a discourse of the sanctity of their rights endowed by religion, which were unchangeable, such as the right to take a second wife. On some issues, those seeking reform managed to secure numerous conditions that curtailed some of the control the law gave husbands over their wives, but could not have the article itself removed. The appearance of others contesting this sanctity, outside mujahiddin and clerical circles, makes the malleability of the *fiqh* more visible, challenging the power bases of the traditional political elite. Naturally, it prompts a reaction from those confronted. Civil society's role in this confrontation in particular will be examined more closely in Section 4.

In the current context, questioning of religious doctrine is highly prone to accusations of cultural corruption via western influence, as was demonstrated in the example of the SPSL. Mohseni, whom one male MP referred to as a "shopkeeper" of religion,[76] successfully used cultural contamination warnings to mobilise support for his position, speaking to issues of cultural and political autonomy, and the notion of a single pure form of Islam. The threat is articulated by one MP, "the law was purely from the *fiqh*, so it was difficult to debate this law openly as one could be accused of going against the sharia."[77] Other respondents from civil society and from the academic community discussed the difficulty of debating anything of a religious nature, as one's religious devotion is vulnerable to attack.[78]

Nevertheless, resistance to the clergy's ownership and authority on Sharia and doctrinal issues did emerge over the SPSL and will continue to do so over other legislation in a confrontation that will increasingly play out on the floors of the national assembly. In particular, it will make the discussion of human rights and gender issues in parliament highly contentious. Disagreements will very likely reemerge in parliamentary debate around the Elimination of Violence Against Women bill, as well as the Sunni family law bill, which both draw heavily on international human rights standards.

3.7 Lawmaking capacity in the parliament

Studying the SPSL as a glimpse into the legislative process in post-Bonn Afghanistan reveals a parliament that is struggling to reassert itself

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76 Author interview, Kabul, 3 June 2009.

77 Author interview, Kabul, 15 June 2009.

78 For instance, it was reported that Shinkai Kharokhail, an MP for Kabul, who first brought the proposed bill to the attention of civil society, faced numerous constraints in speaking out. Firstly, she struggled to access a copy of the bill, which had been distributed only among Shia MPs. When she brought proposed reforms to the draft to the Speaker of the House, she was directed to present them to the relevant committee. However, the committee chair then failed to present the reforms to the floor. Kharokhail then reportedly joined the joint commission addressing the bill, where discussions were consistently delayed or Kharokhail was not informed when meetings were taking place. Kharokhail, and others who joined her later in criticising the bill, reportedly became the target of name-calling and attacks on her character. The most common accusation was that she was "against Islam".

as a viable governance institution, but faces challenges that impede its ability to make the most of its contribution to the state-building endeavor. In addition to the dominance of MPs who are former commanders, those MPs who are generally unengaged in lawmaking also create challenges for the parliament's legitimacy.[79] Sunni MPs attributed their lack of discussion over the SPSL to it having no implication for their own sectarian interests, rather than seeing it as an issue that affects Afghan women, as well as a sizeable minority group, and potentially members of their own constituencies. One person commented, "It was such a sensitive issue, no one participated. And they have less knowledge about the issue. They didn't want to offend the Shias… everything was misinterpreted and misunderstood."[80] This relates back to weak ideological and partisan alliances that are replaced with ethnic or sectarian identity, sidelining issues like women's rights and how they are reflected in the lawmaking agenda.[81]

A female MP described the discourse in parliament as being full of "emotional blackmail", drawing on terms like "unity" and "solidarity" as supporters were implored to resist interference in the Shia law. She further pointed out that it was Shia women MPs who were among the least involved in discussions around the law. An outside observer commented, "Lots of Shia women were silent in the parliament. We didn't expect that. We thought Shia women would be especially active."[82] Many from both within and outside of the parliament resented that some MPs who became vocal against the law after condemnation from the international community had previously appeared to have been indifferent.

Respondents also tended to blame the lack of capacity in the parliament for facilitating the

extralegal route by which the SPSL was approved. Respondents variably pointed to low capacity and a lack of experience and knowledge in good lawmaking as hindering good legislation practices. There was also criticism over the lack of minimal education criteria for MPs, with specific concerns directed at MPs who were illiterate,[83] lacked secondary education, or who had allegedly forged education certificates.[84] Further, much criticism related to the presence of MPs whose political experience draws mainly from their days as resistance commanders: "It's like having a school built by a council of military experts. Someone who is an expert in blowing up bridges will not know how to build a school. That's the context of our parliament."[85] At the same time, many, including women MPs, also characterised the presence of mujahiddin figures in parliament as a lesser evil, happier that they are distracted within the government rather than causing trouble outside of it: "Even now, they have hundreds of thousands of other things they do on the side, imagine how much more it would be if they weren't in parliament?"[86]

Civil society respondents reported beginning to attempt to work with parliament, although they are distrustful in many ways of individuals in the parliament due to their human rights records in the resistance era and ongoing factional affiliations, as well as their questionable commitment to gender equity issues. Civil society has, however, managed to ally itself with some of the MPs it sees as favourable to its positions and respondents gave examples of how such alliances quelled resistance to bills backed by civil society.[87]

The relationships between the key stakeholder

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79 There is reportedly a group of five to ten MPs who have never entered the Wolesi Jirga building, not participating in a single parliamentary session.

80 Author interview, Kabul, 17 June 2009.

81 Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga.*

82 Author interview, Kabul, 11 June 2009.

83 Author interview, Kabul, 16 June 2009.

84 Author interview, Kabul, 11 June 2009.

85 Author interview, Kabul, 14 June 2009.

86 Author interview, Kabul, 16 June 2009.

87 The case of the Media Law was often cited in this regard by respondents. One civil society respondent commented, "Progressive journalists went to bat against fundamentalists in parliament. This encouraged us." (Author interview, 15 June 2009).

groups to the SPSL process, such as civil society and MPs, is important in understanding the modes in which such groups influence the legislative process. The roles and actions of several of these stakeholder groups (the Shia population, the clergy, civil society, the international community and media, and the national media) are examined in more detail in the following section.

4. Stakeholder Groups in the Making of the Shiite Personal Status Law

The following section provides descriptive accounts of the roles and reactions of key stakeholder groups in the SPSL process, highlighting some of the frictions between different interest groups. An analysis of some of these cleavages provides some indicator of how different players may seek to contest and shape lawmaking. Considering the lack of public access and thus input into the SPSL process, the basis on which each group organises and the means by which they participate in the legislative and policymaking processes are of particular interest.

4.1 Reactions from members of the Shia community

It is difficult to generalise about reactions to the law from the Shia community, as awareness of the law was apparently very low, reflecting the lack of transparency and participation that characterised the creation of the SPSL, even within the minority community the law will most impact. Respondents in this study, whether Shia or Sunni, generally agreed that increased legal and political recognition to the Shia minority is positive, and most supported the idea of Shias having their own personal status law, in light of the historical persecution the sect has experienced and their exclusion from political life for much of Afghanistan's history. A male MP from Bamiyan pointed to the Shia law as a manifestation of the principle of pluralism[88] and other Shia respondents echoed this view. Many also expressed the view, however, that the content and process behind the law had been co-opted by a Shia cleric who did not necessarily represent the wider community and whose interests in dominating the process were largely political. An Afghan scholar who studies the political history of the Hazara population noted, "What I can say for sure is that the degree of mobilisation behind the law is not very high. It did not go very far beyond (Mohseni's) own madrasa students. Some people who were

previously in his party were mobilised."[89] A Shia woman activist commented, "It's the right of Shias to have their own law. But not this kind of law."[90]

Context: Polarisation in the Shia population— ethnicity vs. sect

Divisions within the Shia community in Afghanistan are complex and find their roots in political divisions that occurred largely during the period of Soviet occupation. These have characterised reactions from the Shia community to the SPSL. Mohseni played a role of interest in this period, the aftermath of which continues to permeate the Shia community in Kabul. This also tells something of the politics of identity within the community and the competing gravitations between ethnic and sectarian identities, which came to the fore in the heated emotions surrounding the SPSL.

As a political figure, Mohseni has tended to appeal to urban Shias, not necessarily of Hazara descent, while a competing force, the political party Hizb Wahdat, focuses more on the Hazara minority as its main constituency, advocating for recognition on an ethnic basis over a sectarian one.[91] Mohseni's de-emphasis of ethnicity, as well as the perception that he is closely tied to Iran,[92] has minimised

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88 Author interview, Kabul, 15 June 2009.

89 Author interview, Kabul, 13 June 2009.

90 Author interview, Kabul, 10 June 2009.

91 Unlike the majority of Shias who are of Hazara ethnicity, Mohseni is a Shia from Kandahar. During the 1990s, a time of growing ethnic nationalism among the Hazara population, Mohseni was the only major Shia mujahid figure who had refused to join Hizb Wahdat in 1989, when it formed from the merging of nine Shia militant organisations. Instead, Mohseni continued to pursue the growth of his own party, Hizb Harakat-i-Islami Afghanistan, leading to what became an ethnic split between the two main Shia militant groups.

92 This is in line with a trend since the Iranian revolution drawing some Islamists within Iran's sphere of influence, particularly Shias, in a similar way to how many Sunni Islamists were drawn into the sphere of influence of Pakistan or other Sunni states. Many Afghan Shias went to Iran for their religious education. Indeed, Mohseni founded his own militant party in the Iranian city of Qom, with significant support from the Iranian government. Yet in recent years there is increasing

widespread support for him among Hazara shias while also attracting vocal opposition from some Hazara leaders.[93] However, many respondents speculated that Mohseni is attempting to regain influence among the broader Shia population, most notably of the Hazaras.[94] One observer commented, Mohseni "is a very political figure. He wants political influence."[95] Lacking an ethnic connection with a minority that is increasingly demanding political recognition, he has turned to religion. According to Hazara respondents, some in their community are distrustful of these overtures and saw the SPSL as part of an attempt to apply a divide-and-rule strategy, or alternatively, to bring Hazara Shias under Mohseni's sphere of influence and by extension, under Iran's. An academic observer in Kabul explained, "At the higher level, it's also about how close you are to Iran. The more religious and Shia you are, the closer you are to Iran, which means under Iranian political influence. The more secular you are, the more independent you are from Iran."[96]

While Mohseni mobilised his students behind the law, on the opposing side within the Shia community was a loosely connected network of secular Hazaras who have generally espoused internationalist views in terms of human rights, gender equity and social development.[97] This group includes the Shia faculty and staff of the Kateb Institute of Higher Education, a newly founded self-styled progressive university,

some staff working with the Afghan Independent Human Rights Commission,[98] and Marefat High School, an independent private school founded by Hazara intellectual and secular political activist Aziz Royesh. Royesh in particular has a long history of interaction with Mohseni, having written articles critical of his actions[99] and his politics throughout the 1990s. Royesh, a self-described democracy activist, is a secular figure from the Hazara community whose orientation is toward democracy, education and human rights. His opponent, Mohseni, propagates a vision of the future with Islamic values at its centre, and specifically those that reflect the Iranian state's Islam.[100] The divide between these two men represents in many ways a larger divide between Hazaras who are disenchanted with Iran and turning westwards, and other Shias who seek to carve out a political identity rooted in a sectarian emphasis, and who have accessed Iranian resources to do so.[101]

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disaffection with Iran among Shia Hazaras in particular.

93   Several Hazara leaders immediately expressed opposition to the SPSL and to Mohseni's role in it. The founder of Hizb Wahdat, Hazara MP Haji Mohammad Mohaqiq, outspokenly opposed Mohseni's draft of the SPSL, and another prominent Hazara politician, Wahdat leader and current Vice President Karim Khalili also reportedly voiced opposition to the law.

94   For example, in 2007 Mohseni completed work on a massive mosque complex, Khatam-al Nabyeen, which also includes a madrasa and university, as well as his television and radio station, which primarily use Iranian content. He also heads Afghanistan's Shia Mullahs Council.

95   Author interview, 13 June 2009.

96   Author interview, 13 June 2009.

97   For example, as demonstrated in their support to local education initiatives.

98   The AIHRC is chaired by Hazara physician Dr Sima Samar, a long time women's rights advocate who continued to operate girls' schools openly during the Taliban regime.

99   One incident that critics of Mohseni often raised was his suspected involvement in the assassination of a commander who had been unhappy with Mohseni's marriage to his sister when she was aged 14, after the girl had been entrusted to Mohseni's care to oversee her religious education. According to the Hazaristan Times (1 April 2009), Mohseni was also accused of having raped the girl before marrying her.

100   The clash of ideologies between Mohseni and Royesh broke out into violence on 15 April 2009 when a small band of about 40 Mohseni supporters came to Marefat High School, apparently with the intention of killing Royesh and destroying the Marefat High School in Western Kabul. Royesh fled from another exit, while the crowd attacked the school. This followed Mohseni denouncing the Marefat High School on Tamadun TV. The incident was not widely covered by international media, but is reported here: http://www.france24.com/en/20090506-struggle-shia-shiite-hearts-afghanistan-kabul-Mohaqiq-Mohseni-school.

101   Of note is that Hazara communities in exile actively mobilised to oppose the law's contents, holding demonstrations in front of Afghan embassies, parliaments or UN offices in the United Kingdom, Norway, Italy, Australia, Germany, Denmark and Austria, with protestors in Australia passing a resolution of solidarity with Shia women in Afghanistan and condemning discriminatory laws against women. A Hazara diaspora organisation in New York lobbied the Afghan embassy in the US over the law. A much linked-to opinion piece came from an Afghan Hazara woman living in the US, entitled "Why Afghanistan's Family Shia Status Law Must Be Changed." Respondents in Kabul often mentioned discussions with Shia friends and relatives living abroad who were appalled at the law and Hazara blogs experienced an inundation of comments posted in response to the law, critical of its contents and of Mohseni's role in particular.

Many respondents from civil society as well as some MPs placed Mohseni among those who use their resources to lay claim to ownership over religious doctrine, pointing out his presumed financial backing from Iran, massive mosque complex in Kabul and control over two media outlets. Yet, some Shia Hazara respondents spoke of a marked shift away from Mohseni's influence on the part of the Hazara community. They have gained little from ideological religious fervour, jihad or Iranian interference in Afghanistan and are opting to invest instead in secular education, human rights and social development. Mohseni's name-calling and provocation of violence on Tamadun TV in the context of the SPSL provoked strong resentment from several respondents.[102]

Mobilisation of urban Shia women

The protest event in April 2009 is worth describing at some length as the choice of a public demonstration as a form of action is neither common nor safe for women to undertake in Afghanistan. A female MP who observed the demonstration described it as "a revolution" as a form of action taken by ordinary Afghan women, adding that it was "high in quality, if not in quantity."[103] While little mobilisation against the SPSL occurred in majority Shia provinces, such as Bamiyan and Daikundi, Shia women in Kabul organised a demonstration against the law, which took place on 15 April 2009. The process by which the demonstration was coordinated was noteworthy for its seemingly organic organisation among individuals, rather than at the behest of any established organisation. A Shia woman, an instructor at the Kateb Institute, learned of the law and began making inquiries within the Hazara community. She found Shia Hazara women to be, for the most part, unaware of the contents of the law. She was soon joined by other women and they began soliciting feedback from Shia men and women on the law. She explained:

> *And we had emails come back to us. It was interesting for all of us because there were*

> *responses from people of different backgrounds: from ordinary people, professors and people living abroad. All levels of society were responding. Most of them were opposing the law, and they could not believe that after the collapse of the Taliban government... they could not believe that such a backward law could be passed.[104]*

The idea to hold a highly visible response in the form of a public protest was provoked, according to the protest organisers, specifically by Mohseni's statements on his television station, Tamadun, that "this law is based on the *fiqh* and no one has the right to challenge it. There can be no changes."[105] The women were responding less to the content of the law than to the claim of ownership over the right to challenge religious writ and the attempt to speak on their behalf, as members of the Shia sect. A protest organiser explained, "Mr Mohseni had said, 'most women support this law.' This was the main thing that motivated us. We didn't have any way to say, 'No we don't support the law.' That's why we wanted to do this."[106] Another explained:

> *The environment made it so that we needed to have the demonstration, because of what Mr Mohseni was broadcasting. He prepared a long letter signed by his students saying that the women want this. He was saying that all Shia women want this law and we needed to show that wasn't true. We didn't have a television station, an organisation, a school. So this was a tool how we could send our message out to the public to say, we are Shia women and we don't support this.[107]*

The initial group of organising women asked a lawyer from the Kateb Institute of Higher Education to explain the articles in the law to a group of Shia women, from a variety of socioeconomic backgrounds, assembled in a local woman's carpentry workshop. The women from

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102   Author interview, Kabul, 11 June 2009.

103   Author interview, Kabul, 11 June 2009.

104   Author interview, Kabul, 18 June 2009.

105   Author interview, Kabul, 18 June 2009.

106   Author interview, Kabul, 16 June 2009.

107   Author interview, Kabul, 19 June 2009.

the workshop then divided themselves up, each group with a leader tasked to focus on a different neighbourhood of Kabul, and distributed flyers, focusing especially on Shia neighbourhoods and targeting public schools. "We had a paper that showed the main articles' problems. In this first paper, our purpose was to make people aware of the law. In the second paper, we had the date of the protest."[108] The Shia women also joined a meeting with MPs and civil society representatives seeking to reform the law and proposed the protest, which was met with resistance from the MPs though many mainstream women's organisations supported the protest and participated in the demonstration. "In our organisation, we have no segregation between Shia and Sunni, so that day I asked all of our women to go and support their Shia sisters,"[109] reported one woman who heads a large women's organisation. The women used cell phones and email to spread word of the protest to an array of organisations. "It was the first time I had heard of these organisations, but they came and supported us,"[110] a protest organiser explained.

Many of the protesters reported seeing relatives or acquaintances from their community in the counter-protest. One woman reported, "I saw one of my former students supporting the law. I said, 'Why are you here?' She said, 'Someone came into our class and said that Islam is in danger, go!'"[111] Other accounts from respondents who were at the protest suggested that the counter-protestors had been mobilised to respond to an ambiguous "attack on Islam," while sitting in class in Mohseni's school.

By all accounts, the gathering rapidly turned hostile as the counter-protestors threw stones at the women and called them names.[112] The scene

escalated in several instances when women were singled out from the larger group and threatened. One woman was reportedly surrounded and had her headscarf ripped off with a man yelling, "if this is what you want, then go!"[113] Policewomen assisted in protecting the protestors from counter-demonstrators, "The policewomen especially really helped us. (The counter-protestors) also threw mud, besides the stones. They were extremely insulting, used very bad words. It was very hard for the women and girls to stay calm."[114]

The group of young women responsible for initiating the demonstration pointed out that they are still contending with the fall-out of the protest, and will continue to live with the consequences of it long after international attention fades. Many reported facing threats following participation in the protest.[115] Despite the risks, the women who led the protest reported that they felt motivated to undertake further awareness work. Reflections on the usefulness of the protest as a form of response to a rights issue were more tempered among the established women's movement. Many, from some of the larger women's organisations and women MPs, were disconcerted by the violence that erupted and the attacks on their character, "What we learned from the protest is that we won't do that kind of thing anymore. It made us look weak because the other side was bigger and it showed as if they liked the law."[116] Still there was recognition

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108 Author interview, Kabul, 19 June 2009.

109 Author interview, Kabul, 16 June 2009.

110 Author interview, Kabul, 19 June 2009.

111 Author interview, Kabul, 19 June 2009.

112 The women who organised the protest claimed their plan was to sit in silence in front of Mohseni's mosque and madrasa complex in Kabul, "we decided we would not shout, nothing. It was supposed to be a very quiet demonstration: gathering and silence, nothing else."

News of the protest had spread and on 14 April, Mohseni appealed on Tamadun TV to his supporters to gather for a counter-protest and called on Shia families to disallow their women from attending the protest. The protestors were ultimately surrounded by Mohseni's protesters, who came out of his school in a group that included both men and women in numbers greater than the 250 women gathered to resist the law. The protest organisers reported receiving calls from another large group of women on their way from a Hazara neighbourhood who were blocked by a group of counter-protestors.

113 Author interview, Kabul, 19 June 2009.

114 Author interview, Kabul, 19 June 2009.

115 One woman who travelled from Bamiyan to partake in the protest has faced particularly serious intimidation and harassment upon her return, and the Kabul-based women reportedly assisted her by securing a tape of an interview she gave, to dispel rumours that she had made un-Islamic remarks when speaking to the media.

116 Author interview, Kabul, 16 June 2009.

that this form of action was both symbolic and visible, if risky:

> *The demonstration created lots of trouble. The organisers got a lot of threats. Historically that was probably the first time that you had a protest of women not only against a specific group, but also against someone who is considered a religious scholar. Even men can't challenge him, and these women did! And he became scared! You saw in the reactions on his TV station, he really thought maybe his mosque would be closed![117]*

The protest has set an interesting precedent whereby women challenged a religious authority figure and found means of organising themselves on a grassroots basis in an urban setting. The women's reaction to the SPSL, as well as the reaction of political leaders from the Hazara community, showed that there was little agreement over what fairly constituted a "Shia law" and suggested resistance to Mohseni's efforts to exercise influence over the Hazara Shia population. A claim of jurisdiction over the *fiqh* was contested, and a plurality of voices emerged from within the Shia community, clashing sporadically and in some cases, violently.

4.2   The Islamic clergy

Members of the clergy in Afghanistan have often simultaneously played roles in conflict and in politics. Many of the mujahiddin commanders had religious educations, and at one time or another were practicing mullahs. Some respondents saw that the mujahiddin have turned to religious authority to fill the power void they previously enjoyed through their role in the *jihad*. "It is only the religious power that gives them lifelong power—jihad is over, what else is there?... The only thing that remains for them is religion, since 99 percent of the country is Muslim, it is always fresh for them."[118] A 2007 study in Kunduz and Wardak found that many of the ulama in these areas tended to overstate their influence, resented the government, and had few

clear, effective roles vis-à-vis the state. The report also found that while increasingly sidelined, the mullahs still posed a potentially viable threat to the government and suggested creating specific roles to help integrate them into state institutions and specifically into development processes.[119] The role and power of the clergy is an issue that will demand increasing attention in the years to come, as Afghanistan continues to build its legal system amid the continued prominence of the clergy and their insistence on having a deciding influence over lawmaking:

> *Legitimised by religious authority and deeply rooted in traditional norms and practices, religious actors and institutions retain considerable influence on the moral values, social practices and political opinions of many Afghans.[120]*

The SPSL provided an opportunity for some Shia mullahs to assert their expertise and make a contribution to the state-building process. One respondent claimed it was one of the first times in the new regime that they were given "official space to act" where their status was acknowledged, "I think on the religious side, the ones who were pushing this law wanted to make a fence for themselves, to have their own space that no one else could enter."[121] How they choose to share—or not—that space will do much to determine what kind of relationship the clergy will have with a growing civil society that positions itself as grounded in values of international human rights and democratisation, but that sees these values as compatible with an Islamic moral framework. For now, the kind of malleability civil society sees in the legal interpretation of sacred texts is dubious for many of the more powerful, older clergy who also dabble in politics. As one Hazara MP argued, the Sharia is seen as divined by God and is not open to adjustment, "you cannot bring the Sharia into

117   Author interview, Kabul, 14 June 2009.

118   Author interview, Kabul, 14 June 2009.

119   Cooperation for Peace and Unity (CPAU), *The Role and Functions of Civil Society in Afghanistan: Case Studies from Sayedabad and Kunduz* (Kabul: CPAU, 2007).

120   Kaja Borchgrevink, *Religious Actors and Civil Society in Post-2001 Afghanistan* (Oslo: International Peace Research Institute, 2007), 5.

121   Author interview, Kabul, 16 June 2009.

accordance with human rights values."[122] In this view, the former comes from God and the latter from man, and God's writ always supersedes.

Clerical figures have a well-entrenched historical role as the guardians of religious values and have often appealed to the notion of Islam's vulnerability to foreign influence.[123] This role has traditionally extended into the lawmaking sphere,[124] and as others enter this sphere with alternative frameworks, the clergy has and will continue to seek to resist this encroachment. The competition to influence the degree to which Sharia will be found in legislation, and which kind of Sharia, is far from resolved and can be expected to flare up regularly as the political playing field diversifies and comes to include voices from civil society, the women's movement and independent MPs.

4.3 Civil society's mobilisation and response

The actions and roles of civil society in the SPSL process highlight several intriguing trends. One is civil society's increasing engagement with religious discourse and use of alternative Sharia interpretations to challenge jurisprudence and practice that violates human rights and women's rights. Another is recognition of their potential role in advocating for interest groups in the political arena with a parliament that has weak links with its constituents. A third trend is the active coordination that occurred over the SPSL process, signalling some growth in unity within the sector.

Contesting the right to interpret the Fiqh

Those civil society organisations most enmeshed in the Shia law process from early on advocated reforms to the draft law that would bring it into conformity with international human rights law, and specifically, protections for the rights of women and children in accordance with principles of non-discrimination. Yet, their recommendations were also drawn from alternative sources of Shia jurisprudence, including from known religious scholars in the region. They relied on analyses of comparative law from other Shia countries, such as Iran and Lebanon. The Kateb Institute of Higher Education, which organised a seminar to review the law, espouses this approach and a professor from the Institute encapsulated this simply, "We attempted to get the new law to not violate human rights nor to be against the Sharia or *fiqh*. We believe these two things can be reconciled and we know the way to do this."[125] The approach they engaged for the SPSL follows other recent experiences when civil society organisations appealed to alternative religious perspectives.[126] Consulting a variety of sources, interacting with progressive religious scholars and being intimately familiar with the specific verses of the Quran, *hadiths*[127] and later sources that support a more equitable role for women in Islamic society, many organisations are demonstrating sophisticated referencing of Islamic laws and principles in their advocacy. For instance, one woman, an MP, explained,

> [Regarding] child custody, one of the most extreme [sources of Shia jurisprudence] said as soon as a baby is finished breastfeeding, [she or he] would go to the father. But we found another scholar who said the child should remain with the mother until the age of marriage! So you see, two extremes. And these people [the drafters of the law] relied on the most extreme ones, rather than finding something that would match modern life.[128]

A (non-Shia) female MP who voted against the

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122   AREU interview, Kabul, 31 May 2009.

123   Thomas Barfield, "Custom and Culture in Nation-Building: Law in Afghanistan," *Maine Law Review* 60, no. 2, 2008.

124   Mohammad H. Kamali, "Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary" (Leiden: E.J. Brill, 1985).

125   Author interview, Kabul, 17 June 2009.

126   In 2005, women's NGOs referred to Islamic law to get the legal age for guardianship raised for boys and girls in the Juvenile Code.

127   Hadiths are oral traditions recording the sayings, habits and actions of the Prophet Mohammad, and serving as an important source to the *sunnah*, and to *fiqh*

128   Author interview, Kabul, 17 June 2009.

bill commented, "They (mullahs in the Wolesi Jirga) found it strange for a woman to comment on religious issues. They think this is owned by religious men."[129] Another respondent, a leader of a network of organisations, said, "I think this is the biggest success we have ever had. It was the Sharia law up in the heaven that no one could access, and we brought it down to the people... on the ground, to make it something accessible and changeable... even though they claim it is not touchable."[130] This statement is emblematic of the belief that the law's passing through parliament makes it subject to debate, discussion and approval by a representative body, opening up the process of codifying Sharia-based law to non-clergy. A male democracy activist commented, "It wasn't about the law itself as a collection. Any regulation of the daily life of people should go to the people; what we criticised was that the views of a specific circle should not be regarded as the word of God."[131]

Challenging the clergy's interpretations, however, remains a risky undertaking. One civil society leader expressed the caution needed when navigating this territory: "It's very important for us to bring our religion up to date, and out of the Stone Age. But you have to be very careful."[132] Those challenging the sanctity of dominant religious dictate in other circumstances have faced severe consequences, as when journalism student Sayed Perwiz Kambakhsh was charged with blasphemy in October 2007 for reprinting an article analysing what the Quran says regarding women. Kambakhsh's arrest was influenced in part by pressure from the Mullah's Shura. A woman who formerly headed a prominent women's organisation adds:

Parwaz served as a warning to young people: Don't question. He was young and that was very symbolic... Everything is trademarked and they don't want anyone else interfering in their space. The moment someone starts to break

that boundary and enter it, their power is in danger.[133]

Espousing human rights agendas, advocating for women's participation in public life and being perceived as having close links to the international community, civil society is alleged to be secular, and thus at odds with the clergy. A common rebuttal from clerical politicians when confronted by civil society on rights issues is to accuse them of being western agents and of receiving funding from western sources, or of having been converted to Christianity. It is an accusation around which rights activists must tread carefully. The following quote is included at length, as it provides a specific example of this:

[We] are accused of this all the time, like in this Shia law. They said, "everyone agrees with this law. Only some Sunnis disagree because they want us to follow them, and only a few girls who dress in a western way, because they are getting money from western sources, they are against the law." This was being announced in mosques all over the country, especially in Shia areas... Of course they ignored the fact that we are living here, we are from here, our families are here, and we had carefully looked at the law and researched it. If some women seek asylum from receiving threats, this will damage the credibility of the women. I asked them, "if you are threatened, unless it's very serious, please don't try to leave the country for it." It doesn't help our credibility.[134]

There are few formal forums in which constructive dialogue might take place between the two sectors, fuelling mistrust. When confrontations do occur they tend to be hostile. One legal reform activist commented, "there needs to be a link between civil society and religious scholars. They are currently against each other and do not consult each other."[135] Another said, "we need someone talking about modern Islam now, and no one is, and that is

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129   Author interview, Kabul, 11 June 2009.

130   Author interview, Kabul, 16 June 2009.

131   Author interview, Kabul, 13 June 2009.

132   Author interview, Kabul, 16 June 2009.

133   Author interview, Kabul, 14 June 2009.

134   Author interview, Kabul, 14 June 2009.

135   Author interview, Kabul, 11 June 2009.

dangerous."[136] Without the development of forums where secular civil society can meaningfully engage with clergy from both conservative and progressive standpoints, the tensions described above will continue to hinder civil society's engagement in lawmaking, or alternatively, erupt into conflicts between civil society and members of the clergy. Such conflicts threaten to be spoilers to a vision of pluralism that many in the Shia minority harbour.

Civil society access to parliament

Civil society's influence in legislation arguably carries a greater significance in light of the lack of formalised interactions between voters and their parliamentary representatives in Afghanistan. In an environment where there is often a disconnection between MPs and constituents,[137] civil society seeks to represent organised interest groups that can lobby parliamentarians.

MPs who sought reforms to the SPSL relied on civil society groups to advocate in the public arena and to the media, but also thought they needed to do more by mobilising early on and staying abreast of the parliamentary agenda more consistently. A female MP suggested that civil society should be preparing "analysis of each law they are interested in before it goes to parliament, looking at the pros and cons. They need to be more proactive, analytical and help MPs on issues they want to be included on the law."[138] A greater degree of engagement from a wider variety of players could help rally support around MPs who may be otherwise isolated in parliament over contentious issues such as those related to human rights and gender. This may be all the more important in light of the lack of public outreach from parliament.

Yet at this point, there are few formal forums by which civil society may participate in decision-making. On an ad hoc basis, organisations and networks secure audiences with decision-makers,

reaching them through means such as open letters. One activist reported, "On the 25th of April, we had a meeting with the president and the Minister of Justice was also present and the head of the policy of the presidential office and policy advisors. It was very difficult to get this meeting. We used different channels, all of us."[139] Another said:

> We can't access the parliament easily to influence what is happening. All these meetings we had with Karzai and different ministers is all because of our contacts through MPs or bureaucrats, otherwise they wouldn't listen to us. It is very difficult to enter the parliament, to go to the offices of the MPs. We went twice, and it's more difficult than security at the airport!… It's not accessible to the common people to go to parliament.[140]

There are however recent exceptions to the ad hoc nature of civil society's relationship with policy-makers. A somewhat formalised relationship exists between female members of parliament and female civil society leaders through a forum called the Women Parliamentarians and Women Activists Network, which maintains a regular meeting schedule and is used as an information-sharing forum and for jointly coordinating lobbying efforts.[141] This group presents an interesting example, as a network that was frequently cited by both women MPs and civil society respondents as being very useful to their efforts. It might thus serve well as a model to other sectors for facilitating civil society-MP dialogue.

Civil society reflections on SPSL advocacy efforts

Following international media coverage, a coalition of women's organisations managed to secure several meetings with President Karzai to push for a review of the law.[142] This coalition had come to

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136 Author interview, Kabul, 14 June 2009.

137 Wordsworth, *Gender and the Politics of Presence in Afghanistan's Wolesi Jirga*.

138 Author interview, Kabul, 11 June 2009.

139 Author interview, Kabul, 14 June 2009.

140 Author interview, Kabul, 16 June 2009.

141 The network was originally funded for two years by the National Democratic Institute, but has continued to meet since the funding ended, and members are seeking to have it rotate secretariats to ensure it remains active.

142 The president reportedly asked the organisations to "keep quiet"

include a broad number of organisations[143] with up to 30 different groups represented in coordination meetings. Many pointed to these advocacy efforts as showing growth in the unity and coordination of civil society: "My argument is that none of us was leading this. Something discriminatory was happening, and we came together and took action."[144] However, others felt that coordination only took place effectively after the international community became involved: "If we had coordinated better from the beginning maybe this thing would have never happened. It is better to know what is happening in your own house than having your neighbour tell you about it."[145]

The SPSL made many anxious, as it seemed clear that the law would have passed despite civil society's protests, were it not for the international media coverage that set off condemnation from western leaders. This caused many respondents to reflect on the need for new strategies, the further strengthening of coordination and more advance planning in responding to policy issues. The robust international response was invigorating for many within civil society, but also reminded them of their dependence on the international community:

I think we have done something, by raising our voices through the demonstration, meeting officials, releasing a statement that went worldwide, by lobbying at the Hague conference. But we will need a lot more capacity building. I look at India and see that women activists there are a really strong force and they pressure their

government. I can say we are active but our capacity needs to be built.[146]

On the other hand, the unusually extensive coverage of the issue by western media did not go unnoticed by Afghan NGOs seeking legal and policy reform, and is a strategy they will likely seek to activate again. Organisations recognised the value of maintaining contacts with journalists, as well as timing when they turn to the media. News of the law's passing spread to western leaders attending the G20 Summit in London, at the end of March 2009. On the heels of that summit came a conference in The Hague on Afghanistan where the same leaders were uniting along with President Karzai. The succession of events and international media coverage already in place, whether intentional or not, combined to cause a quick and concentrated response from the international community. One civil society representative commented:

It was pressure from the international media that gave us support. Without their support, women's rights, democracy and social justice would be impossible. In our government, there is little understanding of what these things mean. After Hilary Clinton shared her protest, the Canadians, and others, it pushed our government. It was very effective.[147]

4.4   The international community

The SPSL illustrates well the tensions between the expectations of civil society of the international community and the international community's often slow response to human rights issues in Afghanistan. While the diplomatic community and international organisations may have perceived any outcry as further igniting anti-western discourse from clerical figures and parliamentarians, in interviews civil society representatives vocally accused the international community of passivity on this and other human rights issues.

Prior to the international media coverage of the law, meetings were held between Afghan organisations

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until after the election, initially raising suspicions among the women that he had made a contradictory promise to Mohseni. By the end of June 2009, however, these suspicions appear to be unfounded as the Afghan media reported that a review within the Ministry of Justice had been completed, omitting 12 articles including the by now infamous article regulating sexual relations between husbands and wives.

143   Including the Afghan Independent Human Rights Commission, Kateb Institute of Higher Education, Rights and Democracy, medica mondiale, Civil Society and Human Rights, Humanitarian Assistance for Women and Children of Afghanistan (HAWCA), the Afghan Women's Skills Development Centre, the Women's Political Participation Committee, Global Rights, UNIFEM, and the Afghan Women's Network, among others.

144   Author interview, Kabul, 14 June 2009.

145   Author interview, Kabul, 16 June 2009.

146   Author interview, Kabul, 14 June 2009.

147   Author interview, Kabul, 10 June 2009.

advocating for reform of the law and the European Union, the United Nations Assistance Mission in Afghanistan (UNAMA), and several embassies of donor governments. The Afghan organisations interviewed reported being consistently told that this was an internal issue of the Afghan state and it was outside of the role of international institutions to interfere. UNAMA was singled out for particular criticism for their inaction. Civil society had higher expectations of UNAMA's role in speaking out on human rights, gender and political development issues. One MP remarked on UNAMA's cumbersome bureaucracy, slow reactions and the institution perceiving itself as always having its hands tied.[148]

Representatives from UN agencies as well as western embassies were also reportedly present in the parliamentary gallery when the bill was being discussed and did not raise the issue as a concern with their own governments at that time, to the consternation of MPs alarmed at the bill's contents and the lack of debate. During a meeting hosted by a UN agency between Afghan women activists, MPs, UNAMA and several embassies, one Afghan woman stated, "We understand if the embassies have to work behind the scenes. But they should be working, you know? And it is UNAMA's job to be interfering, to speak up on human rights issues. That is why you are here." Engagement with the issue thus came at a late stage despite the UN's role as a political mission through UNAMA's presence. Another respondent pointed out that a central component of the UN's role is to monitor and seek the enforcement of international conventions to which Afghanistan is a signatory, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.[149] Human rights issues are the prerogative of the international community, as the financers and co-architects of Afghanistan's democratisation and state-building project. One person speaking on behalf of a network of organisations stated, "I was badly disappointed with the perspective of the UN, that they said, 'if the people of Afghanistan want this law, they can have that law.' This was

UNAMA's position. If that's the case, why are you here?" Another made a similar point: "The international community should interfere when we are not changing things ourselves. If we had the capacity, the international community would not be in Afghanistan!"[150] Another added, "The ethical responsibilities of Westerners are much bigger. So if there is a small reaction, it carries a lot of weight here, because they are the defenders of democratic values and human rights."[151]

The eventual response, however, from the western diplomatic community in Kabul was seen as unusually robust and was widely welcomed by civil society groups:[152] "For the first time, I can say, they raised their voices and I think this shocked the government. They realized, "Whoa! I have to actually be accountable."[153] The head of one women's organisation pointed out that the Afghan government "listens more to them than to us... so we need supportive voices from all sides, especially from the international community."[154] Yet many simultaneously expressed fear that the attention would subside too soon, giving Mohseni the opportunity to see the law through to enforcement once international concern died down. Indeed, President Karzai eventually passed the law, retaining some of the articles that triggered the initial controversy, in the weeks leading up to the presidential election when the international and domestic media were largely preoccupied. Many commented that priorities that change too quickly and the fickle interest of the international community make it harder for issues to be followed through to enforcement. The international community, on the other hand, criticised the

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148 Author interview, Kabul, 17 June 2009.

149 Author interview, Kabul, 10 June 2009.

150 Author interview, Kabul, 16 June 2009.

151 Author interview, Kabul, 18 June 2009.

152 The response was often contrasted with the lack of response to other recent human rights issues, including in particular the death of Nakshande, an Afghan driver killed after an Italian journalist's release was negotiated, the amnesty law for MPs that granted immunity from prosecution for war crimes to all perpetrators from 1979, and the imprisonment of Sayed Perwiz Kambakhsh.

153 Author interview, Kabul, 14 June 2009.

154 Author interview, Kabul, 14 June 2009.

information flow from Afghan civil society. In a coordination meeting, diplomats emphasised that they are better able to respond proactively and early when issues of concern are raised from inside their own parliaments, as a result of being on the radar of their own publics. One Western embassy representative implored Afghan organisations to communicate with their counterparts in his own country, so that he could receive the imperative he needs in Kabul.

Those who supported the law's acceptance without further modifications rejected the international community's concerns for a variety of reasons. One MP called the reaction of the international community "premature," pointing out that "they didn't have enough information."[155] A Hazara MP argued that the international community opposed the law "not on a legal basis, but rather, on a political basis,"[156] suggesting that this was foreign interference and an attempt to impose western values on Afghans. A male Shia MP who supported the law stated:

> *The Jewish religion has different sects, as well as the Christians—there are the Protestants and the Catholics, or Buddhism or Hinduism. So everybody works according to their own school of thought and others should respect them. This personal status law is not only for Shias. Most of the content has come from general Islamic values that are observed by both Sunnis and Shias. So this is one issue—everybody has the freedom to follow their own religion.[157]*

Others who had worked on and pushed for the law's passing believed the international community had a fundamental misunderstanding about the role and meaning of Sharia in Islamic society, and did not grasp that Afghan laws found their roots in Sharia. One MP argued:

> *In the west, the source of lawmaking is Common Law or the Roman Germanic Law. In Islamic countries, particularly in Afghanistan, one of the sources is the Sharia. Article 3 of the Afghan Constitution says that no law can be against Islamic values. From my point of view, until Western countries accept the Sharia as a source of law for Muslim countries, this problem will continue to exist.[158]*

Male Shia MPs who opposed modifications to the SPSL framed the law as designed to protect women in ways that Westerners failed to do in their own society. They often pointed to the articles that required women to have the permission of their husbands to leave the home as a means of protecting women from danger or immorality. Many pointed out that Islam places additional obligations on husbands than Western tradition does. Because Muslim men are required to provide for their wives financially, it follows that the wives should return this favour by meeting the husbands' sexual needs: "Women in the West, they go out themselves and get their own food, and everything. Here, the men have to provide everything."[159] Those respondents supporting the SPSL greatly resented President Karzai's agreement to change the law in light of international pressure.[160]

4.5   International media's response

Respondents' reactions to the international media coverage were mixed. One observer felt that the media had failed to adequately grasp Hazara perceptions of the law, or to show an understanding of dynamics within the Hazara community, such as the split between secularists and Islamists, and how this was being played out in the confrontations

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155   Author interview, Kabul, 15 June 2009. This MP had prepared a letter to US President Barack Obama claiming that Obama had misread the law, and outlining his explanations for how the law protects women in a society where men are responsible for working outside and earning the household income.

156   AREU interview, Kabul, 31 May 2009.

157   Author interview, Kabul, 20 June 2009.

158   Author interview, Kabul, 15 June 2009.

159   Author interview, Kabul, 20 June 2009.

160   Despite their frustrations with the international response, there was a widespread report and one firsthand account (author interview, Kabul, 15 June 2009) that following the international media coverage critical of the SPSL, a representative of the US Embassy met with Mohseni and apologised for the "misinterpretation" of the law, stating they had relied on an old draft and misunderstood the articles. The event, if it occurred, appeared to be an overture to preserve a friendly relationship with Mohseni and his supporters.

over the SPSL.[161] There was resentment voiced over media articles that made blanket statements suggesting that the Law was widely supported by the Shia community and, in particular, anger over the coverage of the counter-demonstration on 15 April that showed Afghan women demonstrating in support of the law. Civil society was generally enthusiastic at the media attention garnered, but again pointed to the imbalance they perceived in how the international community picks and chooses its battles in Afghanistan:

I see the international media as a very opportunistic entity. As a human rights activist, I expected them to at least give half the same coverage a few years ago to the issue on impunity for war criminals in parliament. Forget about media, even the embassies in this country, no one came and even talked to us. A couple of embassies showed up in the meeting we organised, and it was extremely disappointing. Now the situation is changed politically. At that time, our government was very popular; regardless of what is was doing. But now there are some troubles between our government and the international community, and now they found out about this law, and they reacted. But with the impunity law,[162] I can never forgive them for this. If I am paying for something, I have the right to ask after what is going on, and they should not say, "it is an internal affair." No, it's not—you are paying for it, so it is your business![163]

4.6   National media

The Afghan national media gave very little, if any, coverage to the bill before it was signed by President Karzai and many observers felt that the silence was unusual.[164] Civil society and women

MPs felt that the lack of coverage was on account of a national media that is unsympathetic to the objectives of the women's movement, and in some cases, even openly hostile to them.[165] As a legal reform activist commented, "There are no media in Afghanistan who support women's rights. They support religious scholars, warlords or rich people. So no one supports women. The personal status law of the Shia people is an example of that." She added that the protest organisers organised a press conference at the Kabuli Hotel,

to explain their side of things, since they had been called infidels. After that press conference, (the reporters) surrounded them and said, "so you think husbands should not buy make-up for their wives? You want to break up families?" The male news reporter said to me, "women should stay at home." The society, including the news reporters, do not know their duties. How can women live in such a society?[166]

Civil society organisations claim they were more vocal publicly than the media, utilising their own websites and contacts, and took credit for bringing the issue to the attention of the foreign press. Respondents from civil society expressed having an uneasy relationship with the national media: "Sometimes if you inform the media beforehand, it's positive, but often it's not, because it can mobilise the opposition."[167] In a country where civil society's modus operandi is often discretion, the ambiguous stance of the media on gender issues

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161   Author interview, Kabul, 13 June 2009.

162   The parliamentary bill that granted amnesty to all people suspected of committing crimes against humanity, war crimes and human rights violations during various chapters of the Afghan wars, between 1979 to the current regime, including former commanders.

163   Author interview, Kabul, 14 June 2009.

164   One civil society respondent contrasted the silence in the parliament over the deviations in procedure over the SPSL to the Media

Law passed in 2006. She pointed out that the media's open and active discussion over the Media Law meant the procedure was being closely monitored, and could not bypass a transparent process.

165   In contrast to the mainstream radio, television and print media, the Hazara media, both within Afghanistan and in the diaspora, actively covered the SPSL and in particular, the Hazara blogosphere aroused an outpouring of articles, editorials and feedback from readers. In a country where literacy levels are among the lowest in the world, the mainstream media is radio, and it is unclear how much of an impact internet coverage would have had beyond the intelligentsia, the highly educated and those living abroad. Blog posts and online media did nonetheless facilitate discussion between Hazaras in different parts of the world and served in many cases as forums for the expression of solidarity between Hazaras in different locations and for open discussions on human rights, pluralism and rule of law.

166   Author interview, Kabul, 14 June 2009.

167   Author interview, Kabul, 14 June 2009.

is often too risky a play. Some wanted media to be more opinionated by defending human rights issues, while others simply wanted fairer coverage of the issues. "The media should reflect like a glass, reflect whatever is happening. But they just write what they want... these journalists are not professional and they don't believe in women's rights."[168]

The SPSL did receive significant coverage on Mohseni's own television station, Tamadun TV. The issue was framed as interference from the West, citing specific examples such as NATO Secretary General Jaap de Hoop Scheffer calling President Karzai to express his concern. Tamadun TV televised a forum on the law, where all commentators voiced support for the law to be left unchanged.[169] Those who opposed it were allegedly labelled as infidels, prostitutes, and "bad women". The Shia women who organised the demonstration on 15 April were provoked by what they saw as grossly unbalanced media coverage, both because Mohseni's media resources were able to dominate discussion of the issue from one angle, and because other national media were failing to cover the issue with any depth. Similarly, their decision to hold a press conference following the demonstration was specifically to counteract the claims that by protesting the law, they were against Islam. It was a direct confrontation to resist the control over the portrayal of the issue by a media dominated by conservatives.

Male MPs supporting the law who are also religious figures felt that the media had no business covering this issue, as they lacked expertise on it. One respondent said, "If I am not a doctor, so I can't diagnose the patient correctly."[170] This again suggests the sense of ownership over jurisprudential matters and a discomfort on the part of the ulama over the emergence of challenges to this ownership. One MP suggested that elements of the national media were under the influence of foreigners because they received funding from them, and so were not independently reporting the issue.[171]

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168 Author interview, Kabul, 17 June 2009.

169 Mohseni also broadcast a televised interview about the SPSL between himself and an American reporter for the full length of the interview, over one hour, which had been shown in a brief clip only on the American channel.

170 Author interview, Kabul, 20 June 2009.

171 Author interview, Kabul, 15 June 2009.

5. Lessons Learned, Ways Forward, and Conclusion

The SPSL serves well as a window into the capacity, culture and processes inside Afghanistan's national assembly. It points to evolving dynamics between traditional power-holders and new political actors who are seeking a role in the policymaking process, often bringing competing agendas (and different networks) with them. When ideological confrontations erupt over laws that speak to religious values, the ownership over religious doctrine and thus the political and cultural dominance of traditional power-holders is challenged. This has led, in Afghan politics, to a gradual diversification over who endorses sources of interpretation of Sharia and sacred texts and the choice of appropriate schools of jurisprudence. In the case of the SPSL, women MPs, MPs without clerical backgrounds, and secular organisations sought out alternative interpretations and different religious scholars, and challenged the ownership over lawmaking of the mullahs and clerical MPs.

However, the growing frictions between these diverse players are not well managed and forums for constructive dialogue are nearly non-existent, while hostile dialogue erupts sporadically on a variety of fronts. In the case of the SPSL, these fronts included street protests, the parliament floor and in the media. Within the Shia community, different ideological camps were pitted against each other in response to the SPSL, activating pre-existing tensions between those who want more religion in Afghan politics and those who want less.

The widespread perception that trades were being made for political support, in the case of the SPSL, is emblematic of an erosion in confidence that Afghanistan's new political structures can subjugate patronage networks and alliances sustained on the basis of sect, ethnicity or tribe. There is thus the risk that an ideas-based politics will be unable to eventually subvert identity-based politics, with consequences for how parliamentarians transfer the interests of the electorate into the policymaking arena. Nevertheless, there is evidence of a growing respect for the role of parliament as a forum where the rules that govern society are officially legitimated, demonstrated in the choice of Mohseni and his backers seeking to enforce their perspectives through this body. Yet there is little balance in the degree of influence held over the legislative process, and inadequate public outreach in an environment where political parties are not encouraged to build platforms based on public interest and where MPs have inadequate access to their constituents.

Eight practical recommendations and ways forward emerge from this paper, based on the observed strengths and weaknesses of the existing parliamentary system and culture, and the linkages between MPs, constituents and other key stakeholder groups described in this paper.

Recommendations and ways forward:

1. *Facilitating a peaceful pluralism in matters of* fiqh: The Religious Affairs Commission, or the Ministry of Hajj and Religious Affairs, should create formal opportunities for dialogue between members of the Sunni and Shia clergy and civil society organisations, and in particular, with women's organisations. Such opportunities should be forums where constructive discussions might occur between the two groups and where each might offer the other specific roles, such as serving on advisory boards or facilitating community consultations. Such opportunities are needed to reduce hostility and build trust between the ulama and secular civil society.

2. *Reforming the party system:* Reinforcing earlier recommendations,[172] the SPSL case also highlights that the Government of Afghanistan must seriously reconsider the merits of the single non-transferable vote (SNTV) system for parliamentary elections and create the legal environment for a form of proportional representation or party list system. Under the SNTV system, used only in three other countries

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172   Larson, *Afghanistan's New Democratic Parties*.

in the world, candidates run as individuals rather than as party members, resulting in the marginalisation of political parties, vulnerability to vote-buying and manipulation, and a potentially unrepresentative parliament, among other problems.[173] Removing the SNTV system and building a stronger party system would facilitate better representation of the public will in parliament, encourage political parties to develop platforms that appeal to the public interest, and help parliament hold government accountable.[174]

3. *Financing and supporting political parties*: International donors should provide technical assistance and funding to strengthen democratic political parties and support them to develop platforms responsive to the electorate and to find means to engage around legislative issues that emerge. This recommendation also echoes earlier work with similar findings, pointing to the critical need for funding to new democratic parties.[175]

4. *Improving parliamentary procedure:* The Ministry for Parliamentary Affairs should re-evaluate its ledger system for recording discussion and voting in both houses, and introduce a computerised, instant transcription system. Transcripts and records of parliamentary decisions should be posted to the parliament's website and made available to the media and public, to facilitate public awareness and scrutiny of parliamentary discussion and voting.

5. *Refining and enforcing parliamentary rules*: The Ministry for Parliamentary Affairs should introduce specific rules that govern how bills of varying length are to be considered, to help prevent discussion and voting being bypassed or co-opted, and should further modify parliamentary procedure to record how individual MPs vote. This will facilitate greater

accountability by making voting in the national assembly more transparent to the electorate and to the media.

6. *Supporting the media's role in good lawmaking:* Training opportunities should continue to be made available to all types of national media outlets that specifically target the media's role in democratisation by sharing tools and techniques for journalists to question and scrutinise political figures and activities inside parliament and to play a monitoring role over parliamentary affairs. Trainings should include the need for sensitivity to how identity and exclusion play out in lawmaking, considering the impact of laws on women and minorities, and these groups' participation in lawmaking.

7. *Growing links between MPs and civil society:* The Women Parliamentarians-Women Activists Network should be explored as a model for other sectors or issues to instigate constructive communication channels between civil society organisations and MPs. Similar networks could be formed for issues (such as media, education, legal reform, and minority rights, among others) as well as on the basis of constituencies (for example, NGOs and MPs working in the same province or representing common constituents).

8. *Encouraging accountability from lawmakers:* International and donor organisations working on parliamentary development issues should explore how MPs' interactions with constituents can be better facilitated and should share concrete ways in which MPs can invite input from constituents on legislation and communicate issues of concern.

The development of the capacity to make good policy in Afghanistan is no easy feat. It takes place within an environment shaped by a history of extremities not quickly receding—extreme violence, extreme factionalism, extreme poverty—and can bring little to bear from previous political eras. "The easy formulae that might have been used to underpin the practice of politics in the past no longer works well in this radically altered environment."[176]

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173 See for instance: International Crisis Group, "Political Parties in Afghanistan," Asia Briefing No. 39 (Brussels and Kabul: International Crisis Group, 2 June 2005).

174 Ashley Elliot, "Policy Options for State-Building in Afghanistan," The Paul H. Nitze School of International Studies (SAIS), April 2009.

175 Larson, *Afghanistan's New Democratic Parties*.

176 William Maley, "Looking Back at the Bonn Process" in *Afghanistan: Transition Under Threat*, edited by Geoffrey Hayes and Mark Sedra

Understanding weaknesses in the process, as well as opportunities for reform, is critical when so much has been invested into democratic development in Afghanistan. As one respondent pointed out, this investment has been about more than dollars and has been about Afghans' investment in their desire for good governance: "Every election here has a death rate. Every election here has a price tag of $250 million dollars. People walk miles to polling stations to vote."[177] There is a profound belief among ordinary people of the potential for a different kind of civic life in Afghanistan and that in and of itself is reason enough to take a closer look at where policy succeeds, where it fails, and what might be done about it.

(Ottawa: The Centre for International Governance Innovation and Wilfrid Laurier Univesity Press, 2007), 4.

177   Author interview, by phone, 29 June 2009.

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