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We Are All Farkhunda: An Examination of the Treatment of Women within Afghanistan's Formal Legal System

ASHLEY LENDERMAN*

INTRODUCTION

In March 2015, the President of Afghanistan, Ashraf Ghani, “promised to work towards a commitment to women’s rights, a transformation of the legal system, and a pledge to defeat terrorism.”¹ This pledge is timely and necessary because violence against women in Afghanistan is widespread. A 2012 Oxfam report found that eighty-seven percent of women and girls in Afghanistan will be victims of physical, sexual, or psychological violence, or forced marriage during their lifetimes.²

In this paper, I will examine three cases of violence against women that went through the Afghan formal legal system: the case of Farkhunda, the Paghman district gang rape case, and the case of Sahar Gul. In the first Part, I will discuss the formal legal system framework on which the cases are based. In the second Part, I will discuss the cases in detail. In the third Part, I will describe neo-liberal, reformist, and neo-fundamentalist approaches to interpretation of Islamic law, and I will then draw out pieces of the decisions from the three cases that closely match these tenets. Finally, I will use these interpretations to argue that Afghanistan can improve its legal system through such advancements as the televising of trials, the creation of a civil remedy system, and a call for activism, which would enable an understanding of Islam that is more favorable to women’s rights.

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¹ Kimberly Motley, *The Mob Killing of Farkhunda Was a Defining Moment for Women’s Rights in Afghanistan*, TELEGRAPH (May 20, 2015, 7:00 AM), <http://www.telegraph.co.uk/women/womens-life/11616589/Afghanistan-Farkhunda-case-Now-the-demise-of-women-needs-to-stop.html>

² Motley, *supra* note 1.

I. BACKGROUND OF WOMEN'S RIGHTS CASES IN THE FORMAL LEGAL SYSTEM

Within Afghanistan's formal legal system, a hierarchy of laws exists for cases of violence against women. First, there is a system of international human rights laws and principles to protect women from violence. Afghanistan is a signatory to the Convention on Elimination of all Forms of Discrimination Against Women, or "CEDAW."³ Under CEDAW, Afghanistan has an obligation to take all necessary actions to "prevent, protect against and respond to violence against women, whether perpetrated by private or public actors."⁴ Significantly, Afghanistan was the first Muslim country to sign and ratify CEDAW without reservations.⁵

The ratification of CEDAW in 2003 gave women's rights activists leverage in arguing for the inclusion of the equality of women in the Afghan constitution and thus colors judicial interpretation of the guarantee of equality.⁶ The Supreme Court also looks to the clause of the constitution guaranteeing Sharia law, which traditionalists often argue contradicts CEDAW.⁷ These competing interpretations of CEDAW and the constitution shape courtroom debate and strategy. The United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Declaration") also places obligations and restrictions on the government of Afghanistan.⁸ The Declaration allows non-judicial means where appropriate,⁹

³ U.N. Assistance Mission in Afghanistan, *Justice through the Eyes of Afghan Women: Cases of Violence against Women Addressed Through Mediation and Court Adjudication 2* (Apr. 2015) [hereinafter UNAMA], https://unama.unmissions.org/sites/default/files/unama_ohchr_justice_through_eyes_of_afghan_women_-_15_april_2015.pdf.

⁴ *Id.*

⁵ Chesmak Farhoumand-Sims, *CEDAW and Afghanistan*, 11 J. INT'L WOMEN'S STUD. 136, 142 (2009).

⁶ *Id.*

⁷ *Id.* at 149.

⁸ UNAMA, *supra* note 3, at 11.

⁹ See G.A. Res. 40/34 (Nov. 29, 1985) [hereinafter *Declaration*].

such as the *shuras* and *jirgas*¹⁰ of Afghan customary laws. It also calls for an expansion of judicial and administrative mechanisms to better respond to cases of violence against women.¹¹

Another source of law to protect women in the formal legal framework is the national law. In 2009, President Hamid Karzai passed the Elimination of Violence against Women Law (“EVAW”) by presidential decree, which criminalized twenty-two acts of violence and harmful traditional practices against women and girls.¹² The law is in effect because the president decreed it, but it has yet to pass Parliament.¹³ EVAW remains the main legislative tool used to protect women from violence in Afghanistan.¹⁴

EVAW allows women to make claims against their perpetrators while also allowing them to withdraw a claim at any time, with exceptions for rape and forced prostitution.¹⁵ Often, women are afraid to press criminal charges because the accused men are the primary source of income for their families, and the women face societal pressure to drop their cases.¹⁶ Women are more likely to come forward if the case can instead be referred to mediation and the breadwinner will not necessarily be detained.¹⁷ However, claims for the worst offenses cannot be withdrawn and those perpetrators will still face trial.¹⁸

¹⁰ Maren Christensen, *Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies*, 4 BERKELEY J. OF MIDDLE EASTERN & ISLAMIC L. 101, 105 (2011) (“Traditional justice is generally administered through *shuras* or *jirgas*, which are councils of tribal chiefs (*mullahs*), religious leaders (*ulema*), village elders (*maliks*)[] Each of these councils applies its own sophisticated and historically evolved canons of law (*adaat*) in resolving community problems.” (footnotes omitted) (internal quotation marks omitted)).

¹¹ See *Declaration*, *supra* note 9.

¹² Elimination of Violence against Women Law, Jrid’-Rasmi [Official Gazette] 989 of 2009, 6–7 (Afg.) [hereinafter EVAW], translation at <http://www.refworld.org/pdfid/5486d1a34.pdf>; Ali M. Latifi, *U.N. Says Afghanistan’s Court System Fails Women*, L.A. TIMES (Apr. 19, 2015, 11:24 AM), <http://www.latimes.com/world/afghanistan-pakistan/la-fg-un-afghanistan-women-courts-20150419-story.html>.

¹³ Daud Qarizadah, *Farkhunda’s Death—‘Turning Point’ for Afghanistan?*, BBC (Apr. 26, 2015), <http://www.bbc.com/news/world-asia-32394188>.

¹⁴ UNAMA, *supra* note 3, at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 17, 29, 32.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 2.

Under EVAW, the government also has an obligation to take protective and supportive measures to help women, expanding on the principles already set out in CEDAW.¹⁹ However, EVAW contains many major gaps. For example, domestic violence is not criminalized in Afghanistan.²⁰ As of November 2016, the parliamentary Commission on Women, Civil Society, and Human Rights was considering draft amendments that would create punishments for civil rights violations and provide women's shelters.²¹ Additionally, the Supreme Court works to protect women's rights in limited circumstances. In December 2015, the Supreme Court issued a judicial ruling that banned the imprisonment of women for running from their homes if they fled to a medical provider, the police, or the house of a close male relative.²²

Despite laws that aim to protect women, there are still many problems in the formal legal system. Formal divorce laws make it very difficult for women to obtain a divorce.²³ A woman must prove that her husband has stopped providing for her,²⁴ whereas a man may simply declare himself divorced.²⁵ This makes it particularly difficult for women to escape domestic abuse situations, as domestic violence is not a proper ground for divorce²⁶ or even a crime. If a woman cannot get a divorce and chooses to leave, she is punished for running away from her family, while her abuser will face no punishment.²⁷ Four hundred women and girls are imprisoned for

¹⁹ *Id.*

²⁰ Zarghona Salihi, *Afghanistan's Domestic Violence Loophole*, INST. FOR WAR & PEACE REPORTING (Jan. 16, 2017), <https://iwpr.net/global-voices/afghanistans-domestic-violence-loophole>.

²¹ Human Rights Watch, *Afghanistan: Events of 2016*, <https://www.hrw.org/world-report/2017/country-chapters/afghanistan#d91ede> (last visited Sept. 5, 2017).

²² *Id.*

²³ Human Rights Watch, *Afghanistan: Hundreds of Women, Girls, Jailed for 'Moral Crimes'* (Mar. 28, 2012) [hereinafter *Hundreds of Women*], <https://www.hrw.org/news/2012/03/28/afghanistan-hundreds-women-girls-jailed-moral-crimes>.

²⁴ Mina Habib, *Divorce Rights Still Elusive for Afghan Women*, INST. FOR WAR & PEACE REPORTING (Sept. 15, 2015), <https://iwpr.net/global-voices/divorce-rights-still-elusive-afghan-women>.

²⁵ *Hundreds of Women*, *supra* note 23.

²⁶ Habib, *supra* note 24.

²⁷ *Hundreds of Women*, *supra* note 23.

so-called moral crimes in Afghanistan.²⁸ Many of these crimes involve fleeing from domestic violence or a forced marriage.²⁹ A common accusation is *zina*—or sex outside marriage—when a woman has been raped or forced into prostitution.³⁰ *Zina* is punishable by up to 15 years of prison.³¹ Women and girls in domestic violence situations describe abuses such as “beatings, stabbings, burnings, rapes, forced prostitution, kidnapping, and murder threats,” but do not report the incidents to the authorities.³² The same police who punish women for *zina* often ignore evidence of the abuse.³³ Often, women do not report because of insecurity, cultural belief, and fear of retaliation or stigmatization.³⁴ Furthermore, when women do report, they are not always believed.³⁵ In one instance, a woman was told that it was culturally unacceptable to place a complaint against a relative.³⁶ N., age 24, from Samangan province, was called a prostitute and told to leave the police station when she tried to report her abuser.³⁷ Because of these incidents, Afghanistan could be in violation of its obligations to protect women under CEDAW.³⁸

Islamic law is hugely influential in both the formal and informal legal systems in Afghanistan. *Sharia* courts exist throughout the country.³⁹ Despite popular perception, customary law often subverts Islamic law.⁴⁰ The distinction between the two is somewhat tenuous and

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ UNAMA, *supra* note 3, at 7.

³⁵ *Hundreds of Women*, *supra* note 23.

³⁶ UNAMA, *supra* note 3, at 17.

³⁷ *Id.* at 21.

³⁸ UNAMA, *supra* note 3, at 29.

³⁹ See Casey Garret Johnson, *Afghan Islamic Courts: A Pre-Taliban System with Post-2014 Potential?*, N.Y. TIMES: AT WAR (Apr. 17, 2013, 11:40 AM), <https://atwar.blogs.nytimes.com/2013/04/17/afghan-islamic-courts-a-pre-taliban-system-with-post-2014-potential/>.

⁴⁰ Hamid M. Khan, U.S. Inst. of Peace, *Islamic Law, Customary Law, and Afghan Informal Justice*, Spec. Report 363, at 10 (March 2015).

circular. Although Islamic law is supposed to be supreme, “Islamic laws are often suborned by prevalent customary tribal norms, which are themselves assumed to conform with Islamic law.”⁴¹ In Afghanistan, customary law tends to focus on restorative justice rather than the retributive justice that is familiar in the United States.⁴² The goal is to restore the rule-breaker to society rather than to punish him.⁴³ In fact, the customary system of Afghanistan is very different from formal legal systems. There are no lawyers or evidentiary rules.⁴⁴ The legal process itself incorporates several elements of tribal life, including the involvement of families, neighbors, and elders.⁴⁵ The people sitting on the mediation counsel can be the victim’s neighbors, family members, and respected members of her community,⁴⁶ but they can also be the neighbors and family of the abuser.

Using the formal legal system instead of the informal legal system can help protect women’s rights. There are three different kinds of mediation systems in Afghanistan. Of the cases studied in a recent report by the United Nations, forty-seven percent of mediation cases went through ERAW law institutions, seventeen percent went through NGOs, and twenty-two percent went through traditional dispute resolution mechanisms.⁴⁷ The United Nations found that only five percent of criminal cases involving violence against women ended in prosecution and sanctions.⁴⁸ In traditional mediation courts, unification of the family is the goal and not justice

⁴¹ *Id.* at 2.

⁴² INT’L LEGAL FOUND., THE CUSTOMARY LAWS OF AFGHANISTAN 10 (Sept. 2004).

⁴³ THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 18 (2010).

⁴⁴ Susan Williams, *Women and Judging: A Feminist Approach to Judging and the Issue of Customary Law (Eleventh Annual Ruth Bader Ginsburg Lecture)*, 36 T. JEFFERSON L. REV. 25, 27 (2013) [hereinafter *Women and Judging*].

⁴⁵ *Id.*

⁴⁶ UNAMA, *supra* note 3, at 3 n.9.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 2.

for the victim.⁴⁹ Women often choose traditional mediation in cases of domestic violence.⁵⁰ For example, out of the eighty cases of battery and laceration studied, fifty-two went through traditional mediation.⁵¹ Only four of these eighty went through the formal legal system.⁵² This can be particularly problematic for women's human rights as they are sometimes not allowed to be present at their mediations.⁵³ Ten percent of the mediations resulted from a woman being forced to go through mediation over the formal legal system.⁵⁴ Worse yet, the study tracked the enforcement of twenty-five cases and found that over half of the perpetrators did not honor the agreement made during mediation.⁵⁵ Compounding the unbalanced nature of mediations, once an agreement has been reached, a criminal conviction in the formal legal system will not be enforced.⁵⁶

One reason for the high number of mediations despite clearly unbalanced outcomes is that more women prefer civil remedies than the formal legal system is not yet equipped to provide. These civil remedies include divorce, fair alimony, custody settlements, and living without domestic violence.⁵⁷ The formal legal system only deals with these issues through criminal punishment. As discussed above, women often do not want to report a crime and risk the breadwinner being imprisoned. There are no protective or restraining orders in the formal legal system.⁵⁸ For women to truly seek and receive justice, the formal legal system must be strengthened.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 16–17.

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 21.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 2–3.

⁵⁸ *Id.* at 28–29.

II. CASES

A. *Farkhunda*

On March 19, 2015, twenty-seven year-old Farkhunda was surrounded, jumped on, kicked, trampled, run over, set on fire, and tossed into the shallows of the Kabul River by a crowd of men.⁵⁹ Members of the crowd surrounding her filmed the attack on cell phones and placed the videos on social media.⁶⁰ Other onlookers shouted “Allahu Akbar” while watching the carnage.⁶¹ Members of the police stood by without quelling the violence and some officers even participated in it.⁶²

This horrific attack took place in the shadow of the Shah-Du-Shamshaira mosque and shrine, which is within blocks of the presidential palace and main bazaar of Kabul.⁶³ Many come to the mosque and shrine to seek the “guardians of the shrine”—men selling charms and amulets that ward off disease or issues such as infertility and family disputes.⁶⁴ Farkhunda herself had only been to the shrine once before and saw women standing in the cold. She came back to bring a sweater to one of them.⁶⁵ Her father said, “She was always keen to help poor people, especially women.”⁶⁶ While at the shrine, it is believed that she attempted to confront one of the men selling amulets about “superstitious practices” that were not in line with Islam.⁶⁷ The man grew

⁵⁹ Motley, *supra* note 1.

⁶⁰ *Id.*; Leela Jacinto, *Is There Hope for Afghanistan's Other Daughters?*, FOREIGN POL'Y (May 26, 2015, 3:30 PM), <http://foreignpolicy.com/2015/05/26/is-there-hope-for-afghanistans-other-daughters-farkhunda/>.

⁶¹ Motley, *supra* note 1.

⁶² *Id.*

⁶³ Qarizadah, *supra* note 13.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

enraged and accused her of burning the Koran and working with the infidels, inciting the attack.⁶⁸

This accusation could not have been further from the truth. Farkhunda was training to be a religious teacher.⁶⁹ Her father says that she was always interested in Islam, even from a young age.⁷⁰ Her religious education had led her to condemn the man's acts as contrary to Islam and an attempt to con the destitute out of their money. A special investigation proved that the allegation that she burned a Koran was baseless.⁷¹ Many women's rights advocates were enraged soon after the attack, but once it was widely known that she was a religious scholar, many in Afghanistan were enraged.⁷² She became known as "Afghanistan's Daughter."⁷³

When Farkhunda was buried on March 22, women's rights activists broke precedent by carrying her coffin instead of allowing her male relatives to do so. While the activists were carrying her, they cried out "*maa hama Farkhunda yem*," or "We are all Farkhunda."⁷⁴ Activists remain instrumental in ensuring that Farkhunda's memory lives on. They have created a shrine to her at Shah-Du-Shamshaira. Shortly after the attack, activists reenacted the crime to draw attention to the violence.⁷⁵ President Ashraf Ghani weighed in on the incident, calling it a "heinous attack."⁷⁶

One factor that impacted the trial outcome was the reaction of the *ulema*, or Islamic clergy. There was a concern that Islam would be blamed for the attack as it took place outside of

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Jacinto, *supra* note 60.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Motley, *supra* note 1.

a mosque. And in fact, some did blame Islam—there were anti-clerical posts on social media in the days following the attack.⁷⁷ Members of a fringe leftist group shouted “death to mullahs” during a Kabul demonstration.⁷⁸ The *ulema* responded in kind, saying, “I warn those who use this opportunity that women will be killed more heinously than our sister [Farkhunda], and many will be eliminated in a far worse way. Then, nobody will dare raise their voice.”⁷⁹ However, many clerics and citizens alike honored Farkhunda’s memory by pointing out that the attackers were not acting in the spirit of Islam, but rather that Islam condemns violence against women and encourages peace.⁸⁰ The reaction of the clerics is better seen as a reaction against the direction in which some see the country moving. Many clerics believe that the government is in a “struggle against Islam.”⁸¹ Interestingly, clerics have distanced themselves and Islam from the attack, that all of the perpetrators were illiterate men who had never read the Koran.⁸²

The trial in the primary court took just two days. The court took less than forty-eight hours to try forty-nine people.⁸³ Judge Safiullah Mujadidi was the presiding judge. Twenty-seven men were found not guilty—eighteen civilians and nine police officers.⁸⁴ Twelve civilians received convictions, including four who received the death penalty. Ten police officers were convicted of failing to protect Farkhunda.⁸⁵ An official investigation of the police officers conducted by a presidentially-mandated commission found that police lost control of the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Borhan Osman, *The Killing of Farkhunda (2): Mullahs, Feminists, and a Gap in the Debate*, AFG. ANALYSTS NETWORK (Apr. 29 2015), <https://www.afghanistan-analysts.org/the-killing-of-farkhunda-2-mullahs-feminists-and-a-gap-in-the-debate/>.

⁸¹ Jacinto, *supra* note 60.

⁸² Osman, *supra* note 80.

⁸³ Alissa J. Rubin, *Flawed Justice after a Mob Killed an Afghan Woman*, N.Y. TIMES (Dec. 26, 2015), <https://www.nytimes.com/2015/12/27/world/asia/flawed-justice-after-a-mob-killed-an-afghan-woman.html>.

⁸⁴ Motley, *supra* note 1.

⁸⁵ *Id.*

situation. The commission recommended emergency training to emphasize better communication and management.⁸⁶

The court case was particularly influential because it was one of the first to be televised.⁸⁷ This allowed the citizens to actively engage with their formal legal system and learn how a case goes through the court. However, for Mujbullah, Farkhunda's brother, the outcome did not seem like justice. He decried it, saying, "The outcome of the trial is not fair and we do not accept it—you saw just four people sentenced to death but everybody knows that more than 40 people were involved in martyring and burning and beating my sister."⁸⁸

Devastatingly, Mujbullah's cries of injustice proved to be warranted. Mujbullah and other members Farkhunda's family were denied what little justice they received from the primary court. A secret hearing in the appellate court reversed the primary court's decision.⁸⁹ The appellate court reduced the sentences of the men convicted of having a primary role in Farkhunda's death.⁹⁰ The Court overturned three death sentences and converted them to twenty-year prison sentences. The fourth death sentence was commuted to ten years in prison. Some of the convicted parties received an acquittal.⁹¹ This hearing occurred without the knowledge or presence of Farkhunda's family.⁹² The appellate court is required to submit a written explanation but has yet to do so.⁹³

⁸⁶ Qarizadah, *supra* note 13.

⁸⁷ Kimberly Motley, *Failing Farkhunda Means Failing Afghan Women*, AL JAZEERA (July 7, 2015, 10:12 AM) [hereinafter *Failing Farkhunda*], <http://www.aljazeera.com/indepth/opinion/2015/07/failing-farkhunda-means-failing-afghan-women-150707055139140.html>.

⁸⁸ Motley, *supra* note 1.

⁸⁹ *Failing Farkhunda*, *supra* note 87.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Farkhunda's family appealed to the Supreme Court, but the sentence reductions were upheld.⁹⁴ Kimberly Motley, a Minneapolis-born attorney who was the first non-Afghan to argue a case before the Afghan Supreme Court, recommended the appeal.⁹⁵ She originally represented Farkhunda's family but left after initial deliberations.⁹⁶ She also recommended an internal investigation into the appellate court judges who made the decision without the input of lawyers and family or observance of due process rights.⁹⁷

B. Paghman Gang Rapes

On August 23, 2014, four women and an unconfirmed number of men were returning from a wedding through the Paghman district, a popular picnic area, in Kabul when seven men dressed in police uniforms stopped them.⁹⁸ The attackers tied the men up and pulled the women out of the car before raping them.⁹⁹

The attack caused public outcry, including President Hamid Karzai calling for the death penalty. This trial was also televised, although it lasted only two hours.¹⁰⁰ Seven men originally received the death penalty, although two were commuted to life sentences.¹⁰¹ The same judge who presided over the Farkhunda trial, Judge Safihullah Mujadidi, presided.¹⁰² President Karzai signed the death warrants on his last day in office.¹⁰³

⁹⁴ Rod Nordland & Jawad Sukhanyar, *Afghan Court Confirms Reduced Sentences in Mob Killing of Farkhunda*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/world/asia/afghanistan-farkhunda.html>.

⁹⁵ *Failing Farkhunda*, *supra* note 87.

⁹⁶ Jacinto, *supra* note 60.

⁹⁷ *Failing Farkhunda*, *supra* note 87.

⁹⁸ *Afghan Executions: Five Hanged for Paghman Gang-Rape*, BBC (Oct. 8, 2014) [hereinafter *Afghan Executions*], <http://www.bbc.com/news/world-asia-29537738>.

⁹⁹ Hamid Shalizi, *Afghan Court Sentences Seven Men to Death for Gang Rape in Case that Shook Capital*, REUTERS (Sept. 7, 2014, 6:03 AM), <http://www.reuters.com/article/us-afghanistan-rape-idUSKBN0H209T20140907>.

¹⁰⁰ *Afghan Executions*, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² Shalizi, *supra* note 99.

¹⁰³ *Afghan Executions*, *supra* note 98.

It is important to note there were some problems with the way the case was handled. Instead of being accused of rape, the perpetrators were accused of *zina*, or sex outside marriage, which also implicated the victims.¹⁰⁴ The four victims never received assistance from female police officers, despite an initiative by the Afghan government to have women police officers for the convenience of victims. Because of cultural norms, it is preferable for female victims to speak to female police officers about something as sensitive as sexual assault.¹⁰⁵ Additionally, the defense attorneys used the same language as the Farkhunda trials, “My clients did it because they’re illiterate and ignorant,” and succeeded in reducing the perpetrators’ sentence.¹⁰⁶

C. Sahar Gul

Sahar Gul was forced by her parents into an illegal marriage at a young age¹⁰⁷ even though EVAW prohibited child marriages.¹⁰⁸ Sahar Gul was tied up, beaten, buried, and kept captive in a basement for months by her husband.¹⁰⁹ The trial court sentenced the husband and his family to twenty years in prison, but the appellate court quietly overturned this decision, as in the Farkhunda case. The Supreme Court overruled the appellate court and reaffirmed the decision of the primary court.¹¹⁰

D. Lessons from Case Studies

The cases above illustrate both the strengths and weaknesses of the Afghan formal legal system. A major strength of the primary court system is transparency. Both the Farkhunda and Paghman gang rape cases were publicly televised, putting pressure on the courts to convict the

¹⁰⁴ Human Rights Watch, *Afghanistan: Gang Rape Trial Badly Flawed* (Sept. 8, 2014, 5:55 PM) [hereinafter *Gang Rape Trial Badly Flawed*], <https://www.hrw.org/news/2014/09/08/afghanistan-gang-rape-trial-badly-flawed>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Failing Farkhunda*, *supra* note 87.

¹⁰⁸ EVAW, *supra* note 12, at 14.

¹⁰⁹ *Failing Farkhunda*, *supra* note 87.

¹¹⁰ *Id.*

abusers. In contrast, the appellate court held hearings in secret, and the judges did not experience the same pressure to convict. This highlights a weakness of the legal system—the lack of basic due process in the appellate court. The appellate court heard the case without notifying the victims or their families of the appeal.

Another weakness was the trials' brevity. The Farkhunda court took forty-eight hours to convict forty-nine men, while the court in the Paghman case took two hours to convict seven. Haste allows for potential miscarriage of justice, as neither side can prepare adequately, leading to errors at trial and in the appellate courts, which are much less likely to convict abusers.

The cases also highlight the different interpretations of Islam present in Afghan courts. The Farkhunda case elicited three different reactions: a contingent blamed Islam and cried “death to mullahs.” Another group justified the actions of the perpetrators under Islam. By far the largest group argued that the actions of the men were contrary to the spirit of Islam. Interpretations of Islam diverge in public opinion as well as in the courts.

III. CONCEPTUALIZATIONS OF ISLAM

A. *Neoliberalism*

The Neoliberal conceptualization of Islam emphasizes the compatibility of Islam with human rights and capitalist development.¹¹¹ Many Islamic scholars have determined that “what you consider freedom in Europe is exactly what our religion views as justice (‘*adl*), right (*haqq*), consultation (*shura*) and equality (*musawat*).”¹¹² Neoliberal courts argue that human rights are inherent in laws of Islam. The neoliberal interpretation of Islam focuses on three elements: human rights, human dignity rather than honor, and community.

¹¹¹ Nikos Moudouros, *The ‘Harmonization’ of Islam with the Neoliberal Transformation: The Case of Turkey*, 11 GLOBALIZATIONS 843, 846 (2014), <https://anatolikotera.files.wordpress.com/2014/02/download-pdf>.

¹¹² *Id.*

In fact, neoliberals argue that the best approach to resolve human rights issues in Islamic countries is to return to the roots of Islam.¹¹³ Both the Hadith and the Koran, the bases of sharia, emphasize protection of the woman and women's rights.¹¹⁴ Islam has historically been a unifying factor in Afghanistan.¹¹⁵ It is possible to use religious tenets to moderate. Informal justice actors have "expressed openness to overturning prevailing customary law and signaled their willingness to take a more Islamic legal approach to resolving disputes if they were educated by the particulars of Islamic law, especially as it pertained to women and understanding gender-related norms."¹¹⁶ An important shift for women's rights will be to emphasize the human dignity of Islam rather than *Pashtunwali* honor.¹¹⁷ Islam's respect for human dignity can ensure equality between men and women.

Neoliberal interpretations of Islam are often used to solve social problems because they emphasize community.¹¹⁸ Neoliberalism emphasizes the Islamic values of community, good will, and charity to others.¹¹⁹ These interpretations value accountability for one's actions against the community highly.¹²⁰

The primary court system in Afghanistan appears to lean towards a neoliberal interpretation of Islam, although it may not fully subscribe to it. For example, the reasoning Farkhunda's primary court case bears a striking resemblance to the neoliberal conceptualization

¹¹³ *Id.*

¹¹⁴ UNAMA, *supra* note 3, at 13.

¹¹⁵ See generally Mohammad Hashim Kamali, *Caliphate and Political Jurisprudence in Islam: Historical and Contemporary Perspectives*, 106 MUSLIM WORLD 384 (2016).

¹¹⁶ Khan, *supra* note 40, at 2.

¹¹⁷ Pashtuns are the single largest ethnic group in Afghanistan. "To be a Pashtun means observing *Pashtunwali*, or 'the way of the Pashtuns.'" *Pashtunwali* traditionally requires seclusion of female members of a household, prohibits women owning property, and mandates a woman's remarriage to her deceased husband's brother. *Id.* at 2–4.

¹¹⁸ Mona Atia, "A Way to Paradise": Pious Neoliberalism, Islam, and Faith-Based Development, 102 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 808, 810 (2012).

¹¹⁹ *Id.* at 811.

¹²⁰ *Id.* at 810.

as there was an emphasis on the accountability of the perpetrators. Farkhunda's primary court case saw the conviction of twenty-two men,¹²¹ indicating a preference for holding the perpetrators accountable rather than blaming the victims.

Additionally, emphasized the value of Farkhunda's life and the good of the community, reflecting the Islamic principles of good will and cohesion of the community rather than viewing of women as property. The court saw itself as trying to prevent a tragedy of this magnitude from occurring again.

The courts' decision in the Paghman district gang rape case also reflects a neoliberal approach to Islam. The men received death sentences, showing a preference for accountability. However, not all aspects of the case conformed to the neoliberal interpretation. The police worked hard to deny the responsibility of the officers in the case.¹²² Additionally, human rights advocates decried the use of the death penalty, as the president's call for the death penalty before a trial had occurred heavily influenced the sentence.¹²³ However, the case reflects the neoliberal Islamic value of aiding the community—the judge stated that he wanted to set a precedent that future violence against women would not be tolerated.

In Sahar Gul's case, both the primary court and the Supreme Court's decisions leaned more towards the neoliberal conceptualization of Islam. They emphasized the rights of Sahar Gul to not be forced into a marriage and then horrifically abused by her husband. The courts demonstrated a preference for holding the husband accountable for his actions toward his wife rather than treating her like his property.

B. Reformism

¹²¹ Motley, *supra* note 1.

¹²² *Gang Rape Trial Badly Flawed*, *supra* note 104.

¹²³ *Id.*

People who adhere to a reformist conceptualization of Islam “oppose traditionalist and Islamist ideas, and project a new and modern concept of Islam.”¹²⁴ The hallmark of reformism is text-based analysis with a focus on different historic interpretations.¹²⁵ However, reformists subscribe to a wide spectrum of ideologies, from the right-wing to leftist. Reformists tend to interpret the Koran to emphasize the reform of sharia, the equality of men and women, and freedom of religion.¹²⁶ Reformists attempt to reconcile Islam with the challenges of modernity while still staying true to the teachings of Islam.¹²⁷ Many seek to bring attention to women’s rights violations.¹²⁸

The basis of reformism is the interpretation of the holy scriptures of Islam.¹²⁹ The Koran, both in its form and its content, is the literal and unchangeable word of God. Reformism emphasizes interpretation of the text rather than the words or passages themselves. Reformists argue that the Koran is complicated to read and needs linguistic context, which allows for different interpretations.¹³⁰ Reformists especially emphasize leaving the principles of human rights and constitutionality intact while preserving sharia. The unifying principle in sharia and human rights is the view that poor treatment of women results not from the scripture itself, but rather from the way it has been interpreted for hundreds of years.¹³¹ Often, neoliberals and reformists come to the same conclusion, though they reach it through different reasoning. Neoliberals look to the spirit of Islam and other ideals.¹³² Rather than interpreting the texts,

¹²⁴ Andreas Jacobs, *Reformist Islam: Protagonists, Methods, and Themes of Progressive Thinking in Contemporary Islam* 3 (Konrad-Adenauer-Stiftung, Working Paper No. 155, 2006).

¹²⁵ *Id.* at 10.

¹²⁶ *Id.* at 3.

¹²⁷ *Id.*

¹²⁸ *Id.* at 8.

¹²⁹ *Id.* at 11.

¹³⁰ *Id.*

¹³¹ *Id.* at 14.

¹³² Atia, *supra* note 118, at 811

neoliberals use the values of Islam to justify their view. In contrast, reformists look directly to the text of the Koran and draw conclusions from a modern interpretation of it.

The reaction of the courts to the defendants in the Paghman rape case and the Farkhunda case is evidence of reformist attitudes. In both cases, the courts pointed out that the defendants were illiterate and could not read the Koran, thereby exculpating Islam and placing the blame on the culture and the individuals themselves. Additionally, reformists tend to advocate for women's rights. The primary courts' decisions in the Farkhunda case and the Sahar Gul case and the Supreme Court's decision in the Sahar Gul case reflect this.

C Neo-Fundamentalists and Conservatives

Unlike neoliberalism, neo-fundamentalist and conservative Islam emphasizes historic cultural norms. Neo-fundamentalists and conservatives argue that Islam is incompatible with so-called western notions of Islam.¹³³ Gender issues create the greatest disparity between neo-fundamentalism and neoliberalism—however, adherents of both claim that they are returning to the roots of Islam.¹³⁴ Similarly, both reformists and neo-fundamentalists place great emphasis on the text itself. Reformists argue for updated interpretations of it, while neo-fundamentalists advocate for traditional interpretations.

Neo-fundamentalist conceptualizations tend to focus on the individual rather than the community.¹³⁵ Neo-fundamentalism compares the lives of men now to those of men of ancient times—a time where cultural norms were less fair to women.¹³⁶ The philosophy focused on Islamic teachings as isolated from all other forms of intellectualism.¹³⁷

¹³³ Masoud Kazemzadeh, *Teaching the Politics of Islamic Fundamentalism*, 31 POL. SCI. & POL. 52, 52 (1998).

¹³⁴ *Id.* at 53; Moudouros, *supra* note 11, at 846.

¹³⁵ Fazlur Rahman, *Islam: Legacy and Contemporary Challenge*, 19 ISLAMIC STUD. 235, 237 (1980).

¹³⁶ *Id.* at 244.

¹³⁷ Kazemzadeh, *supra* note 133.

Although the court did not publicize its reasoning, it seems that the appellate courts in both Sahar Gul and Farkhunda's cases favored neo-fundamentalism. These results in these cases are more compatible with older notion of women's rights. Additionally, there are neo-fundamentalist leanings in the response of some of the clergy to Farkhunda's case. They decried the women activists and advocated strict adherence and deference to conservative Islamic interpretations.¹³⁸

Additionally, although the overall outcome of the case had a neo-liberal leaning, there are shadows of conservative thoughts. The death penalties and lack of due process given to the perpetrators echo the earlier conservative thought and notions of deference to the strictest interpretation of Islam without any adjustment for the religion's cries for peace and human rights.

IV. IMPLICATIONS

A neoliberal interpretation of Islam is crucial for women's rights moving forward in court cases. Mediation, the most common form of arbitration and advocacy in Afghanistan, uses a neo-fundamentalist approach, and often results in unenforceable remedies to abuse.¹³⁹ Although the appellate court has adhered to neo-fundamentalism, the Supreme Court, which makes final decisions, has used neoliberal conceptualizations of Islam during recent trials.

By emphasizing neoliberal conceptualizations of Islam, perhaps more women will be willing to turn to the court system. Women who turn to neo-fundamentalist courts and mediators because of fear of corruption—including the payment of bribes to move the legal process along—lack a clear understanding of the legal process. Furthermore, they fear the imprisonment

¹³⁸ Jacinto, *supra* note 60.

¹³⁹ See generally UNAMA, *supra* note 3.

of the men who provide for their family.¹⁴⁰ By increasing education and televising cases, as in the Farkhunda and Paghman gang rape cases, perhaps women will come to trust the courts' neoliberal conceptualization of Islam and will be encouraged to take their cases into court.

Although mediation is seen as the only solution, the goal should be to encourage women to use the formal legal system.¹⁴¹ The informal legal system leans toward a conservative approach to Islam, emphasizing the rights of the man and preservation of the family structure.¹⁴² However, with neo-liberalism budding in the formal courts, they may eventually be seen as a better option for women. The following design elements that would create a better formal legal system for women: televised trials, availability of civil remedies, and the facilitation of activism.

A. Televised Trials

Televising trials allows greater transparency of the law for the people of Afghanistan. Both Farkhunda's primary trial and the Paghman primary trial were televised. Both had high levels of viewership. Both resulted in convictions for the abusers. When the judges are accountable to the people, they are more likely to use conceptualizations of Islam that value women's rights and promote the values of the community, such as protecting women.

This stands in direct contrast to the appellate trials, which were not televised. Further, the written opinions of the appellate courts are not always released, even when the law so requires. For example, the opinion in the appeal of Farkhunda's case has yet to be released. Thus, the people have no idea why the perpetrators received a reduced sentence. By televising the trial, the transparency is immediate, and the people of Afghanistan can better engage with the judicial

¹⁴⁰ Latifi, *supra* note 12.

¹⁴¹ *Id.*

¹⁴² UNAMA, *supra* note 3, at .3

system. Televising trials also allows women to become more familiar with the formal legal system, and thus more likely to turn to it in the future.

B. Civil Remedies

One way to address a woman's fear of going to the formal court system is to create a system of civil remedies in the formal court as opposed to strictly criminal. This would be in line with the neo-fundamentalist ideal of community and the health of the victim, rather than pure retributive justice.¹⁴³ A system which provides protective and restraining orders would help ensure that a woman can still be protected without cutting off the flow of money to the family.¹⁴⁴ Rights to alimony and a life in the family home could also be an aspect of this new neo-fundamentalist approach.

C. Facilitation of Activism

Afghanistan can strengthen women's rights by the facilitating of activism in trials. Particularly if the trials are televised, this can be a powerful way for civil society organizations to reach a large audience of women and convince them that they will be supported at trial.

One way to do this is simply by allowing activists to file briefs with the court. Another way would be to allow the activists to make statements in court. Activists would be able to advocate for the courts to use a more neoliberal or reformist approach to the interpretation of Islam.

CONCLUSION

The Afghan justice system's turn to neoliberal and reformist conceptualizations of Islam will help the country move forward in the field of human rights. This approach can encourage women to participate in the formal legal system, where it is easier to measure adherence to

¹⁴³ INT'L LEGAL FOUND., *supra* note 42.

¹⁴⁴ UNAMA, *supra* note 3, at 4.

women's rights and human rights concerns. A neo-fundamentalist understanding of Islam could contribute mechanisms that would to allow women to receive justice while also balancing the needs of the home and family without fear of retaliation