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Ubi Maior, Ibi Ius:
Assessing Justice System Reform in Afghanistan

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To My Family
&
To Federica,
for standing by me

To Myself,
for my courage and
unfailing determination

The author at the 'Open' Juvenile Rehabilitation Centre, Kabul, Afghanistan, 25 February 2008.

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List of Abbreviations

ACAS	Afghan Court Administration System
ACBAR	Agency Coordinating Body for Afghan Relief
AGO	Attorney General's Office
AIA	Afghan Interim Authority
AIHRC	Afghan Independent Human Rights Commission
AJDL	Access to Justice at the District Level
AREU	Afghanistan Research and Evaluation Unit
ARoLP	Afghanistan Rule of Law Project
ARTF	Afghanistan Reconstruction Trust Fund
ATA	Afghanistan Transitional Authority
BoD	Board of Donors
CAP	Consolidated Appeals Process
CDDRL	Center on Democracy, Development and the Rule of Law
CDF	Comprehensive Development Framework
CERI	Centre d'Etudes et de Recherches Internationales
CFC-A	Combined Forces Command Afghanistan
CG	Consultative Group
CIDA	Canadian International Development Agency
CJRC	Closed Juvenile Rehabilitation Center
CJTF-101	Combined Joint Task Force 101
CNJC	Counter-Narcotics Justice Center
CNPA	Counter Narcotics Police of Afghanistan

CNT	Counter-Narcotics Tribunal
CNTF	Counter Narcotics Trust Fund
CPA	Coalition Provisional Authority
CPC	Criminal Procedure Code
CPD	(MoJ) Central Prison Directorate
CPHD	Center for Policy and Human Development
CRAFT	Consortium for Response to the Afghanistan Transition
CSSP	Corrections System Support Program
CSTC-A	(US) Combined Security Transition Command-Afghanistan
CT	Coordination Team
DCAF	(Geneva Centre for the) Democratic Control of Armed Forces
DDR	Disarmament, Demobilization and Reintegration
DIFD	Department for International Development
DoD	(US) Department of Defense
DoJ	(US) Department of Justice
DRC	Democratic Republic of Congo
ELBAG	Economic Literacy and Budget Analysis Group
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FDD	Focused District Development
G8	Group of Eight (states)
GoA	Government of Afghanistan
GWOT	Global War on Terrorism
HIPC	Heavily Indebted Poor Countries

IACSLR	Increasing Afghanistan’s Capacity for Sustainable Legal Reform
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICGJR	International Coordination Group for Justice Reform
ICHR	Irish Centre for Human Rights
ICLT	International Coordination for Legal Training
ICPC	Interim Criminal Procedure Code
IDA	International Development Association
IDLO	International Development Law Organization
IFIs	International Financial Institutions
IG	Implementation Group
IJPO	Italian Justice Project Office
ILF	International Legal Foundation
IMF	International Monetary Fund
IMG	International Management Group
INL	US State Department, Bureau of International Narcotics and Law Enforcement Affairs
IOM	International Organization for Migration
IPA	International Peace Academy
I-PRSP	Interim PRSP
IRIN	Integrated Regional Information Networks
ISAF	International Security Assistance Force
ISISC	Istituto Superiore Internazionale di Scienze Criminali
JAG	Judge Advocate General’s Corps
JCMB	Joint Coordination and Monitoring Board
JRC	Judicial Reform Commission

JSC	Justice Support Center
JSCG	Justice Sector Consultative Group
JSD	Justice Sector Development Program
JSSP	Justice Sector Support Program
LAOA	Legal Aid Organization of Afghanistan
LEC	Legal Education Centre
LICUS	Low Income Countries Under Stress
LOTFA	Law and Order Trust Fund
LUISS	Libera Università Internazionale degli Studi Sociali (Rome)
MFA	Ministry of Foreign Affairs
MoD	Ministry of Defence
MoF	Ministry of Finance
MoJ	Ministry of Justice
MSI	Management Systems International
NAP	National Action Plan
NDCS	National Drug Control Strategy
NDF	National Development Framework
NSP	National Solidarity Programme
OECD	Organization for Economic Cooperation and Development
OECD-DAC	OECD – Development Assistance Committee
OHCHR	Office of the UN High Commissioner for Human Rights
OMIK	OSCE Mission in Kosovo
OP	Operational Policy
OSC	Oversight Committee

OSCE	Organization for Security and Co-operation in Europe
PIP	Public Investment Plan
PJCM	Provincial Justice Coordination Mechanism
PJI	Provincial Justice Initiative
POC	Programme Oversight Committee
PRSP	Poverty Reduction Strategy Paper
PRT	Provincial Reconstruction Team
PSU	Programme Support Unit
PU	Programme Unit
RoL WG	(Advisory) Rule of Law Working Group
ROLS	Rule of Law & Security Program
SDP	Sector Development Programme
SDU	Special Disbursement Unit
SEESAC	South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons
SSR	Security Sector Reform
SWAP	Sector-Wide Approach
TAG	Technical Advisory Group on Women and Children in Justice
ToR	Terms of Reference
TWGs	Technical Working Groups
UN	United Nations
UN DPKO	UN Department of Peacekeeping Operations
UNAMA	UN Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
UNGA	UN General Assembly
UNICEF	United Nations Children's Fund

UNIFEM	United Nation Development Fund for Women
UNODC	UN Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNOSOM	UN Mission in Somalia
UNSC	UN Security Council
US	United States
USAID	United States Agency for International Development
USIP	United States Institute of Peace
UTL	Unità Tecnica Locale
WB	World Bank

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Data and figures are taken from open sources only. Related references have been put in footnotes. No confidential documents or information are mentioned in this thesis. The views and opinions expressed are solely those of the author and do not bind any institution/institute which he is or was affiliated with. Notes and comments at m.tondini@gmail.com.

* * * * *

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Publications

Articles & Book Chapters

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2. M. Tondini, 'The "Italian Job": How to Make International Organizations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States', in J. Wouters, E. Brems and S. Smis (eds.), *Accountability for Human Rights Violations of International Organizations* (Antwerp/Oxford: Intersentia, 2008) (forthcoming).
3. M. Tondini, 'Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism Through (Criminal) Law', 5 *Processi Storici e Politiche di Pace/Historical Processes and Peace Politics* 2008 (forthcoming).
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- Profili istituzionali e giuridici* (Roma: CeMiSS Blu Series, 2007), 189-240.
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 14. M. Tondini, 'Exporting the rule of law: Human rights abroad during conflicts and peace operations', 3(1) *Pace Diritti Umani* 2006, 83-109.
 15. M. Tondini, 'UN Peace Operations: The Last Frontier of the Extraterritorial Application of Human Rights', 58(4) *Studia Diplomatica* 2005, 75-138.
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19. M. Tondini, 'L'Introduzione del sistema democratico a Timor Est. Una via verso la riconciliazione?', (2003) *Informazioni della Difesa* 2, 5-13.

Online Publications

1. M. Tondini, *Justice Sector Reform in Afghanistan: From a "Lead Nation" Approach to a "Mixed Ownership" Regime?*. Paper presented at the International Peace Research Association 22nd Global Conference, University of Leuven, Belgium, 19 July 2008, <http://www.ipra2008.org> (submitted for publication in *Transition Studies Review*, 2008).
2. M. Tondini and F. Bertolin, 'La sentenza Calipari: Volenti non fit iniuria?', *Forum di Quaderni costituzionali*, 3 April 2008, <http://www.forumcostituzionale.it/site>.
3. M. Tondini and J.P. Pierini, 'Tavole di legislazione e giurisprudenza comparata sul fenomeno del terrorismo internazionale', *Forum di Quaderni costituzionali*, July 2007, <http://www.forumcostituzionale.it/site>.
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8. M. Tondini, *L'Amministrazione Civile delle Nazioni Unite in Kosovo: profili di diritto internazionale* (Macerata/Trento: Università degli Studi di Macerata/Centro Italiano Studi per la Pace, July 2002), <http://www.studiperlapace.it>.

Other Research

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2. G. Morbidelli, L. Pegoraro, A. Reposo, M. Volpi, *Diritto pubblico comparato* (Torino: Giappichelli, 2nd ed., 2007) (*revised chapter 2 for the 2007 edition*).

Presentations

Conference Presentations

1. *Il diritto internazionale umanitario alla prova del 'terrorismo internazionale'*, Italian Red Cross, 8th National Congress of International Humanitarian Law Instructors, Senigallia, Italy, 4 October 2008.
2. *Building Sustainable Futures*, International Peace Research Association 22nd Global Conference, University of Leuven (Belgium), 19 July 2008.
3. *Problematiche applicative delle ROE*, Round Table: 'Aspetti giuridici del post conflict', Centro Alti Studi per la Difesa (CASD), Rome, 4 July 2008.
4. *Le trasformazioni del sistema internazionale dopo la fine della guerra fredda*, 2008 Congress of the Italian Standing Group on International Relations, Bertinoro, Italy, 27 June 2008.
5. *Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism Through Law*, Cortona Colloquium 2007: War, Law and Global Order, Centro Congressi S. Agostino, Cortona, Italy, 20 October 2007.
6. *Making Sense of a Pluralist World*, Sixth Pan-European Conference on International Relations, University of Turin, 15 September 2007.
7. *Problematiche applicative delle ROE*, Round Table: 'Aspetti giuridici del post conflict', Centro Alti Studi per la Difesa (CASD), Rome, 10 July 2007.
8. *Accountability for Human Rights Violations by International Organizations*, Royal Flemish Academy of Belgium for Sciences and Arts, Brussels, 17 March 2007.
9. *Stato di guerra e stato della guerra nel XXI secolo*, 25th Congress of the Italian Society of Political Science, Bologna, 13 September 2006.

10. *The Rule of Law in Peace Operations*, 17th Congress of the International Society for Military Law and the Law of War, Scheveningen, The Hague, 18 May 2006.

Seminars & Lectures

1. *Guerra e terrorismo: Un binomio scindibile*, Carabinieri – Marche Regional Command, Ancona, Italy, 22 October 2008.
2. *Evoluzione delle normative nazionali in risposta al terrorismo*, Italian Red Cross, 27th & 28th National Training Course for International Humanitarian Law Instructors, Marina di Massa, Italy, 29 June & 10 July 2008.
3. *La ricostruzione della giustizia in Afghanistan: Temi, problematiche e prospettive future*, Joint Staff College, Rome, 10 June 2008.
4. *Post Conflict Peace-Building: The Reconstruction of Justice in Afghanistan*, University of Rome 3, Faculty of Law, International Humanitarian Law Course (classes in English), 9 May 2008.
5. *The War on Terror and New Problems for IHL*, University of Rome 3, Faculty of Law, International Humanitarian Law Course (classes in English), 8 May 2008.
6. *Sicurezza e diritti dopo l'11 settembre*, University of Florence – Faculty of Political Science, International Relations Course, 24 & 26 April 2007.
7. *Justice for Someone: Strengthening a Functional Sense of Justice in Peace Operations*, University of Bradford, Department of Peace Studies, United Kingdom, 14 December 2006.
8. *La giurisdizione concorrente prevista dagli Status of Forces Agreements (SOFAs), con particolare riferimento alle operazioni in ambito NATO*, Naval Academy, Livorno, Italy, 7 June 2006.

Abstract

This study analyses the reform of justice in Afghanistan which started in the wake of the US-led military intervention of 2001. In particular, it focuses on the role of international actors and their interaction with local stakeholders. The research addresses a number of issues, relating to the way justice system reform is practically carried out in Afghanistan. It also highlights some provisional results, together with problems and dilemmas encountered in the reform activities. The main objective of this study is to evaluate whether the success of justice system reform in Afghanistan may be linked to any specific reason, feature or approach.

The research has been conducted under a twofold approach, comprising both theoretical and practical phases. The former phase has included the analysis of the relevant literature on the topic, drawing particular attention on several specific issues of interest (e.g. the development cooperation policies currently applied at international level, the 'local ownership' principle, the justice system in place in Afghanistan, etc.). This theoretical phase has been enriched by a period of study at the Department of Peace Studies of the University of Bradford (UK), and by the organization of the Conference on the Rule of Law in Afghanistan in July 2007. On the other hand, the practical phase has been characterized by a 'learning by doing' methodology, the author having served as a consultant to the Italian Development Cooperation Office in Kabul (Dec. 2007 – May 2008), working within the 'Italian Justice Programme'.

This research confirms that justice system reform in Afghanistan may succeed only if development programmes are implemented through a real multilateral approach, involving domestic authorities and other relevant local stakeholders. Success is therefore linked to: limiting the political interests of donors (which should abandon the idea of gaining 'political dividends' from their assistance); establishing pooled financing mechanisms for the sector reform; restricting the use of bilateral projects; improving the efficacy of technical and financial aid;

and concentrating the attention on the 'demand for justice' at local level rather than on the traditional supply of financial and technical assistance.

Alcibiades: Tell me, Pericles, [...] can you explain to me what law is?

Pericles: Most Certainly. [...] When the people, meeting together, approve and enact a proposal stating what should or should not be done, that is a law. [...]

Even the enactments of a despot in power are called laws.

Alcibiades: And what is violence and lawlessness, Pericles? Isn't it when the stronger party compels the weaker to do what he wants by using force instead of persuasion? [...] Then anything that a despot enacts and compels the citizens to do instead of persuading them is an example of lawlessness?

Pericles: I suppose so [...]. I retract the statement that what a despot enacts otherwise than by persuasion is law [...].

If one party, instead of persuading another, compels him to do something, whether by enactment or not, this is always violence rather than law.*

* Xenophon, 'Memoirs of Socrates', in R. Waterfield and H. Tredennick (eds. & trans.), *Conversations of Socrates* (London: Penguin Books, 1990), 68-216, at 80-81.

1 Introduction: Justice System Reform in Afghanistan

I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail

Abraham Maslow¹

What is law? This question lies at the very basis of the legal science. Since ancient Greece, philosophers and legal theorists have always tried to give a plausible answer, elaborating complex theories on the origin and the essence of law. In particular, scholars have attempted to answer three further questions: What does it mean to follow a 'rule'? What is the difference between a legal and a moral obligation? More importantly: what is the difference between being obliged by force and obliged by law?² There are two Latin sayings that may summarize a possible answer to such questions. They are: *ubi maior, minor cessat*, i.e., the weak (*minor*) capitulates before the strong (*maior*); and *ubi societas, ibi ius*, i.e., where there is society, there is law. The former phrase refers to the autocratic conception of law: law is the rule imposed by the mighty, the tangible manifestation of a political order. The latter instead mirrors a sociologic conception of law: law is considered to be a social phenomenon, a product of the society, a set of norms which regulate the life of society, according to its beliefs and cultural orientation. The first saying entails a top-down approach in the

¹ American psychologist, founder of humanistic psychology. A.H. Maslow, *The Psychology of Science: A Reconnaissance* (New York: Harper & Row, 1966), 15-16.

² See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 6.

formation of law: law descends from the mighty to the society. In the second case, law simply emerges from the society as a consequence of people's life.

And what is 'state-building'? This concept mainly refers to the process that aims at rebuilding the institutions of a weak, post-conflict or failing state, undertaken by international actors. In this respect, state-building always implies some form of external intervention. For intervening countries and organizations, this means, in the end, to exercise their own influence in the host country's internal affairs. Any kind of intervention entails a form of coercion, even though this may be exercised hypothetically without the use of force, for example only through the so-called 'peace-conditionalities'³.

Therefore, justice system reform in a state-building operation implies an external intervention in the host country's domestic legal order, aimed at reshaping justice institutions and the internal system of laws. Generally, international actors (the *maiores*) are able to influence the host country's (the *minor*) institution-building process on the basis of their financial/technical power and appeal. Indeed, in order to intervene in the host country's legal order, international players need a mutually-shared reference model. This may be found in human rights standards and treaties, but also in the internal administrative organization of intervening states. Under this perspective, the (re)establishment of the rule of law in countries recovering from conflict is largely conceived as a one-way, top-down transfer of

³ Peace conditionality may be defined as «the use of aid as a lever to persuade conflicting parties to make peace, to implement peace accords, and to consolidate peace» (G. Frerks, *The Use of Peace Conditionalities in Conflict and Post-conflict Settings: A Conceptual Framework and a Checklist* (The Hague: Netherlands Institute of International Relations 'Clingendael', October 2006), 1, http://www.clingendael.nl/publications/2006/20061000_cru_frerks.pdf. See on Afghanistan, J. Goodhand and M. Sedra, 'Bribes or Bargains? Peace Conditionalities and "Post-Conflict" Reconstruction in Afghanistan', 14(1) *International Peacekeeping* 2007, 41-61.

knowledge from ‘civilized’ to ‘fragile’ states⁴ – a technical problem, based on the replication of institutional models deemed universally applicable.

However, institutional changes do not take place in a political, legal and social vacuum. There is always an existing set of (maybe non-statutory) rules and institutions governing the life of local societies (the *societas*), which are the product of the historical, economic, political, social and even religious conditions in which people have been living. Social organizations always aim at a balance in human relations – which is not necessarily conflict-free – as a precondition for an ordered course of social life. In this regard, law is the way by which social balance is maintained. This bottom-up, social dimension of law and justice institutions clashes with the classic ‘dirigiste’ approach to justice reform in the above-mentioned state-building operations. As a consequence, justice system reform in state-building operations rests on a perennial struggle between these two conflicting pressures. Besides, the concept of state-building itself is formulated in a contradictory way, as, on the one hand, it aims at strengthening state sovereignty, while, on the other hand, it inevitably ends up in undermining the autonomy of the recipient state from external economic and technical dependency⁵.

Such a contradictory tendency, which affects justice system reform in state-building operations, may be described by combining the two Latin sayings, mentioned earlier, into a novel expression: ‘Ubi Maior, Ibi Ius’. In English this phrase would sound almost like: ‘only

⁴ The term ‘fragile states’ has now gained the momentum in the development cooperation literature (see, e.g., the OECD, *Principles for Good International Engagement in Fragile States & Situations* (Paris: OECD, April 2007), <http://www.oecd.org/dataoecd/61/45/38368714.pdf>). Besides, the expression ‘fragile states’ is *prima facie* more ‘politically correct’ than ‘failed states’, LICUS, ‘countries recovering from conflict’, or ‘developing countries’. In addition, it is also more neutral than the others: in fact, it does not entail any ‘development’, or ‘recovering’, or temporary failure.

⁵ See D. Chandler, *Empire in Denial: The Politics of State-building* (London: Pluto Press, 2006), 26.

the mighty make the law”⁶. Under this perspective, law is a ‘superstructure’, which reflects the existing political and social order – set up by whoever is able to do it. Besides, «[t]o say that ‘law is a tool of the powerful’ is not to embrace or promote cynicism. [...] Law is not contaminated simply because it is an instrument of power. The degree of justice or injustice depends on who wields power and for what ends»⁷. In the context of state-building operations, the linkage between justice reform and the achievement of a lasting peace becomes fundamental. However, this relationship raises further questions, such as: «do these efforts actually provide [...] justice and help build a just and lasting peace in [these] societies»⁸? Or are such efforts simply aimed at achieving what scholars call ‘liberal peace’⁹? Are international actors mighty enough to impose their own rule of law formula? Do local actors have the power and authority to make their own orientations and strategies prevail over external organization models? Will a compromise between the two instances be successful?

⁶ A similar expression has been used in the book of J.E. Stromseth, D. Wippman, and R. Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions* (New York: Cambridge University Press, 2006).

⁷ S. Holmes, ‘Lineages of the Rule of Law’, in A. Przeworski, J.M. Maravall (eds.), *Democracy and the Rule of Law* (New York: Cambridge University Press, 2003), 19-61, at 51.

⁸ R. Mani, ‘The Rule of Law or the Rule of Might? Restoring Legal Justice in the Aftermath of Conflict’, in M. Pugh (ed.), *Regeneration of War-Torn Societies* (Basingstoke: Macmillan Press, 2000), 90-111, at 93.

⁹ Liberal peace may be described as a «paradigm that gives priority to the rule of law rather than social justice, to quick-fix election rather than political accountability, to neoliberal economics rather than state direction (dirigisme) to increase purchasing power, and to widening external influences rather than strengthening autonomy in the undeveloped world» (M.C. Pugh, N. Cooper and J. Goodhand, *War Economies in a Regional Context: Challenges of Transformation* (Boulder, Co: Lynne Rienner, 2004), 6). See also M.R. Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001), 9.

All these questions assume a new and fundamental significance with the intervention in Afghanistan, born on the ashes of multilateralism and moulded since the beginning by strong ideological features. Indeed, in the wake of the 9/11 terrorist attacks, with the beginning of the War on Terror, the liberal peace theories reached their apex. The international community was believed to speak with only one voice: that of the US. The development cooperation policies themselves changed, rerouting humanitarian assistance towards the achievement of political goals. More importantly, in the initial expectations of the US government, both military interventions in Iraq and Afghanistan should have lasted a few months and should have been followed by a quick reconstruction, which would have helped in exporting liberal democracy and values in 'freed' countries. Accordingly, the reform of domestic legal and judicial systems would have been accepted by the local population, as a sign that the 'victor's justice' was globally applicable.

However, things have gone differently. The progressive failure of both military expeditions in establishing order after conflict (and in the case of Afghanistan, basically in winning the war) has led to a 'reawakening of consciousness' within the international community. This impasse has also affected the US political credibility on the global stage, resulting in an increasing rivalry among the other intervening powers. In Afghanistan, such a competition has in turn impeded the formation of a common strategic vision for the end of the conflict and undermined the foundations of this interventionist approach. 'Exit strategy' is a phrase which is now being rather recurrent in the US and international political debate. In addition, the economic crisis that the world is facing in fall 2008 is wiping out the last financial and economic certainties of liberal democracies. The scientific and political community is now searching for alternative models of development.

That in Afghanistan is therefore something more than a mere justice system reform carried out in the framework of a state-building intervention. In particular, it occurs in the twilight of the idea that values, principles and institutions sustaining the Western concept of 'liberal justice' may be successfully exported to war-torn societies. Indeed, the limited results accomplished so far in the reform itself and the worsening of the security conditions have progressively led to a change of approach, which has shifted from an orientation focused on

pre-established organizational models towards a mixed operational concept based on pragmatic political compromises and the formal involvement of national authorities in the reconstruction process. Such a change of course has been rather visible in the reform of governance mechanisms. In 2002 the security sector reform in Afghanistan was divided between 'lead nations', each one being in charge of managing the reconstruction activities within a single sector of responsibility (the 'lead nation approach'). Italy was entrusted with the reform of justice. However, this mostly unilateral approach waned in 2006, when the whole policy-making framework in charge of reforms was reshaped comprehensively and aligned with the templates set by major International Financial Institutions for countries emerging from conflict. Since then, justice system reform has been carried out under a more inclusive approach, generating a mixed international-national governance regime. Eventually, this local ownership consolidating process has recently led to the adoption of a development strategy for justice sector (National Justice Sector Strategy) by the Afghan government, to be implemented through a National Justice Programme. The latter's key feature is the use of an integrated funding structure to finance justice system reform, through the creation of a dedicated project, which is run jointly by the Afghan justice institutions. Such a project is funded by several donors through a trust fund, administered by the World Bank. In short, donors would grant the required financial assistance and monitor the status of activities, the World Bank would provide the technical expertise, and the local authorities would manage the project autonomously. However doubts remain on the success of this initiative. Will justice system reform be really successful, or will this change of approach be only a desperate attempt to make Western-oriented development policies bite?

In this context, the thesis analyses the post-2001 justice system reform in Afghanistan, focusing, in particular, on the role of international actors. I will first discuss some methodological aspects of this thesis, attempting to highlight the scientific significance of this research and explaining the reasons that led me to choose the topic of this study (**Chapter Two**). I will then illustrate the major changes that occurred after the September 11 attacks in development cooperation policies. To this aim, I will also analyse strategies and frameworks used at international level to foster the development of 'fragile states'. I will

also describe the rising of the ‘local ownership’ principle in development cooperation policies and how this theory is practically implemented through the establishment of joint ‘consultative’ and working groups (**Chapter Three**). In **Chapter Four**, I will explore state-building theories and methods, as applied to justice system reform in post-conflict scenarios. I will first consider imposed and consensual solutions, namely the ‘dirigiste’ and the consent-based approach. In addition, I will also look at the need to settle the domestic political order before providing to legal or judicial reforms. In the third section I will illustrate the reasons for choosing a model of reform based on internal consensus and how to successfully rely on it, by considering the local ‘demand for justice’. I will then briefly examine the issue of transitional justice in post-conflict situations, extending the analysis to Afghanistan. In the last paragraph, I will list some common characteristics of state-building operations dealing with justice system reform, and make a comparison with the current state of affairs in Afghanistan.

The following chapter (**Chapter Five**) will open with a description of the Afghan justice system’s development in the recent history. I will first examine the most relevant principles of Islamic law, which are of interest for this study. In the subsequent section I will focus on the influence of Islamic law over the Afghan justice system in the years prior to the US-led military intervention, starting from the reforms undertaken in the twenties. A paragraph will be dedicated to the justice system in place during the Taliban domination. In the subsequent two sections I will study the evolution of the Afghan legal and judicial systems from the sixties to 2001. **Chapter Six**, will contain a detailed analysis of the Afghan justice system currently in force and the first phase of reform activities, going from the beginning of the international intervention to the opening of the London Conference on Afghanistan in 2006. Initially, I will concentrate on the study of institutional changes undertaken in the aftermath of the Bonn Agreement, also examining the Italian leadership in justice sector reform. I will then focus on the adoption of the 2004 Constitution and the reorganization of the domestic legal and court system. Specifically, I will divide this issue into four sub-paragraphs, concerning the organization of courts, the applicable law, the legal training/capacity-building activities, and the reconstruction of judicial infrastructure. The

last paragraph will be dedicated to a preliminary assessment of justice reform during the first phase of reconstruction.

In the last chapter before the conclusion (**Chapter Seven**), I will discuss the second phase of justice system reform, going from the London Conference to date. This phase is characterized by a rather more inclusive approach to reconstruction activities, with a wider participation of the Afghan authorities to the decisional process. The first paragraph will illustrate the evolution of the institutional scenario in Afghanistan starting from the London Conference to the Rome Conference of 2007. A further section will be dedicated to present some data and figures reflecting the status of justice before the opening of the Rome Conference. I will then delineate the developments which occurred since mid-2007 to date, also focusing on the analysis of both the National Justice Sector Strategy and the National Justice Programme. The subsequent paragraph will concern the study of the initiatives undertaken during this second phase of reconstruction. It will include sub-sections on the new counter-narcotics law, the training and capacity building activities, and the restoration of the judicial infrastructure, with special reference to the establishment of the National Legal Training Center. Furthermore, I will address the role of the US in justice sector reform, also providing data and figures. In the conclusive paragraph, I will make a second assessment of justice reform, centred on the real implementation of the 'local ownership' principle. In doing so, I will also attempt to give a practitioner's view of the ongoing activities, based on my service for the Italian Ministry of Foreign Affairs in Rome and Kabul.

In the conclusive chapter (**Chapter Eight**) I will outline some general conclusions as regards the effectiveness and efficacy of the state-building intervention in Afghanistan, concentrating the assessment on the reform of justice. Ultimately, I will list a number of recommendations, descending from this study, which could be of help for a successful reform of the Afghan justice system.

2 Objectives and Methodology

Law is the pendulum of human society, regulating its action and mechanism. Just as a pendulum sometimes runs behind or ahead of time, so law occasionally leads or lags behind prevailing climates of opinion. When its pendulum breaks down completely a clock becomes functionally useless. [...] [S]imilarly, [...] [w]hen [the system of laws] is no longer in harmony with the communities that it governs, [...] it may render justice ineptly and inefficiently. In the worst scenario law may give refuge and expression to the darkest, and most malign, forces in the human character¹⁰.

The topic of this thesis has been chosen for a number of reasons. First, in my opinion, there are some background issues which make this research rather interesting and innovative. I have always been fascinated by the contradictions and dilemmas that peace-builders (or state-builders¹¹) have to face when reforming state institutions in war-torn countries. In particular, I have often focused my attention on the dichotomous approach between either the transplant of external institutional and administrative models in countries recovering from conflict (i.e., the ‘neo-colonial’ or ‘dirigiste’ approach), or the simple restoration and/or reform of existing state institutions according to a

¹⁰ H. Ross, *Law as a Social Institution* (Oxford/Portland, OR: Hart Publishing, 2001), 1.

¹¹ In my opinion, the distinction between the concepts of peacekeeping, peace-building, state-building, etc. is extremely vague. In fact, currently, distinguishing among these operations is of limited operational value, given the evolution of peace operations doctrine towards a holistic and integrated approach. As a consequence, I deem all these terms as interchangeable.

new 'social contract', signed at the end of hostilities (i.e., the consent-based approach). Although these two theoretical approaches exhaust the issue at the strategic level (and this is why I refer to a dichotomy), they are not separated by a clear demarcation line, nor are they mutually-exclusive at the operational level. Indeed, operationally, state-building interventions usually see a joint application of both these orientations, so that it is basically impossible to label a mission either as 'neo-colonialist' or consent-based, in operational terms. As a consequence, in order to assess a state-building mission, it becomes fundamental to study in-depth the decisional mechanisms standing at the very basis of reform activities. In fact, in the face of each and every choice in the course of reform activities, international and local actors are forced to take a decision according to one of these two approaches. In other words, to be scientifically valuable, a research should examine *who* exactly, and even *de facto*, runs the state-building process, through *what* decisional apparatus, *where* problems possibly lie and *how* such problems may be addressed, *when* the state-building process will be over, and last but not least, *why* the latter initiated and under which approach.

It is obvious that the magnitude of such a task makes the topic unfit for any doctoral research. Therefore, it has been necessary to limit the objective of research to the reform of a single institutional sector. In this respect, I have opted for the justice system¹² for several reasons. First because of my educational background, as I am a law graduate. Secondly, I am convinced that law itself may be successfully used as a subject of analysis and assessment. Clearly, the mere study of new laws

¹² In English, this term is basically quite unspecific and vague. It describes one or all of the various components of the law-related state institutions, including the judiciary, the prosecution service, the bar, the police service, and the prisons. However, this study pays less attention to the status of the legal profession, the police, and the corrections in Afghanistan and mainly focuses on the court system and the prosecution service. Conversely, to the aims of this study, the term 'justice system' also encompasses the legal system, intended as the system of laws and other norms officially in force in the country.

and regulations, together with the introduction of a new court system, would be only descriptive. On the other hand, investigating the reasons at the basis of legal reforms, explaining how the latter have been decided, according to which interests, under which logic, what consequences they generate and what the expected short and medium-term impact of reforms is, would entail a true analysis.

In other words, I believe that the study of laws, norms, prescriptions and decision-making frameworks may be studied from an analytic perspective. This may be true for the reform of any institutional sector, as any novel organization system is settled through the enactment of new laws and regulations. For example, even the restoration and development of the agricultural sector passes through the adoption of new norms. However, with the reform of justice we go to the heart of the normative dilemma. Analysing the reform of the legal (including the constitutional) and judicial system entails investigating the instruments and mechanisms through which a new political entity manifests its power and authority over the society it is supposed to govern. Choosing between the 'dirigiste' or the 'consent-based' approach in founding a new legal order implies a decision between the autocratic or sociologic origin of law, which is the fundamental and irresolvable issue at the basis of the general theory of law. This happens every time an international consultant or a local civil servant drafts a policy document or a new statute. For a legal scholar, as I am, this sounds like a miracle – the most exiting discovery ever. Although only for a moment and within certain limits, that consultant or civil servant cuts the Gordian knot and reveals the true nature of law: in that moment he/she is a Leviathan or a simple citizen-consociated. Having been involved in the legal reform in Kabul, this dilemma has been rather recurrent in my mind.

However, there are also other reasons why the reform of justice in state-building interventions may be deemed so significant. Being a social phenomenon, law is typically a product of society. Law characterizes the society which it applies to, and vice-versa. Law focuses on the society's common interest, which is established according to the society's values and purposes. Moreover, law unifies the social and the individual consciousness, namely the public and private mind, under a single explicative theory. Above all, «law presupposes a society whose structures and systems make possible the

mutual conditioning of the public mind and the private mind, and the mutual conditioning of the legal and the non legal»¹³. In this regard, modifying the legal and court system in a country recovering from conflict, and making the new justice system acceptable for the local population means, to some extent, inducing profound changes in the local society. On the other hand, the acceptance of a large-scale justice system reform entails that the local society is probably already changed. This makes the adoption of the right approach particularly important for the success of reforms.

Several other reasons have induced me to take Afghanistan as a case study. Among these are: the major change in the concept of humanitarian action which occurred in the wake of the September 11 attacks and its immediate application to the state-building intervention in Afghanistan; the profound ideological basis of such intervention, matured in the context of the Global War on Terrorism (GWOT); the magnitude of the commitment undertaken by the international community; and the challenge of reforming public institutions by introducing Western-oriented legal and administrative models into an Islamic, war-torn, atomized society, traditionally refractory to any political and institutional change.

Specifically, as I will show in the third chapter, at international level, development cooperation policies and procedures have radically changed since the beginning of the civil and military intervention in Afghanistan. Changes were initially based on the idea that humanitarian action should be openly aimed at achieving political goals. It is easy to imagine that this has happened, at first, as a result of the unanimous international political response to the 9/11 attacks. The 'politicization' of development assistance presupposes a final political goal which is mutually-shared by the community of national and international stakeholders participating in the country's reconstruction. The substantial failure of the reconstruction process in Afghanistan could prove that such a political end-state was absent, probably from

¹³ P. Allot, 'The Concept of International Law', 10(1) *European Journal of International Law* 1999, 31-50, at 32.

the beginning. Possibly, such a 'common' approach was nothing but the product of an ideological representation of reality – just like the GWOT itself¹⁴ – which has led the US and its allies to foresee the establishment of 'democratic' and Western-oriented state institutions as a panacea to tackle situations of political instability.

Moreover, while the state-building doctrine has been extensively used during peace support operations in the nineties, none of those operations have concerned a war-torn country bigger than France¹⁵, whose central government has never really extended its authority over a third (at least) of the territory. The complexity of the mission also reverberates in the number of tasks to be accomplished – political, military, civilian, and humanitarian – and in the large number of national and international stakeholders concerned in the reconstruction process. Ultimately, there is the 'clash of civilizations'¹⁶ issue. Of course, it is extremely interesting to study the dilemmas, contradictions, results and failures encountered in reforming a justice system dominated by Islamic law and traditional justice resolution mechanisms, trying to transplant Western-oriented, technocratic legal and administrative models into the country and adapt such models to local conditions.

In this context, I believe that the scientific significance of assessing justice system reform in Afghanistan is indisputable. However, my expectations in 2005, at the beginning of this research, were not optimistic. Too many factors were conditioning the success of legal and judicial reforms. In particular, apart from independent variables such as the security and the difficult socio-economic environment, my concerns were focused, in particular, on the ideological portrait of the situation on field, with the intervening

¹⁴ I have considered the issue in M. Tondini, 'Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism Through (Criminal) Law', 5 *Processi Storici e Politiche di Pace/Historical Processes and Peace Politics* 2008 (forthcoming).

¹⁵ France extends for 551,500 km²; Afghanistan for 652,090 km².

¹⁶ From the famous Samuel P. Huntington's book, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996).

powers convinced that the Afghan population would have followed the institutional reforms, driven by a kind of 'democratic instinct' towards the adoption of Western legal and administrative models. In my opinion, this simplistic assumption would have made the entire intervention rest on false premises. Another issue was the limits of the 'lead nation approach'¹⁷ in addressing an immense commitment such as the reform of justice in a big country like Afghanistan. Given the 'size' of this undertaking, such top-down approach would have probably failed. However, during the period spent in Kabul, I did not pay so much attention in verifying these initial hypotheses, since I realized that by 2007 their truthfulness was already evident to any scholar or practitioner. In addition, at that time, just after the Rome Conference, aid architecture had already evolved under a more inclusive orientation, leaving the 'lead nation approach' behind. Conversely, I focused on other conditioning factors, such as the short-term political and economic objectives of donors, the effective participation of local stakeholders to the decisional process, and the way financial resources are made available and funds disbursed. Comments are included in the conclusion.

Research has been conducted under a two-stage approach: theoretical and practical. The theoretical phase lasted up until November 2007 and has seen, *inter alia*, the study of: the justice system previously and currently in place in Afghanistan, the development cooperation policies and guidelines followed by international and national authorities, and the bodies that compose the policy-making structure which governs legal and judicial reforms. As a preliminary research, I have also analysed state-building theories and methods as applied to justice system reform in previous post-conflict operations. This was necessary to be able to make comparisons with the same kind of reforms undertaken in Afghanistan. In addition, I have had to study some key issues of Islamic law, since the latter has deeply influenced the Afghan legal culture. Indispensable has been also to examine policies and guidelines set up by the World Bank, the IMF and the OECD for countries recovering from conflict, since the aid architecture

¹⁷ See Chapter 6.

in Afghanistan was shaped according to such policy documents. Ultimately, I have become familiar with the 'local ownership' concept and with the other modern development cooperation principles, as these terms are rather recurring in the dedicated literature. In practice, it has been essential to merge typical legal studies (e.g., the analysis of the legal and court system) with the study of development cooperation policies, and the analysis of some relevant figures and data.

During this phase of activities I spent three months as a visiting student at the Department of Peace Studies – University of Bradford (UK), under the supervision of Prof. Michael Pugh (September-December 2006). I further served as a consultant to the Ministry of Foreign Affairs for the organization of the Conference on the Rule of Law in Afghanistan, held in Rome on 2-3 July 2007. In addition, I gave presentations and lectures, both in Italy and abroad, and published three articles focusing on the topic (a fourth article has been recently submitted to an international journal).

The practical phase of my research has been characterized by a 'learning by doing' methodology. From December 2007 to May 2008 I served as a consultant for the Italian Development Cooperation Office in Kabul (Ministry of Foreign Affairs), working as a policy analyst within the 'Italian Justice Programme'. My service in Kabul has been extremely valuable in gaining crucial insights into how the reform of justice in Afghanistan is currently being conducted and how the theoretical issues previously studied are actually dealt with in practice. While some aspects of my job in Kabul are not in the public domain and cannot be mentioned or discussed in this thesis, due to my duties of confidentiality as a civil servant, there are many issues that are not confidential but that only a practitioner may perceive. In this respect, my experience in Kabul has been indispensable for the success of this research.

The main research questions of this study are:

- i) How has justice system reform been practically carried out in Afghanistan?
- ii) Does it present the same characteristics of reforms undertaken in previous state-building missions or does it own specific features?
- iii) What are its provisional results?

- iv) What are the problems and dilemmas encountered during reform activities, and what is the origin of such issues?
- v) Is the success of justice system reform in Afghanistan linked to any specific reason, feature, or approach?

Answers to these questions will be given throughout the thesis, especially in the last paragraphs of Chapters Six and Seven and in the conclusion. As for now, it may be said that justice system reform in Afghanistan has been implemented, at the strategic level, under both the 'dirigiste' and the consent-based approach, thus confirming the trend that emerged in previous state-building missions. A first part of reform activities was carried out according to a pure 'dirigiste', top-down approach. Conversely, a second phase, which started approximately in 2006, has seen a change of course towards a more inclusive strategy, involving a growing number of local stakeholders. Generally, the application at the operational level of general policies and guidelines set up by International Financial Institutions proves that justice system reform in Afghanistan has followed pre-established models and conformed to other contemporary state-building operations. Besides, the adoption of a rather strict top-down approach in the first phase of activities could be considered as an evolution of the 'benevolent despotism'¹⁸ of international actors, experimented during the previous territorial administrations of the nineties, when international authorities were running quasi-state administrative apparatus in Bosnia, East Slavonija, East Timor and Kosovo. This would also confirm that the reform of justice in Afghanistan followed the existing development patterns at the time of its establishment in 2001. In this context, the 'light footprint approach'¹⁹, officially adopted by the international community in Afghanistan in 2002 could be considered as a mere necessity imposed by the magnitude of the undertaking, rather than a genuine evolution in the overall approach to

¹⁸ See J.C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', 33(4) *New York University Journal of International Law and Politics* 2001, 1101-1178.

¹⁹ See para. 3.1.

state-building. Such a major change has only occurred with the evolution of development cooperation policies at international level, marked by the 2003 Rome Declaration on Harmonization and the 2005 Paris Declaration on Aid Effectiveness²⁰, and the integration of such principles (and above all the 'local ownership' principle²¹) in the current state-building agenda.

On the other hand, justice system reform in Afghanistan presents unique characteristics due to the socio-economic environment in which it takes place: a traditional Islamic society, mainly administered by council of elders rather than the state, and reluctant to any social or political change. Another element of discontinuity with previous and contemporary state-building missions is the situation of armed conflict, which is still ongoing. The latter affects the solidity of the internal political order, the establishment of a transitional justice phase, and thus the effectiveness of any successful legal and judicial reform. That in Afghanistan is not a *post-conflict* but an *in-conflict* justice reform. However, leaving the establishment of a solid political order behind the reform of justice practically reverses the theory of rule of law as the product of a social contract²², thus undermining the foundation of the same liberal-democratic values that current justice reform aims at diffusing in the country. This basic contradiction has further conditioned the establishment of a *common* reform *strategy*, which is frequently invoked in literature and official documents. However, is it really possible to set up a *common strategy* for justice sector reform in the absence of steady and credible local and international political authorities? In this respect, that in Afghanistan is a *sui generis* justice system reform, including elements of colonialism – such as the extensive use of the military apparatus in the reforms, the strong political pressure exercised by external actors on the local government, the latter's lack of sovereignty, its dependency from foreign technical and financial resources – and local ownership – such as the adoption of

²⁰ See para. 3.2.

²¹ See para. 3.3.

²² See para. 4.1.

inclusive development policies, the involvement of local authorities at all levels in the decisional process, and the formal adoption of each and every decision concerning justice sector reform solely by the Afghan government. In the end, I believe that this situation only reflects a provisional *status quo* and that such a hybrid model will soon evolve. Unfortunately, at this stage of activities, it is difficult to predict the final outcome of this process.

3 Reforming Public Institutions in Countries Recovering from Conflict: A Brief Overview

3.1 A New Approach to Institutional Reforms in the Aftermath of 9/11

In future studies, that in Afghanistan will probably be regarded as one of the most significant state-building interventions undertaken by the international community under a novel approach. This new trend reflects a large-scale change in the concept of humanitarian action, which becomes increasingly professionalized and rationalized, as well as openly aimed at achieving political goals²³.

The first signs of such evolution in the development aid agenda started in early 'nineties, as a consequence of the resurgence of cosmopolitan idealism in the US foreign policy. The post cold-war era had left behind any form of dialectic confrontation between distinct ideas on global development. Mankind's ideological evolution was believed to be at its end point, with the victory of the of western liberal democracy over any other possible political philosophy²⁴. The resumption of 'state-building'²⁵ (or 'nation-building' in American

²³ For an analysis see M. Barnett, 'Humanitarianism Transformed', 3(4) *Perspectives on Politics* 2005, 723-740.

²⁴ F. Fukuyama, 'The End of History', *The National Interest* (Summer 1989), 3-35, at 4. This thesis was lately developed by Fukuyama in the famous *The End of History and the Last Man* (New York: Avon Books, 1992).

²⁵ 'Nation-building' was a concept widely used in the fifties and sixties, in the context of the East-West confrontation. In particular it constituted a western strategy for containing socialism and the expansion of Soviet Union in the

literature²⁶) doctrine followed the universalization of this theory, which was mostly implemented as a one-way, top-down transfer of knowledge from 'civilized' countries to weak states or countries recovering from conflict. Generally, the whole process was conceived as a path towards the formation of a legal and political *civitas maxima* –

third world. Indeed, the term 'nation-building' almost disappeared from the political debate during the seventies, along with the US defeat in Vietnam. However, the rationale of past state-building operations clearly resembles that of current interventions. According to Hippler, during the sixties,

«(e)conomic development was perceived to imply a market economy, and political development a nation-state. Political development as a component of or prerequisite for economic development was thus regarded above all as a nation-building process. The two together, that is accomplishment of the market mechanism and the nation-state, were regarded as being closely linked and as 'modernisation'»

(J. Hippler, 'Violent Conflicts, Conflict Prevention and Nation-building – Terminology and Political Concepts', in J. Hippler (ed.), *Nation-Building – A Key Concept for Peaceful Conflict Transformation?* (London: Pluto Press 2005), 3-14, at 5).

²⁶ Scholars are inclined to distinguish between the two concepts. In this respect, they define State-building as the «actions undertaken by international or national actors to establish, reform, or strengthen the institutions of the state which may or may not contribute to peacebuilding». On the contrary, Nation-building mostly focuses at forging a sense of identity and nationhood. It may be described as the «actions undertaken, usually by national actors, to forge a sense of common nationhood, usually in order to overcome ethnic, sectarian, or communal differences; usually to counter alternate sources of identity and loyalty; and usually to mobilize a population behind a parallel state-building project» (C.T. Call and E.M. Cousens, *Ending Wars and Building Peace: Coping With Crisis* (New York: IPA, Working Paper, March 2007), 3, http://www.ipacademy.org/asset/file/151/CWC_Working_Paper_ENDING_WARS_CCEC.pdf). According to Fukuyama, nation-building may be divided into three different aspects or phases: 1) post-conflict reconstruction; 2) creation of self-sustaining state institutions; and 3) strengthening of state institutions (F. Fukuyama, *State-Building: Governance and World Order in the 21st Century* (New York: Cornell University Press), 100-101).

a concept which entails a single universal state, law and morality²⁷. This process entailed «an ideology of world order that reflect[ed] and legitimize[ed] neoliberal values, state-centrism and the economic structure of the international system [, as a] part and parcel of a globalized 'liberal peace'»²⁸.

On the other hand, this scenario was naturally nothing but an ideological representation of reality. This resulted pretty evident with the poor outcomes of most interventions undertaken either by a number of different international actors under the UN political umbrella or by the UN itself by means of international territorial administrations²⁹. In Eastern Slavonia, Bosnia, Kosovo and East Timor, the powers assumed by external actors were so extensive that the status of the administered territories resembled that of a protectorate or a trusteeship administration³⁰. The authority vested by international administrators encompassed, inter alia, «the creation and enforcement of new legal systems; the management and rebuilding of the local

²⁷ See D. Zolo, *I signori della pace: Una critica del globalismo giuridico* (Carocci: Rome, 1998), 137.

²⁸ M. Pugh, 'Peacekeeping and IR Theory: Phantom of the Opera?', 10(4) *International Peacekeeping* 2003, 104-112, at 110-111.

²⁹ Among the latest contributions on the issue of international administration of territories, see gen. C. Stahn, *The Law and Practice of International Territorial Administration: From Versailles to Iraq and Beyond* (New York/Cambridge: Cambridge University Press, 2008). According to Stahn, the success of international administrations as a tool for state-building is difficult to assess. Though to some extent they have made «a lasting contribution to the development of pluralist and democratic structures of society», their major achievements have been hampered by «repeated drawbacks, such returns to violence [...] or the strengthening of radical political forces in elections» (*ibid.*, at 404-405). See also gen. R. Caplan, *International Governance of War-Torn Territories* (New York: Oxford University Press, 2005).

³⁰ See gen. R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (New York: Oxford University Press, 2008). See also R. Paris, 'Peacekeeping and the Constraints of Global Culture', 9(3) *European Journal of International Relations* 2003, 441-473, at 456.

economies; the appointment and dismissal of officials; the reconstruction and operation of public utilities; the establishment of effective customs and police services; and, not least, the provision of public security»³¹. The UN 'peace-building'³² soon became «an enormous experiment in social engineering – an experiment that involves transplanting Western models of social, political and economic organization into war shattered states in order to control civil conflict: in other words, pacification through political and economic liberalization»³³. However, at the same time, state-building operations in Somalia, Rwanda, Haiti, Bosnia, Kosovo and East Timor have been described as marked by various levels of success. While missions in Somalia, Rwanda and Bosnia (pre-Dayton) are commonly considered as *debacles*, the other interventions, which are still in place, are seen by scholars as requiring continuous economic and political assistance in the years to come³⁴.

To some extent, the September 11 attacks in New York and Washington accelerated the process. Once again such a change may be traced back to a vigorous shift in the American foreign policy, under which the US are now forced to «either tak[e] on responsibility for the governance of weak states or else [to] throw the problem in the lap of the international community»³⁵. The latter was suddenly influenced by

³¹ M. Berdal and R. Caplan, 'Politics of International Administration', 10(1) *Global Governance* 2004, 1-5, at 2.

³² The concept of 'post-conflict peace-building' was initially conceived by the Secretary-General Boutros Boutros-Ghali in his 1992 *Agenda for Peace* as an «action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict» (*An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General, UN Doc. A/47/277 – S/24111, 17 June 1992, para. 21)

³³ R. Paris, 'Peacebuilding and the Limits of Liberal Internationalism', 22(2) *International Security* 1997, 54-89, at 56.

³⁴ N.D. White, *The United Nations System: Toward International Justice* (Boulder, Co: Lynne Rienner, 2002), 155-156.

³⁵ Fukuyama, *State-Building*, p. 94.

this renewed unilateral policy. As a result, a vast consensus emerged among key actors participating in state-building interventions on the leading policy to be implemented in the reconstruction activities. In particular, the donor community agreed that, while the international assistance efforts must combine into an integrated approach to support the political process, the short-term relief activities must turn rapidly into long-term investment strategies, aimed at reducing poverty and consolidating the authority of national government all over the state territory³⁶. With regard to Afghanistan, the external assistance was thus largely intended to stabilize the Afghan state structure and provide legitimacy for the central government, under a strategy that has been further labelled as 'aid-induced pacification'³⁷. On the whole, since the stabilization is now conceived as passing through an effective policy of aid assistance, the real objective of the reform process becomes that of structuring state political economy in order to convince potential opponents or spoilers to join the new political process³⁸.

As a consequence of this new scenario, the UN role in state-building missions was rapidly reconsidered. The UN abandoned comprehensive governance models, as experimented in Kosovo and East Timor, and returned to a more modest *modus operandi*, by assisting the local government in the state-building process, rather than directly providing to the administration of territory³⁹. The theory and practice of

³⁶ A. Costy, 'The Dilemma of Humanitarianism in the Post-Taliban Transition', in A. Donini, N. Niland and K. Wermester (eds.), *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan* (Bloomfield, CT: Kumarian Press, 2004), 143-165, at 145.

³⁷ N. Stockton, *Strategic Coordination in Afghanistan* (Kabul: AREU, August 2002), 25, www.areu.org.af/index.php?option=com_docman&Itemid=&task=doc_download&gid=260.

³⁸ B.D. Jones, 'Aid, Peace and Justice in a Reordered World', A. Donini, N. Niland and K. Wermester (eds.), *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan* (Bloomfield, CT: Kumarian Press, 2004), 207-226, at 214.

³⁹ Stahn, *The Law and Practice*, p. 348.

United Nations post-conflict operations had thus initially passed from the application of a consent-based model, as in the case of the UN missions in Namibia, Cambodia and El Salvador, to a 'dirigiste' (also labelled 'neo-colonialist'⁴⁰) approach, as in the cases of Somalia, Kosovo and East Timor. Eventually, it became minimalist again with the UN Assistance Mission in Afghanistan (UNAMA)⁴¹. The right formulation for this renewed UN engagement was found by the Special Representative of the Secretary General (SRSG) in Afghanistan, Lakhdar Brahimi, who called this novel UN strategy the 'light footprint approach'⁴². This new model of engagement would reflect those past failures and excesses registered in the establishment of quasi-state administrative apparatus run by international authorities, which have

⁴⁰ See e.g. J. Chopra, 'The UN's Kingdom of East Timor', 42(3) *Survival* 2000, 27-39, at 33. The term 'neo-colonialism' was initially coined by Kwame Nkrumah in 1965. It refers to the economic and political control which former colonial powers and other powerful states continue to exercise over former colonies and other third-world countries after their formal independence (see K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (London: Thomas Nelson & Sons, 1965).

⁴¹ J.S. Kreilkamp, 'UN Postconflict Reconstruction', 35(3) *New York University Journal of International Law and Politics* 2003, 619-670, at 622, 634 and 657. UNAMA was established with UNSC Res. 1401 (2002). For a brief analysis of its initial mandate see A. de Guttry, 'Il ruolo delle Nazioni Unite in Afghanistan dal ritiro sovietico alla *pax americana*', in A. de Guttry, *Oltre la reazione: Complessità e limiti nella guerra al terrorismo internazionale dopo l'11 settembre* (Pisa: Edizioni ETS, 2003), 139-200, at 186.

⁴² Daily Press Briefing by the Office of the Spokesman for the Secretary-General, 6 February 2002, <http://www.un.org/News/briefings/docs/2002/db020602.doc.htm>. See also *The situation in Afghanistan and its implications for international peace and security*, Report of the Secretary-General, UN Doc. A/56/875 – S/2002/278, 18 March 2002, at 16: «(d) UNAMA should aim to bolster Afghan capacity (both official and non-governmental), relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate 'footprint'»

deeply conditioned the reform of local state institutions according to externally-imposed models. Indeed, whereas that in Afghanistan may be considered as the first mission undertaken under this 'light footprint' strategy, the same approach is consistent with that of subsequent UN missions in Liberia, Democratic Republic of Congo and Ivory Coast⁴³.

Conversely, more recently, with the stalemate in the reconstruction of Afghanistan and Iraq and the growing concerns over the failure of both interventions, the focus has progressively shifted on the responsibilities of beneficiaries, shadowing those of participating states and organizations. Accordingly, state-building is now regarded as being «a primarily endogenous development»⁴⁴, a «responsive process»⁴⁵, with scholars debating on the failure of 'external' nation-building⁴⁶. The loss of political credibility by the US on the global stage and the resulting increasing rivalry with the other major powers impedes the formation of a single strategic vision for peace-building interventions. This in turn has led to a creeping crisis in the UN's

⁴³ Stahn, *The Law and Practice*, p. 350.

⁴⁴ OECD-DAC, *Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience* (Paris: OECD-DAC, Discussion Paper, 2008), 3, <http://www.oecd.org/dataoecd/59/51/41100930.pdf>.

⁴⁵ A. Whaites, *States in Development: Understanding State-building* (London: DFID, 2008), 6, <http://www.dfid.gov.uk/pubs/files/State-in-Development-Wkg-Paper.pdf>.

⁴⁶ M. Ottaway, 'Rebuilding State Institutions in Collapsed States', 33(5) *Development and Change* 2002, 1001-1023; U. Hopp and A. Klope-Lesche, 'External Nation-building vs. Endogenous Nation-forming: A Development Policy Perspective', in J. Hippler (ed.), *Nation-Building – A Key Concept for Peaceful Conflict Transformation?* (London: Pluto Press 2005), 137-150; T. Dodge, 'Iraq: the Contradictions of Exogenous State-Building in Historical Perspective', 27(1) *Third World Quarterly* 2006, 187-200.

capacity to organize effective state-building missions⁴⁷. Such circumstances could be considered as indicators of a further evolution in the theory of state-building, whose final outcome is, however, still doubtful.

3.2 The Role of International Institutions in the Formation of Development Aid Policies

The peace-building strategy experimented in Afghanistan also comes at the end of a process of transformation in the approach taken by International Financial Institutions (IFIs) towards countries recovering from conflict⁴⁸. Some months before the beginning of the international intervention, the World Bank (WB) had adopted its Operational Policy (OP) No. 2.30⁴⁹ that sets the scope and terms of the Bank's intervention in conflict prevention activities. However, already in 1999 both the Bank and the International Monetary Fund (IMF) had adopted a broader common approach to development planning, called Comprehensive Development Framework (CDF), which lays down the framework for 'concessionary' lending, mostly through the mandatory adoption of a Poverty Reduction Strategy Paper (PRSP) by requesting countries⁵⁰.

⁴⁷ R. Gowan, 'The Strategic Context: Peacekeeping in Crisis, 2006–08', 15(4) *International Peacekeeping* 2008, 453–469 (for a brief analysis of the situation in Afghanistan see p. 462).

⁴⁸ P. Cammack, 'Global Governance, State Agency and Competitiveness: The Political Economy of the Commission for Africa', 8(3) *British Journal of Politics and International Relations* 2006, 331–350, at 336.

⁴⁹ World Bank, *Development Cooperation and Conflict: Operational Policy No. 2.30* (Washington, D.C.: The World Bank, January 2001). This policy should now be read in conjunction with the World Bank Operational Policy No. 8.00, entitled 'Rapid Response to Crises and Emergencies'.

⁵⁰ See the joint note by J.D. Wolfensohn and S. Fischer, *The Comprehensive Development Framework (CDF) and Poverty Reduction Strategy Papers (PRSP)*

A PRSP outlines the country's macroeconomic, structural and social policies and programmes over a three year or longer period. It aims at promoting growth and reducing poverty, as well as identifying associated external financing needs and major sources of financing⁵¹. The PRSP formula was initially developed in order to respond to evident weaknesses in relations between poor countries and IFIs – in particular the lack of country ownership during reforms⁵². The PRSPs rationale is in fact that of conditioning international support to clear prospects and policies by the recipient country. In this respect, a PRSP should be country-driven, result oriented, comprehensive in scope, partnership-oriented, and participatory⁵³. While national governments are in principle responsible for setting up their PRSPs, they normally receive relevant inputs and assistance from domestic and external partners, including the WB and the IMF themselves. PRSPs also provide the basis for debt relief under the Heavily Indebted Poor Countries (HIPC) initiative. The latter, first launched in 1996, is a comprehensive policy to debt reduction for heavily-indebted countries pursuing IMF/WB adjustment and reform programmes. Before receiving full assistance, a country must await the final approval of its

(Washington, D.C.: The World Bank, 5 April 2000), <http://www.imf.org/external/np/prsp/pdf/cdfprsp.pdf>.

⁵¹ For a definition of PRSP see IMF, *Poverty Reduction Strategy Papers (PRSP)* (Washington, D.C.: IMF, 20 May 2008), <http://www.imf.org/external/np/prsp/prsp.asp>. See also G. Nicotera, 'United Nations Development Cooperation from its Origins to the Paris Declaration on Aid Effectiveness: Is the UN on the Rights Track?', 63(3) *La Comunità Internazionale* 2008, 469-487, at 476.

⁵² Bretton Woods Project, *Poverty Reduction Strategy Papers (PRSPs): A Rough Guide* (London: Action Aid, 9 April 2003), http://www.brettonwoodsproject.org/topic/adjustment/prsp_roughguide/prsp_roughguide.pdf.

⁵³ For an in depth analysis see L. Yiu and R. Saner, 'Development Diplomacy and Poverty Reduction Strategy Papers for Least Developed Countries: Non-State Actor Advocacy and Multistakeholder Diplomacy', in J. Kurbalija and V. Katrandjiev (eds.), *Multistakeholder Diplomacy: Challenges and Opportunities* (Malta: DiploFoundation, 2005), 105-121, at 106.

PRSP by both the Bank and Fund Boards. A PRSP normally covers a period of three years. However, changes can be made to the content of a PRSP using an Annual Progress Report. Usually, the majority of requesting countries are not ready to engage in a difficult task such as drafting a PRSP, due to the lack of human and economic resources. In this case, they submit an Interim PRSP (I-PRSP). An I-PRSP outlines a provisional poverty reduction strategy and a roadmap towards the adoption of a PRSP. Normally, the Interim Paper precedes the full Paper by 12 months. In case more time is required, a 'PRSP Preparation Status Reports' is to be submitted in order to receive continued assistance.

On the other hand, a major change was similarly affecting the UN approach to peace-building. At the time of intervention in Afghanistan, and even before that, since 1999, the UN had been implementing the concept of 'integrated mission' in Kosovo, after it had matured experience in the former Yugoslavia where a similar model based on single lead agencies had been adopted. Indeed, integrated missions are conceived to address situations of transition from war to peace through a wide UN response, which subsumes relevant actors and policies within an overall political-strategic crisis management framework⁵⁴. Under this holistic approach, state-building missions should immediately focus on capacity building without jeopardizing the local ownership of the reform process. Accordingly, at the beginning of the international intervention, Afghanistan saw the launch of a Consolidated Appeals Process (CAP)⁵⁵ by the UN, called 'Immediate and Transitional Assistance Programme for the Afghan

⁵⁴ E.B. Eide, A.J. Kaspersen, R. Kent and K. von Hippel, *Report on Integrated Missions: Practical Perspectives and Recommendations* (Oslo: Norwegian Institute of International Affairs, 2005), 4 and 13.

⁵⁵ The UN CAPs were initially created by the UN General Assembly in 1991 (UNGA Res. 46/182, UN Doc. A/RES/46/182, 19 December 1991), following the plight of Iraqi Kurdish refugees in the wake of the first Gulf War. A CAP is a multilateral financing tool used by aid organisations to plan, coordinate, fund, implement and monitor their activities during complex emergencies that require an integrated humanitarian response.

People’⁵⁶. However, in line with the tendency to ‘politicize’ the humanitarian assistance and follow the low-profile approach decided upon at the beginning of the intervention in 2002, «the United Nations submitted to a detailed review of individual programmes by national authorities. The United Nations subsequently supported the incorporation of humanitarian and recovery programmes into the national development framework and budget process»⁵⁷.

Eventually, the UN humanitarian assistance and the development aid policies established by IFIs were consolidated under a unified strategy. For the UN, this entailed abandoning an independent assistance policy in favour of a comprehensive development plan in which the UN itself played a secondary role. This interaction between IFIs and UN activities has been rather frequent in the course of the most recent state-building missions. During the UN missions in Afghanistan, East Timor, Iraq and Kosovo, the role of IFIs in the country’s reconstruction was partially provided by Security Council resolutions, revealing «an important and developing legal relationship between the IFIs and the UN»⁵⁸. Once this integration received full legitimation at the strategic level, the reform process was implemented at the operational level according to policies and manuals for Low Income Countries Under Stress (LICUS), developed mostly by the WB and the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD-DAC)⁵⁹. This pattern

⁵⁶ UN Country Team for Afghanistan, *Immediate and Transitional Assistance Programme for the Afghan People* (Kabul/Geneva: UN, January 2002), [http://www.reliefweb.int/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DI4W-un_afg_21jan.pdf/\\$File/un_afg_21jan.pdf](http://www.reliefweb.int/rw/RWFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64DI4W-un_afg_21jan.pdf/$File/un_afg_21jan.pdf).

⁵⁷ Costy, *The Dilemma of Humanitarianism*, p. 149.

⁵⁸ K.E. Boon, “‘Open For Business’: International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law”, 39(3) *New York University Journal of International Law and Politics* 2007, 513-582, 515.

⁵⁹ See e.g. World Bank, *Supporting Development Programs Effectively* (Washington, D.C.: The World Bank, November 2004), <http://siteresources.worldbank.org/CDFINTRANET/Resources/developm>

of combining traditional humanitarian assistance and IFIs development policies relies on the expected continuum between emergency and development. However, such concept is often misleading, as typically an emergency persists even when the development phase has officially started⁶⁰. «The continuum concept also assumes that poverty is transitional and that *development* in a neo-liberal mould is an inevitable consequence of the spread of global capitalism and human rights values. Adherents tend to see development as a solution to conflict»⁶¹.

In this respect, Afghanistan does not differ from other state-building interventions, as it has seen a number of organizational models taken from OECD/WB manuals and policies applied both at macro and micro level, i.e., within both the strategic and the operational structure of the new policy-making framework. On the one hand, the coordination among donors and Afghan authorities has been characterized by the use of the 'Consultative Group' formula⁶²; on the other hand, the formation of the National Development Budget has been assisted by IFIs through relevant inputs. The latter have taken the form of close assistance and performance monitoring of Afghan institutions, partially by means of joint assessment missions, as well as the perspective of short and medium-term financial assistance, as conditioned to the accomplishment of those stages described in IFIs manuals. It is also remarkable to note that, as IFIs policies and procedures themselves changed, they were immediately applied to the Afghan reconstruction. Therefore, as the principles of local ownership, alignment, harmonization, managing for results and mutual

[enteffectiveness.pdf](http://www.oecd.org/dataoecd/53/7/34583142.pdf); OECD-DAC, *Harmonising Donor Practices for Effective Aid Delivery*: Vol. 2 (Paris: OECD, 2005) <http://www.oecd.org/dataoecd/53/7/34583142.pdf>.

⁶⁰ M. Duffield, 'NGO Relief in War Zones: Towards an Analysis of the New Aid Paradigm', 18(3) *Third World Quarterly* 1997, 527-542, at 539-540.

⁶¹ M.C. Pugh, 'Post-Conflict Rehabilitation: Social and Civil Dimensions', *Journal of Humanitarian Assistance*, 11 December 1998, <http://jha.ac/1998/12/11/post-conflict-rehabilitation-social-and-civil-dimensions>.

⁶² See, para. 3.3.1.

accountability emerged at the Rome and Paris conferences on aid harmonization and effectiveness⁶³, the policy-making framework was itself reformed and aid programmes readapted to comply with the new tenets.

3.3 The 'Local Ownership': A New Mantra?

Political stability and economic prosperity will depend on well-functioning [...] institutions. However, well-functioning institutions depend on a strong sense of local ownership. Such ownership cannot be achieved if the owners do not know what they own and what they are intended to govern.

Kai Eide (at present, SRSG in Afghanistan)⁶⁴

⁶³ In recent years there have been a number of significant international events that have called for a more co-ordinated assistance among donors, aimed at improving the quality of international aid, and so its effects on poverty reduction and development. Such initiatives include the 2002 Monterrey Consensus on Financing for Development, the 2003 Rome Declaration on Aid Harmonization, and the 2005 Paris Declaration on Aid Effectiveness. In particular, the Paris Declaration, endorsed on 2 March 2005, may be considered as an international agreement establishing a practical, action-orientated plan to improve the quality of aid and its impact on development. The Declaration includes 12 indicators of aid effectiveness and specific targets to be met within fixed terms. Targets for 2010 have been laid down for 11 of such indicators (Targets are available at: www.oecd.org/dataoecd/57/60/36080258.pdf).

⁶⁴ *Report on the situation in Kosovo*, Brussels, 15 July 2004 (Annex to Letter dated 17 November 2004 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2004/932, 30 November 2004, p. 11).

As previously discussed, the shift towards the light footprint approach registered at the turn of the millennium was also influenced by the changes occurring in the field of development aid, which started stressing the concept of 'local ownership'. According to this principle, in order to be sustainable, a country's development must be locally owned and «based on integrated strategies that incorporate key economic, social, environmental and political elements»⁶⁵. Hence, the role of external partners becomes that of helping strengthen local capacities, rather than simply transplanting their own administrative and economic models into recipient countries. The local ownership theory stands at the very basis of the CDF, as advocated in 1999 by the President of the World Bank, James Wolfensohn⁶⁶ and also represents the guiding principle of the most relevant international initiatives in the field of development aid.

That of local ownership is not an original idea. The principle of preserving local capacity and domestic decision-making in processes of external governance was adopted, for instance, by Britain in the administration of African colonies or by the administering countries mandated under both the Mandate System of the League of Nations and the UN Trusteeship System⁶⁷. Besides, during the nineties, scholars had attempted formulating a definition of (domestic) government's ownership of institutional reforms⁶⁸, based on the assumption that:

⁶⁵ OECD-DAC, *Shaping the 21st Century: The Contribution of Development Co-operation* (Paris: OECD, 1996), 13, <http://www.oecd.org/dataoecd/23/35/2508761.pdf>.

⁶⁶ J. Wolfensohn, *A Proposal for a Comprehensive Development Framework (A Discussion Draft)*, Washington, D.C., 21 January 1999, <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf>.

⁶⁷ Stahn, *The Law and Practice*, p. 348. For an analysis of both the Mandate System of the League of Nations and UN Trusteeship System see *ibid.*, p. 73 and p. 92, respectively.

⁶⁸ See e.g. T. Killick, R. Gunatilaka, and A. Marr, *Aid and the Political Economy of Policy Change* (London and New York: Routledge, 1998), 87:

«when a government does not have the legitimate authority to implement a program, it will also lack political support. In such a situation the government may find that dependence on other forms of power (force, manipulation, persuasion) or of authority (coercion) will enable it to attain only a rather modest degree of implementation in the face of sabotage, indifference, nonparticipation, and minimum effort and compliance from the general population, despite large expenditure of resources»⁶⁹.

Currently, other authors seek a possible development model by dividing the concept of local ownership into a number of functional components⁷⁰. A recent contribution lists six different senses in which the concept of local ownership has been used in the context of post-conflict reconstruction: (i) responsiveness of new policies to local culture; (ii) consultation of local population before implementing new

«Government ownership is at its strongest when the political leadership and its advisers, with broad support among agencies of state and civil society, decide of their own volition that policy changes are desirable, choose what these changes should be and when they should be introduced, and where these changes become built into the parameters of policy and administration, which are generally accepted as desirable».

⁶⁹ O.E.G. Johnson, 'Managing Adjustment Costs, Political Authority, and the Implementation of Adjustment Programs, with Special Reference to African Countries', 22(3) *World Development* 1994, 399-411, at 406. This principle has been further recalled in other more recent works of the author: see O.E.G. Johnson, *Country Ownership of Reform Programmes and the Implications for Conditionality* (New York: United Nations, G-24 Discussion Paper Series, No. 35, January 2005), 6, <http://www.g24.org/un-joh05.pdf>.

⁷⁰ According to Brinkerhoff, local ownership may be divided into 6 main components: 1) government initiative; 2) choice of policy/programme based on balanced consideration and analysis of options, anticipated outcomes, and cost/benefits; 3) mobilization of stakeholders; 4) public commitment and allocation of resources by domestic authorities; 5) assignment of resources and responsibilities over the long-term; 6) learning practices and programmes from other countries and selectively adapting to local conditions (D.W. Brinkerhoff, 'Where There's a Will, There's a Way? Untangling Ownership and Political Will in Post-Conflict Stability and Reconstruction Operations', 8(1) *Whitehead Journal of Diplomacy and International Relations* 2007, 111-120, at 115-116).

policies; (iii) participation of local actors in the implementation process; (iv) accountability of international actors to domestic authorities; (v) overall control by international structures; (vi) respect for domestic sovereignty⁷¹.

Notwithstanding such theoretical definitions, the empirical meaning of the local ownership concept remains ambiguous. As anticipated, the entire model is centred on the domestic demand for institutional reforms. Insufficient internal demand then represents «the single most important obstacle to institutional development in poor countries»⁷². Nonetheless, domestic demand for institutional reforms should not be generated externally. It should rather come from a genuine aspiration of the requesting states. In practice, however, the situation on field is different and although the changes in question are officially fully agreed upon by the government, the civil service does not possess the expertise nor the resources to implement them⁷³. In addition, even if we may consider ownership as a pre-condition for true state development, stable institutional changes also require a qualified national leadership⁷⁴, which is often absent. The latter should be capable to express a shared political willingness or at least formulate political preferences, but often, in the aftermath of a conflict, such capacity is simply non-existent. In other cases, local counterparts may be able, but not willing to carry out reforms⁷⁵. Above all, a model of

⁷¹ S. Chesterman, 'Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations', 1(1) *Journal of Intervention and Statebuilding* 2007, 3-26, at 9-10.

⁷² Fukuyama, *State-Building*, p. 35.

⁷³ Killick, Gunatilaka, and Marr, *Aid and the Political Economy*, 88.

⁷⁴ C. Lopes and T. Theisohn, *Ownership, Leadership and Transformation: Can We Do Better for Capacity Development?* (New York/London: UNDP/Earthscan Publications, 2003), 35, <http://www.capacity.undp.org/indexAction.cfm?module=Library&action=GetFile&DocumentAttachmentID=1001>.

⁷⁵ A.S. Hansen, 'From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict', in C. Stahn and J.K. Kleffner (eds.),

development centred on the local ownership principle does not cease to rely on asymmetric relationships between external partners and domestic government. That is the reason why the local ownership is often indicated as the final outcome of the reform process, and not something which has to be present from the beginning. According to Chesterman: «local leadership may be desirable in development projects in general, but in a post-conflict situation this must be tempered by those concerns that brought international administration to the country concerned in the first place»⁷⁶. Others, such as Stephen Krasner, stress the need for a form of ‘shared sovereignty’, to be exercised jointly by external actors and national authorities⁷⁷.

At the same time, the debate over the application of the local ownership principle risks to be purely academic. A recent authoritative study on state-building interventions confirms that «local ownership [...] is more frequently invoked in word than in deed» and «although ‘ownership’ has long been a mantra of the development community, consistency has generally been limited to the lip service that is paid to this concept»⁷⁸. This may be certainly due to the contradictions and dilemmas frequently faced by international authorities engaged in post-conflict reconstruction, as well as to the insurmountable difficulties generated by the tasks assigned to them. However, this also concerns the genuine aims of the same international actors (and among them, the most powerful states), which often tend to hide the pursuit of their own short-term political interests behind the ‘humanitarian’ participation to state-building missions. As a consequence, international assistance – military, financial and political – is largely

Jus Post Bellum: Towards a Law of Transition From Conflict to Peace (The Hague: TMC Asser Press, 2008), 131-151, at 134 and 146.

⁷⁶ Chesterman, *Ownership in Theory*, p. 20.

⁷⁷ S.D. Krasner, ‘Sharing Sovereignty: New Institutions for Collapsed and Failing States’, 29(2) *International Security* 2004, 85-120, at 108.

⁷⁸ S. Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (New York: Oxford University Press, 2004), 195 and 198.

supply-driven and this basically jeopardizes the application of the local ownership principle⁷⁹. In fact, there is usually no direct empirical link between aid supply and people's needs. For instance, food aid requirements can be estimated this year and foodstuff delivered the next⁸⁰. Besides, building state institutions implies the interdependent exercise by a sovereign authority of coercion, capital and legitimacy⁸¹. However, in most of the current peace support operations, the management of these three resources is often granted by diverse international institutions, while the role of local authorities remains rather limited. Normally, as in the case of Afghanistan, (i) foreign states provide military forces to control the territory, (ii) international economic and financial institutions guarantee basic economic resources and assistance for institutional reform, and (iii) a plethora of agencies, NGOs and other organisations back the mission's national and international legitimacy through their humanitarian action, mostly for the benefit of the media and the world public opinion⁸².

Indeed, another way to assess the local ownership of reforms is to consider the level of authority that local actors exercise⁸³. *A contrario*, that means to focus on the influence exercised by international actors and thus on the transfer of knowledge between the same international actors and domestic authorities (quantitative analysis). On the other hand, a good research should qualitatively illustrate which international and domestic actors are engaged in the reconstruction

⁷⁹ Chesterman, *Ownership in Theory*, p. 19.

⁸⁰ Duffield, *NGO Relief in War Zones*, p. 539.

⁸¹ B.R. Rubin, 'Constructing Sovereignty for Security', 47(4) *Survival* 2005, 93-106, at 95.

⁸² Afghanistan is a clear example of this approach: the reconstruction of the judicial sector is mostly financed by a few trust funds managed by the World Bank, while the implementing activities are actually contracted out to a plethora of agencies and organisations.

⁸³ Hansen, *From Intervention to Local Ownership*, p. 137.

process, also showing the presence of spoilers⁸⁴. At the end of this evaluation, even a 'light footprint' international engagement like that in Afghanistan could very closely resemble more complex missions such as those in East Timor or Kosovo. Accordingly, some authors suppose that originally the adoption of the 'light footprint' approach in Afghanistan would have merely represented a first step, justified by the circumstances of the case, and oriented towards the further establishment of a full administrative structure, modelled according to the ones in Kosovo or East Timor⁸⁵.

Probably, a real change would simply require international actors involved in state-building missions to «promot[e] ownership beyond simply assessing it»⁸⁶. Conversely, this current tendency to affirm publicly the local ownership of reforms may represent a mere saving clause that the same international actors invoke in case of failure. As Belloni observes: «When delays, obstacles, and drawbacks cannot be ignored any longer, they are blamed on the local actors. While success has a thousand fathers, failure is an orphan. Time and again, lack of progress is blamed on the lack of indigenous democratic traditions and the influence of post-war trauma»⁸⁷. Ultimately, one could argue that the adoption of a 'light approach' in reconstruction, decided by international policy-makers, is purely a matter of fact – a result of their incapacity to impose political order (also by military means) abroad and, *a fortiori*, an acknowledgement of the weakness of the legal and political values 'exported' to countries recovering from conflicts.

⁸⁴ A.S. Hansen and S. Wiharta, with B.R. Claussen and S. Kjeksrud *The Transition to a Just Order – Establishing Local Ownership after Conflict: A Practitioners' Guide* (Sandöverken, Sweden: Folke Bernadotte Academy Research Report, 2007), 25.

⁸⁵ Kreilkamp, *UN Postconflict Reconstruction*, p. 664.

⁸⁶ Brinkerhoff, *Where There's a Will*, p. 118.

⁸⁷ R. Belloni, 'Rethinking "Nation-Building:" The Contradictions of the Neo – Wilsonian Approach to Democracy Promotion', 8(1) *Whitehead Journal of Diplomacy and International Relations* 2007, 97-109, at 107.

3.3.1 The 'Local Ownership' in Practice: The Consultative Group Formula

Notwithstanding these rather critical remarks, both the WB, under the CDF approach, and OECD-DAC promote a model of development for LICUS that attempts to put the local ownership principle into effect. Such a model is based on a complex structure whose functioning may be briefly described as follows⁸⁸. First, the requesting state prepares its own long-term, holistic vision for the future. Then, at the strategic level, the government drafts and adopts a PRSP or, at an earlier stage, a I-PRSP, drawing a comprehensive development policy for the country. The PRSP is divided into macro-areas and more specific sectors of intervention. It also contains time-bound medium-term objectives and priorities⁸⁹. The PRSP is complemented by sector strategies, one for each development sector⁹⁰.

At the operational level, a sector strategy is realized through a specific, time-bound and 'costed' set of actions and activities, included in a Sector Development Programme (SDP)⁹¹. Development programmes may be in turn financed bilaterally by means of loans/grants or through the creation of pooled financing mechanisms,

⁸⁸ The model described is voluntarily restricted to bodies and documents of interest to this work. For a more complete description see gen. OECD-DAC, *Harmonising Donor Practices*, and World Bank, *Supporting Development Programs*. See also A.R. Eggen and D.J. Bezemer, *The UNDP – World Bank/IMF Partnership in Achieving Millennium Development Goals: The Role of Poverty Reduction Strategies* (University of Groningen, MPRA Paper No. 7030, January 2007), <http://mpa.ub.uni-muenchen.de/7030>.

⁸⁹ World Bank, *Supporting Development Programs*, p. 4.

⁹⁰ OECD-DAC, *Harmonising Donor Practices*, p. 42.

⁹¹ *Ibid.*, at 37. A Sector development programme is defined by the OECD-DAC as a specific, time-bound and 'costed' set of actions and activities which support a sector strategy.

involving different donors, under a multilateral approach called Sector-Wide Approach (SWAP). There is no agreed definition for SWAP. The most commonly used definition is that of Mick Foster, according to whom a SWAP is when «funding for the sector supports a single sector policy and expenditure programme, under Government leadership, adopting common approaches across the sector, and progressing towards relying on Government procedures to disburse and account for all funds»⁹². SWAP is an approach, not a blueprint⁹³, so practically it may be implemented in different ways. However, an effective SWAP should always include a national sector strategy, to be financed through a medium-term expenditure programme, a performance monitoring system, and a broad consultation mechanism involving all relevant stakeholders⁹⁴.

The policy-making structure which governs the reform process and implements sector policies included in the PRSP is composed of Consultative Groups (CGs). CGs are participated jointly by all the relevant stakeholders (national and international) within distinct sectors of interest, but they are chaired by the local government. The CGs are in turn aligned with the PRSP sectors, so that every CG practically represents the main policy-making forum for each development strategy. At the lower level, sector and thematic working groups are created in order to address sector programmes. Again, such groups are international/national mixed, but led by the relevant government institutions. Finally, the whole structure is monitored by a high-level institution (presided over by the government) in charge of

⁹² M. Foster, *New Approaches to Development Co-operation: What Can We Learn from Experience with Implementing Sector Wide Approaches?* (London: Overseas Development Institute, October 2000), 9, http://www.odi.org.uk/publications/working_papers/wp140.pdf.

⁹³ HLSP Institute, *Sector Wide Approaches: A Resource Document for UNFPA Staff*, September 2005, 5, www.unfpa.org/upload/lib_pub_file/626_filename_swap-unfpa-resource-2005%20.pdf

⁹⁴ For a list of specific components see OECD-DAC, *Harmonising Donor Practices*, p. 36-37

coordinating government agencies with international partners⁹⁵. The whole system is then basically composed of «technical-level bodies to facilitate practical work, donor-co-ordination bodies, ad hoc working groups to tackle specific issues [...] and a wider consultative forum [...] that allows participation by a range of stakeholders»⁹⁶.

As the following chapters will clearly show, this represents the pattern used for institutional reforms in Afghanistan and specifically for justice sector financing and reform.

⁹⁵ World Bank, *Supporting Development Programs*, p. 17.

⁹⁶ OECD-DAC, *Harmonising Donor Practices*, p. 51.

4 Justice Sector Reform in Countries Recovering from Conflict

4.1 Justice Sector Reform in Post-Conflict Situations: A Few Introductory Remarks

The idea of justice in state-building missions has always represented the cornerstone of the new social order in war-torn countries. Legal reforms in territories recovering from conflicts do not usually follow the same rationale or present the same options. Each situation reveals unique and non-repeatable characteristics which prevent drawing up a 'one-size-fits-all formula'⁹⁷. Relevant variables might include the security situation, the historical reasons for the armed conflict, and the starting level for the restoration, while the results of the reconstruction process may be deeply influenced by strategic and operational choices of both local and international political actors. Naturally, the availability of economic resources (sustained by donor commitments) also plays a key role, although the efficacy of financial aid may be ruined by a high level of domestic corruption. Afghanistan and Haiti, for example, are considered among the most corrupted countries in the world notwithstanding the international state-building missions taking place⁹⁸.

⁹⁷ C. Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design', 18(3) *Leiden Journal of International Law* 2005, 425-466, at 425; H. Strohmeier, 'Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor', 25(2) *Fletcher Forum of World Affairs* 2001, 107-128, at 123.

⁹⁸ S.G. Jones, J.M. Wilson, A. Rathmell, and K.J. Riley, *Establishing Law and Order after Conflict* (Santa Monica, CA: Rand Corporation, 2005), 100.

In addition, historically, the reestablishment of the judicial system in a country has mainly followed the foundation of a new political order, imposed at the end of a conflict. In other words, a stable and secure political order has always represented the «*conditio sine qua non* of post-conflict reconstruction»⁹⁹. In the absence of a secure environment, any efforts to promote national reconciliation as well as to establish a functioning justice system are probably doomed to fail¹⁰⁰. However, recent examples like those in Iraq, Afghanistan (by military means alone) and to some extent, Kosovo and East Timor (through massive international political apparatus) show that this 'natural paradigm' has shifted towards a new model encompassing the use of external institutional design to shape the new political order, which has not yet taken root. This seems to be a successful option when the foundations of the new political system are solid and the renovation of the political class is effectively carried out, also by means of a peace agreement or a formal surrender¹⁰¹. Nevertheless, it may turn into a debilitating factor when the authority in charge fails to prevail militarily over competing forces or otherwise when it is not accepted by a relevant part of the population. As it has been sharply argued, «contemporary international intervention takes place in weak states, not conquered ones»¹⁰². Other scholars point out that the same circumstances have always occurred during past interventions. According to Plunkett:

«the reestablishment of the rule of law is reserved invariably for the postconflict stage. But, as in all of the recent UN peace missions – not just in Cambodia, but in places like Bosnia, Angola, and Western Sahara – the lines

⁹⁹ Center for Strategic and International Studies and Association of the U.S. Army, *Play to Win: Final Report of the Bi-Partisan Commission on Post-Conflict Reconstruction*, January 2003, 7, [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5JVD76/\\$FILE/csis-play-jan03.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5JVD76/$FILE/csis-play-jan03.pdf?OpenElement).

¹⁰⁰ Stromseth et al., *Can Might Make Rights?*, p. 134.

¹⁰¹ Jones et al., *Establishing Law and Order*, p. 15.

¹⁰² Belloni, *Rethinking "Nation-Building"*, p. 103.

blurred between when the war ends and the peace begins. Justice officials will inevitably find themselves in a similarly grey area»¹⁰³.

Indeed, this new credo in the Western oriented 'rule of law', as the basic precondition to secure stability and democracy, may be deceptive. As argued by Thomas Carothers, «the idea that specific improvements in the rule of law are necessary to achieve democracy is dangerously simplistic», as in Western countries «[d]emocracy often, in fact usually, co-exists with substantial shortcomings in the rule of law»¹⁰⁴. Indeed, scholars mostly agree that the overall impact of legal reform efforts, inspired by western-oriented rule of law theories on the 'quality' of justice, has been limited at best. For instance, while currently Russia owns a refined corporate law, drafted according to inputs received by US advisors, the shareholder rights are systematically trampled and the trustworthiness of judicial and administrative institutions is extremely poor¹⁰⁵. This suggests that establishing the rule of law is not a panacea for solving political instability. According to Chandler, «'[r]ule of law' regulation through the prioritization of law above the political sphere cannot compensate for, or overcome, the political problems involved in peace-building and post-war reconstruction»¹⁰⁶. Conversely, relegating the political process behind the restoration of the justice system would reverse the theory of rule of law as derived from the liberal democratic contract theory of

¹⁰³ M. Plunkett, 'Reestablishing Law and Order in Peace-Maintenance', 4(1) *Global Governance* 1998, 61-79, 63.

¹⁰⁴ T. Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, Democracy and Rule of Law Project No. 34, January 2003), 7, <http://www.carnegieendowment.org/files/wp34.pdf>.

¹⁰⁵ D. Berkowitz, K. Pistor, and J.F. Richard, 'The Transplant Effect', 51(1) *American Journal of Comparative Law* 2003, 163-204, at 165.

¹⁰⁶ D. Chandler, 'Imposing the 'Rule of Law': The Lessons of BiH for Peacebuilding in Iraq', 11(2) *International Peacekeeping* 2004, 312-333, at 314.

consent and would probably encourage arbitrary rule-making of local political elites¹⁰⁷.

Justice reform in Afghanistan has followed such trend: the limited accomplishments in the sector's restoration may be considered in parallel with the stalemate in military operations¹⁰⁸ and the scarce control of the ground by the Afghan government. According to the Director of US Intelligence, Michael McConnell, at the beginning of 2008, the Karzai Government controlled just under one-third of the country (30-31 percent). The remaining part was split between the Taliban (10-11 percent) and local tribes (58-60 percent)¹⁰⁹. In November 2007, a less favourable analysis reported that 54 percent of Afghanistan's landmass hosted a permanent Taliban presence¹¹⁰. Notwithstanding this, at the Conference on the Rule of Law in Afghanistan, held in Rome in July 2007, both Afghan and international political leaders stated that the achievement of stability in the country is firmly anchored to the country's social and economic development, basically indicating that military operations and reconstruction need to move forward together¹¹¹.

¹⁰⁷ D. Chandler, 'Back to the Future? The Limits of Neo-Wilsonian Ideals of Exporting Democracy', 32(3) *Review of International Studies* 2006, 475-494, at 483.

¹⁰⁸ The stalemate in military operations was initially discussed in S.G. Jones, 'Averting failure in Afghanistan', 48(1) *Survival* 2006, 111-128, at 115.

¹⁰⁹ D. Tate, 'US Official Says Afghan Government Controls Only 30 Percent of Country', *Voice of America*, 27 February 2008, <http://www.voanews.com/english/archive/2008-02/2008-02-27-voa67.cfm?CFID=39444053&CFTOKEN=44418364>.

¹¹⁰ Senlis Afghanistan, *Stumbling into chaos: Afghanistan on the brink* (London: MF Publishing, 2007), 7.

¹¹¹ The Conference Chairs Conclusions (Afghanistan, Italy and UN) reports that «without justice and the rule of law no sustainable security, stabilization, economic development and human rights can be achieved», thus linking the success of the military strategy to that of the reconstruction process. Conference documents are available at <http://www.rolafghanistan.esteri.it>.

4.2 The Dilemma between a Neo-colonial or Consent-Based Approach

As previously mentioned, international interventions in Somalia, Bosnia, East Timor and Kosovo have been characterized by the full participation of international officials in the policy-making process, acting as a kind of trustees¹¹². In these countries, the reform of justice encompassed the introduction of new laws and codes that have the ring of authoritarianism and appear to be dropped in from on high. Most of these missions have seen the use of 'mixed' (i.e. internationally-nationally staffed) tribunals¹¹³. Some have been also characterized by the establishment of courts made up of international judges in charge of dealing with sensitive cases or with crimes committed by the previous regime, during the transitional justice phase¹¹⁴. Ultimately, the reform of justice has included a muscular imposition of human rights-inspired legal models, directly derived from the strong idealistic character of military interventions which originated the civil reconstruction missions in the first place. However, it may be observed that this extensive engagement of international actors in justice system reform is not without risks, as it creates a 'donor-driven justice', completely separate from the country's legal tradition, as it has occurred, for instance, in Rwanda¹¹⁵.

¹¹² See also C. Stahn, 'International Territorial Administration in the former Yugoslavia: Origins, Development, and Challenges ahead', 61(1) *Zeitschrift für Ausländisches öffentliches Rechts und Völkerrecht* 2001, 107-172, at 114.

¹¹³ See gen. C.P.R. Romano, A. Nollkaemper, and Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004).

¹¹⁴ See para. 4.4.

¹¹⁵ B. Oomen, 'Donor-Driven Justice and its Discontents: The Case of Rwanda', 36(5) *Development and Change* 2005, 887-910, at 894.

On the other hand, the post-conflict justice system in Afghanistan has been remodelled with a slightly different perspective, in line with the 'light footprint' approach discussed above. Such principle was mainly implemented by taking into account the legal and judicial systems previously adopted in Afghanistan, leaving the Afghan government in charge of restoring the sector (at least formally), together with international actors performing a limited coordination role. The same approach to justice system reform has been adopted in other state-building operations. This was the case with the UN missions in the Democratic Republic of Congo (DRC), Haiti, Burundi and Liberia, while in Cambodia the UN went on to enact the statutory laws, with the acquiescence of the national authorities¹¹⁶.

The first of these two approaches (the 'dirigiste' or 'neo-colonialist') – namely that held during international administration of territories – mainly consists in prearranging 'justice packages', ready to be deployed on the field in case of need¹¹⁷. The 'packages' should encompass both legal experts (trainers, attorneys and judges, clerks, etc.) and applicable norms (e.g. substantive and procedural model criminal codes), in order to fill the possible vacuum in the justice administration. The creation of such packages follows the recommendations contained in the 2000 Brahimi Report¹¹⁸. A short account is also included in the subsequent 2004 Report of the UN Secretary General on Transitional Justice¹¹⁹. However, the latter seems to show a moderate change of course, when the Secretary General admits that: «pre-packaged solutions are ill-advised. Instead,

¹¹⁶ V. O'Connor, 'Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States: Model Codes for Post Conflict Criminal Justice as a Tool of Assistance', 16(3-4) *Criminal Law Forum* 2005, 231-255, at 234 and 241.

¹¹⁷ Plunkett, *Reestablishing Law and Order*, p. 68.

¹¹⁸ *Comprehensive Review of the Whole Question of Peacekeeping Operations in All their Aspects*, Report of the Chairman of the Panel on United Nations Peace Operations, UN Doc. A/55/305 – S/2000/809, 21 August 2000, p. 14.

¹¹⁹ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc. S/2004/616, 3 August 2004, p. 11.

experiences from other places should simply be used as a starting point for local debates and decisions»¹²⁰. In trying to avoid risks of excessive external influence, experts suggest that it should be the national authorities themselves to decide which part of this pre-drafted legislation should be included in legal framework of their own country¹²¹. While in theory this principle sounds good, it still shirks the issue of local elites capacity to become genuinely autonomous from external influence in taking significant political decisions and in being accountable to the local population rather than to foreign actors involved in the reconstruction process. This seems particularly true in Afghanistan, where the international quasi-administrative apparatus deployed in the capital city has rapidly created a 'political enclave' in Kabul which is more responsive to international authorities than to society as a whole¹²².

Scholars also focus on the political role played by the newly established rule of law institutions, as well as the political nature of programmes supported by international actors¹²³. Tensions between those who deem institutional design as the core objective of the reconstruction process and those who lament the lack of dialogue between local and international actors, reflect the unresolved dilemma between imposition of foreign administrative templates and a true social contract. Indeed, on the one hand, reconstruction of the justice sector could be (realistically) led by international donors with a pure

¹²⁰ *Ibid.*, at 7.

¹²¹ R. Huang, *Securing the Rule of Law: Assessing International Strategies for Post-Conflict Criminal Justice* (New York: International Peace Academy Policy Paper, November 2005), 4, http://www.ipacademy.org/pdfs/IPA_E_RPT_SecuringROL.pdf.

¹²² J. Goodhand, 'Afghanistan in Central Asia', in M. C. Pugh, N. Cooper and J. Goodhand, *War Economies in a Regional Context: Challenges of Transformation* (Boulder, Co: Lynne Rienner, 2004), 45-89, 76.

¹²³ A. Hurwitz and K. Studdard, *Rule of Law Programs in Peace Operations* (New York: International Peace Academy Policy Paper, August 2005), 10, http://www.ipacademy.org/pdfs/IPA_E_REPORT_RULE_OF_LAW.pdf.

national interest, being that of 'lawfully' securing the exploitation of the country's resources, for instance, by «leaven[ing] ...commercial courts with foreign judges»¹²⁴. On the other hand, a limited use of 'pre-packaged' codes and standby personnel would be nonetheless indispensable, while in the case of the UN Mission in Liberia, the justice system has to be rebuilt from scratch¹²⁵. Yet, the fact that nowadays projects aimed at drafting new applicable codes in peacekeeping operations are still financed, may raise doubts on whether this 'dirigiste' trend has been definitively abandoned. In particular, the United States Institute of Peace (USIP) and the Irish Centre for Human Rights (ICHR), in cooperation with the Office of the UN High Commissioner for Human Rights (OHCHR) and the UN Office on Drugs and Crime (UNODC) are developing four model codes for criminal justice, to be applied in post-conflict state-building operations. The model codes are a criminal code, a criminal procedure code, a penitentiary act and a police code¹²⁶.

¹²⁴ S. Krasner, 'The Case For Shared Sovereignty', 16(1) *Journal of Democracy* 2005, 69-83, at 80.

¹²⁵ See O'Connor, *Traversing the Rocky Road*, p. 231-2:

«[t]here are no cars to transport suspects, no courtrooms in which to conduct trials [...] no paper to document cases [...] There is a dearth of trained lawyers, [...] [t]he local law reports and books have been looted [and] [q]uite a number of judges do not even have access to the applicable criminal laws that they are to apply».

¹²⁶ See V. O'Connor and C. Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice: Volume I: Model Criminal Code* (Washington, D.C.: United States Institute of Peace Press, 2007); V. O'Connor and C. Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice: Volume II: Model Code of Criminal Procedure* (Washington, D.C.: United States Institute of Peace Press, 2008). A third volume, containing the Model Detention Act, the Model Police Powers Act and their accompanying commentaries, will be further published. For additional information on the Model Codes see V. O'Connor and C. Rausch, 'A Tool Box to Tackle Law Reform Challenges in Post Conflict Countries: The Model Codes for Post Conflict Criminal Justice', 10 *International Peacekeeping: The Yearbook of International Peace Operations* 2004 (2006), 71-92, at 82.

The problem between a 'dirigiste' and consensual approach appears irresolvable, since in practice every act of external institutional assistance towards countries recovering from conflict implies a certain level of cultural influence. With regard to law reforms, some scholars recommend adopting proportionality as the guiding principle¹²⁷.

4.3 The Ingredients for Success: Looking for Consensus and Responding to the Local Demand for Justice

Willing to draft a model aimed at establishing functioning and reformed judicial institutions in post-conflict countries, scholars come to the self-evident conclusion of looking for consensus and political legitimacy from a double domestic and international perspective¹²⁸. This practically means that, on the one hand, the foundation of the international mission's mandate should lie on firm legal basis, particularly including 'lawful' international law agreements and/or Security Council's clear mandates; while, on the other hand, such reforms should be accepted by the population they apply to. Moreover, success in reforming the system of justice may be achieved only through a clear mandate from the authorities who *de iure* or even *de facto* exercise governmental power. In fact, «the collapse of formal state structures does not necessarily create a power vacuum; political life does not simply cease»¹²⁹, even if it may be conducted by non-institutional actors.

¹²⁷ See K. Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', 50 *McGill Law Journal* 2005, 285-326, at 323: «Proportionality [...] invites an assessment of the proposed legal reforms in light of the existing legal system, the goals of the interventions, the available alternatives».

¹²⁸ See gen. S. Morphet, 'Current International Civil Administration: The Need for Political Legitimacy', 9(2) *International Peacekeeping* 2002, 140-162.

¹²⁹ Chesterman, *You, The People*, p. 243.

In order to gain domestic legitimacy (thus securing the local ownership of reforms), the aim of the reconstruction process should be that of drawing-up a 'social compact'¹³⁰ between all the relevant stakeholders. Scholars divide the latter into three main categories: (i) the population (citizens, civil society and business community); (ii) political authorities (political leadership – at both national and local level – and civil service); and (iii) members of justice and security sector institutions¹³¹. Signing a 'social compact' for justice with the local population, in order to promote compliance with the law and general stability, would in other words mean moving away from this 'rule of law orthodoxy', primarily based on the reestablishment of courts, towards a more balanced approach, which would comprise the 'legal empowerment' of a growing part of the population¹³². This should help create a reformist political process which would in turn lead to a more realistic establishment of the rule of law, potentially different from the original Western idea of *Rechtsstaat*. The UN itself has started to explore this approach by recommending the strengthening of community-based justice and informal justice mechanisms¹³³. Besides, tribal justice is currently fostered in Afghanistan by a specific project run by the UNDP, while traditional justice institutions have been successfully employed in the post-genocide reconciliation phase in Rwanda,

¹³⁰ R. Mani, 'Balancing Peace with Justice in the Aftermath of Violent Conflict', 48(3) *Development* 2005, 25-34, at 33.

¹³¹ A.S. Hansen and S. Wiharta, *The Transition to a Just Order – Establishing Local Ownership after Conflict: A Policy Report* (Sandöverken, Sweden: Folke Bernadotte Academy Research Report, 2007), 5-6.

¹³² S. Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Washington, D.C.: Carnegie Endowment for International Peace, Democracy and Rule of Law Project No. 41, October 2003), 37, <http://www.carnegieendowment.org/files/wp41.pdf>.

¹³³ *Uniting our strengths: enhancing United Nations support for the rule of law*, Report of the Secretary-General, 14 December 2006, UN Doc. A/61/636 – S/2006/980, p. 13

through the so-called 'gacaca courts'¹³⁴. However, it has to be stated that these informal justice mechanisms have been supported by international and national authorities primarily for practical reasons. For instance, by 2001, the Rwandan government had estimated that it would take state courts 200 years to try all the 100,000 individuals accused of participating in genocide¹³⁵.

According to the local ownership principle, the theory of peace-building, as applied to law reforms, should indeed shift its focus away from the 'supply of justice' onto an effective 'demand for justice'. Research indicates that a demand for justice must exist so that the law formally in force is actually put into practice and policy makers and law professionals respond to it¹³⁶. In addition, to be successfully 'transplanted' into the legal order concerned, the new body of law should adapt to the local conditions or contain principles already familiar to the local population. In turn, such a policy would probably strengthen the public demand for institutions to enforce the rule of law. On the contrary, if the new body of law was merely imposed (as in the case of colonisation), the initial demand for using it would probably be weak, conditioning the effectiveness of the overall rule of law reform.

However, relying excessively on local ownership is not without risks, because even if this usually safeguards domestic culture against the dangers of external interference, it may still cause reduction in the level of individual rights protection if domestic policy makers are unwilling or unable to promote human rights protection or criminal

¹³⁴ See E. Daly, 'Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda', 34(2) *New York University Journal of International Law and Policy* 2002, 355-396, at 367.

¹³⁵ L. Chirayath, C. Sage, and M. Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (Washington, D.C.: World Bank, July 2005), 19, http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf.

¹³⁶ Berkowitz et al., *The Transplant Effect*, at 165.

prosecution¹³⁷. In addition, being law a cultural marker, just like folklore or language, it can easily turn into a divisive force¹³⁸. In this respect, a reform which only relies on the local ownership principle could fuel conflict instead of ordering social life.

4.4 Transitional Justice

In post-conflict situations the internal demand for justice is normally associated to phases of political change and social transformations, following a period of widespread human rights violations. Therefore, it becomes essential to deal with abuses committed by the former regime, without endangering the political transformations that are underway. Since these societies are commonly seen as being in transition to democracy, the demand for justice mostly focuses on the full application of the rule of law principles. In other words, justice itself is 'in transition'. For this reason, such a conception of justice is often called 'transitional justice'¹³⁹. The practice of state-building operations suggests that, in order to be effective, transitional justice should include several measures that complement one another, under a

¹³⁷ C. Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm', 27(2) *Houston Journal of International Law* 2005, 311-344, at 337-338.

¹³⁸ C.P.M. Waters, 'Post-Conflict Legal Education', 10(1) *Journal of Conflict and Security Law* 2005, 101-119, at 115.

¹³⁹ «Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by political responses to confront the wrongdoings of repressive predecessor regimes» (R.G. Teitel, 'Transitional Justice Genealogy', 16 *Harvard Human Rights Journal* 2003, 69-94, at 69). The literature on the 'transitional justice' is immense. Among the most recent works see R.G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); N. Roht-Arriaza and J. Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006); R. Kerr and E. Mobekk, *Peace and Justice: Seeking Accountability after War* (Cambridge: Polity Press, 2007).

multidisciplinary approach. Scholars identify four main mechanisms implemented during transitional justice phases:

«1. *Trials* – whether civil or criminal, national or international, domestic or foreign; 2. *Fact-finding bodies* – whether truth commissions or other similar national or international investigative bodies; 3. *Reparations* – whether compensatory, symbolic, restitutionary, or rehabilitative in nature; 4. *Justice reforms* – including legal and constitutional reforms, and the removal of abusers from public positions through vetting or lustration procedures. Transitional justice also intersects with other subjects such as amnesty, reconciliation, and the preservation of memory, as well as democratization and peacebuilding»¹⁴⁰.

These mechanisms mirror the contemporaneous adoption of different models of justice, which go from a retributive to a restorative approach. In particular, the theory of transitional justice as restorative justice seeks solutions to the harmful effects of inter-personal conflicts generated by past crimes, and has the aim of promoting redress, reconciliation and collective security rather than merely punishing the culprits, as occurs under the retributive model¹⁴¹. Other scholars call the simultaneous adoption of different justice models as ‘reparative justice’¹⁴². Generally, at least up until the missions in Afghanistan and Iraq, the trend was that of combining models of both criminal justice

¹⁴⁰ M. Freeman, *Truth Commissions and Procedural Fairness* (New York: Cambridge University Press, 2006) at 5-6.

¹⁴¹ C. Bell and C. O’Rourke, ‘Does Feminism Need a Theory of Transitional Justice? An Introductory Essay’, 1(1) *International Journal of Transitional Justice* 2007, 23-44, at 40.

¹⁴² «Reparative justice reflects the understanding that in order to respond to the various needs of victims, perpetrators, and entire societies of survivors, a variety of responses – combining official and non-official, formal and informal, material and non-material or symbolic measures – rather than a single response, will be required» (R. Mani, ‘Reparation as a Component of Transitional Justice: Pursuing “Reparative Justice” in the Aftermath of a Violent Conflict’, in K. de Feyter, M. Bossuyt, S. Parmentier, P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen/Oxford: Intersentia, 2005), 53-82, at 76).

and reconciliation. This implied the integration of 'truth commissions'¹⁴³ and prosecution, without considering such measures as mutually exclusive. In particular, such integration took place during the UN missions in Cambodia, Rwanda, Sierra Leone, Kosovo and East Timor¹⁴⁴.

Conversely, in Iraq, after the US-led invasion, the transitional justice has been mainly retributive¹⁴⁵, being exercised through the establishment of a kind of «victors' court»¹⁴⁶. Actually, the occupiers (Coalition Provisional Authority – CPA) dealt with the transitional justice phase only by setting up a Special Tribunal (Iraqi Special

¹⁴³ A truth commission may be defined as:

«an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prosecutions». (Freeman, *Truth Commissions*, p.18).

Normally, truth commissions do not have the power to prosecute, as they basically represent the main tool to secure the restorative approach to transitional justice. For a summary of the main features of the most relevant truth commissions since the mid-eighties see P.B. Hayner, 'Truth commissions: a schematic overview', 88(862) *International Review of the Red Cross* 2006, 295-310.

¹⁴⁴ C. Stahn, 'United Nations peace-building, amnesties and alternative forms of justice: A change in practice?', 84(845) *International Review of the Red Cross* 2002, 191-205, at 196; W. Lambourne, 'Justice and Reconciliation: Postconflict Peacebuilding in Cambodia and Rwanda', in M. Abu-Nimer (ed.), *Reconciliation, Justice, and Coexistence: Theory and Practice* (Lanham, MD: Lexington Books, 2001), 311-337, at 317 and 322.

¹⁴⁵ See gen. T. Hall, 'Post-War Criminal Justice in Iraq', 33(1) *Georgia Journal of International and Comparative Law* 2004, 157-170.

¹⁴⁶ D. Zolo, *La Giustizia dei Vincitori: Da Norimberga a Bagdad* (Bari: Laterza, 2006) 160.

Tribunal) in order to prosecute the top leaders of the previous regime. However, the Tribunal was immediately perceived as illegitimate by part of the population and the Arab leaders. In addition, the Tribunal's rules of procedure appeared in sharp contrast with the civil law system previously in force in the country and deemed contrary to some relevant provisions of human rights law¹⁴⁷. In October 2005, the Tribunal was renamed 'Supreme Iraqi Criminal Tribunal' and its rules of procedures were further amended. However, such amendments lowered even the procedural guarantees for defendants, together with the Tribunal's overall perceived fairness¹⁴⁸. Eventually, the 'de-baathification' of public institutions carried out by occupying powers has resulted in an institutional vacuum and in strong popular resentment which in turn fuelled insurgency¹⁴⁹. The Iraqi case might be considered as the breaking point with the past 'Kelsenian' trend. In fact, for the first time, 'new' judicial and legal systems were set up according to a conception of justice which is not perceived to correspond with the highly idealized *casus belli*. The usual pattern of conducting a 'just war' in order to achieve a 'just order' has been thus brutally interrupted.

4.4.1 Transitional Justice in Afghanistan

With regard to the issue of transitional justice, probably the international intervention in Afghanistan may be considered as an exception when confronted with other state-building operations, since

¹⁴⁷ C.M. Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38(2) *Cornell International Law Journal* 2005, 327-390, at 358-359, 363, 381-385.

¹⁴⁸ G. Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', 5(2) *Journal of International Criminal Justice* 2007, 287-293, at 292.

¹⁴⁹ V. Fontan, 'Polarization Between Occupier and Occupied in Post-Saddam Iraq: Colonial Humiliation and the Formation of Political Violence', 18(2) *Terrorism and Political Violence* 2006, 217-238, at 221-222, 225.

in Afghanistan this phase has not been established yet¹⁵⁰. This is mainly due to the ongoing armed conflict and, above all, to the fact that several top leaders of the Northern Alliance, who have possibly committed widespread human rights violations during the war, are still holding key posts at both a local and central government level¹⁵¹. The maintenance of the *status quo* has been availed to avoid destabilisation resulting from attempts to achieve a renewed political order, which seems still in the making¹⁵². As a consequence, the initial calls for the establishment of international or mixed national-international tribunals to enforce the rule of law¹⁵³ and to prosecute the captured members of the Taliban regime¹⁵⁴ have been gradually abandoned. In addition the lack of a transitional justice phase is to be imputed to the shaky political order established in Bonn in 2001¹⁵⁵. Indeed, while recent peace settlements often included an overall agreement on transitional justice, the Bonn Agreement did not. The Bonn talks lacked the process of negotiations which generally establishes the foundation of legitimate centralized political power through mutual recognition among groups of combatants¹⁵⁶. In other words, the Bonn Agreement created a transitional government without bringing to the negotiating table one

¹⁵⁰ See gen. A.N. Nadery, 'Peace or Justice? Transitional Justice in Afghanistan', 1(1) *International Journal of Transitional Justice* 2007, 173-179.

¹⁵¹ A. Deledda, 'Afghanistan – The End of the Bonn Process', 13(1) *Transition Studies Review* 2006, 155-171, at 163.

¹⁵² B.R. Rubin, 'Transitional Justice and Human Rights in Afghanistan', 79(3) *International Affairs* 2003, 567-581, at 575.

¹⁵³ L.A. Dickinson, 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals', 31(1) *Denver Journal of International Law and Policy* 2002, 23-42, at 40.

¹⁵⁴ M.A. Drumbl, 'The Taliban's "Other" Crimes', 23(6) *Third World Quarterly* 2002, 1121-1131, at 1121.

¹⁵⁵ See para. 6.1.

¹⁵⁶ Rubin, *Transitional Justice and Human Rights*, p. 571.

of the parties of the conflict: the Taliban¹⁵⁷. An this was probably a mistake. As Lakhdar Brahimi himself argued:

«It was not possible to get them in the tent at the Bonn conference because of 9/11 and they themselves were not eager. But immediately after that, we should've spoken to those who were willing to speak to us. That I consider to be my mistake – a very, very big mistake»¹⁵⁸.

Indeed, the absence of a transitional-justice period framework is clearly significant in terms of the limited ambition behind the external support for the reconstruction of the Afghan legal and political order.

Efforts to establish a transitional justice phase in the country began in March 2002, when a human rights workshop was organized in Kabul. The workshop, to which President Karzai attended, rallied a number of representatives from the civil society and top religious figures. In June 2002, the Afghan Independent Human Rights Commission (AIHRC) was established by a presidential decree and received a mandate to «undertake national consultations and propose a national strategy for transitional justice and for addressing the abuses of the past»¹⁵⁹. Discussions among civil society, religious leaders, academics and human rights activists took place in late 2003, while a broader consultation process was carried out in 2004. The final outcome of this process was a report entitled 'A Call for Justice'¹⁶⁰, endorsed by President Karzai in January 2005. The Report included opinions of more than 6,000 Afghan citizens from 32 provinces and refugee camps

¹⁵⁷ K. Noble, with H. Kubo, D. Puyo, L. Tassi, and M. Guseva, *Integrated Approaches to Peacebuilding: A Round-Table Discussion* (Paris, Sciences Po: CERI, Conference Report, 2 June 2006), 5, <http://www.peacecenter.sciences-po.fr/pdf/pb-report.pdf>.

¹⁵⁸ Quoted in H. Siddiqui, 'Expert advice on Afghanistan', *Toronto Star*, 14 September 2006, p. A28.

¹⁵⁹ Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, 6 June 2002, Art. 9, <http://www.aihrc.org.af/decreeofp.htm>.

¹⁶⁰ The AIHRC Report is available at http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf.

in Iran and Pakistan. 69 percent of the interviewees identified themselves or their immediate families as direct victims of serious human rights violation during the war¹⁶¹. In addition, respondents displayed profound lack of trust in the Karzai Government, holders of public office, and to some extent in the international community, which failed to do something about the abuses¹⁶².

A task force, made of personnel from the President's Office, AIHRC and UNAMA was hence created. The task force drafted an action plan, entitled 'Action Plan for Peace, Reconciliation, and Justice in Afghanistan'¹⁶³. The Afghan Government endorsed the Plan in December 2005, but it was not launched until December 2006, in confirmation of the sensitivity of the issue. The action plan included five key actions: (i) facilitating the acknowledgement of the suffering of Afghan people; (ii) vetting human rights abusers from positions of power within state institutions; (iii) truth-seeking; (iv) promoting reconciliation and national unity; and (v) establishing a task force to recommend additional accountability mechanisms. The timeline for implementing the actions proposed in the Action Plan was initially three years. However, according to the Joint Coordination and Monitoring Board (JCMB¹⁶⁴), «given the limited progress [...], full compliance with all the key action points is in serious doubt. The timeline [...] may need to be revised and a realistic work plan for the implementation of the action plan agreed upon»¹⁶⁵. As previously mentioned, one of the main challenges ahead is the issue of criminal liability of former militia commanders who now hold key political

¹⁶¹ *Ibid.*, p. 8.

¹⁶² *Ibid.*, p. 41.

¹⁶³ Peace, Reconciliation and Justice in Afghanistan: Action Plan of the Government of the Islamic Republic of Afghanistan, 6-7 June 2005, http://www.aihrc.org.af/tj_actionplan_19_dec_05.htm#_ftn1.

¹⁶⁴ See para. 7.1.

¹⁶⁵ JCMB VII Status Update, Annex 2, January 2008, p. 12-13, <http://www.ands.gov.af>.

posts. According to reliable resources, the Afghan Parliament currently sits «40 commanders still associated with armed groups, 24 members who belong to criminal gangs, 17 drug traffickers, and 19 members who face serious allegations of war crimes and human rights violations»¹⁶⁶. In this respect, unsurprisingly, in February 2007 the Afghan parliament passed a resolution aimed at granting amnesty to all the individuals involved in the conflicts over the past 25 years¹⁶⁷. The resolution was harshly contested by international authorities and human rights bodies¹⁶⁸, as only favouring impunity for perpetrators of war crimes and crimes against humanity, without truly aiming at political reconciliation. The resolution was lately embedded into a bill which was signed by President Karzai¹⁶⁹. However, the legal validity of the amnesty law is not entirely clear¹⁷⁰.

¹⁶⁶ A. Wilder, *A House Divided? Analysing the 2005 Afghan Elections* (Kabul: AREU, December 2005), 14. According to the Deputy Head of the Afghan Independent Human Rights Commission «more than 80 percent of winning candidates in the provinces and more than 60 percent in the capital Kabul have links to armed groups» (*ibid.*).

¹⁶⁷ D. Walsh, 'Afghanistan Approves Amnesty for Warlords', *Guardian*, 1 February 2007, <http://www.guardian.co.uk/afghanistan/story/0,,2003941,00.html>.

¹⁶⁸ *High Commissioner Expresses Concern over National Stability Plan Passed by Afghanistan's Lower House*, UN Press Release, 2 February 2007, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/9347ED6390346D0CC1257276003C57AB?opendocument>.

¹⁶⁹ IRIN, 'Afghanistan: War crime immunity law gets green light', *Reuters*, 11 March 2007, <http://www.alertnet.org/thenews/newsdesk/IRIN/c043164424fa8e2816181848de09bea1.htm>.

¹⁷⁰ *Afghanistan: Addressing the Past*, ICTJ Briefing Note, 25 January 2008, p. 6, <http://www.ictj.org/static/Asia/Afghanistan/20080204AfghanistanBriefingNote.pdf>.

Given the poor developments of transitional justice in Afghanistan, the issue holds a limited significance within the whole justice system reform. However, due to the relevant political consequences of the topic, other brief remarks on the implementation of transitional justice in the country will be offered in the following chapters.

4.5 Justice Reform in Countries Recovering from Conflict: Common Features

A common feature of justice reform in post-conflict scenarios is the fragmented consolidation process of the legal systems concerned, which «almost never conform to the technocratic ideal of rational sequences on which the indicator frameworks and strategic objectives of democracy promoters are built»¹⁷¹. This may prevent accurate assessment of the outcomes of any reconstruction process, because the performance metrics may be clogged by too many variables. However, some useful indicators may be identified in order to evaluate success in reconstruction: *(i)* serious crime rates (especially homicides and violent crimes); *(ii)* other crime indicators (e.g. drug and human trafficking); *(iii)* the level of political violence and insurgency; *(iv)* perceptions of security¹⁷². Naturally, the effectiveness of justice reforms also rests on people's compliance with the law. Research shows that such compliance «depends most heavily on the perceived fairness and legitimacy of the laws, characteristics that are not established primarily by the courts but by other means, such as the political process»¹⁷³.

¹⁷¹ T. Carothers, 'The End of the Transition Paradigm', 13(1) *Journal of Democracy* 2002, 5-21, at 15.

¹⁷² Jones et al., *Establishing Law and Order*, p. 24. A further indicator, namely the number of international casualties, also listed in the RAND Corporation's study, has been omitted because, in the author's opinion, it can be easily included into the level of political violence.

¹⁷³ Carothers, *Promoting the Rule of Law*, p. 8-9.

However, people's perceived fairness of a single justice system stems from the level of expectations and other irrational elements. In Afghanistan, public opinion about the judicial system remains quite positive, notwithstanding the parlous state of justice sector. According to a recent survey conducted in Afghanistan by the Asia Foundation¹⁷⁴, state courts are perceived as fair and trusted by 50 percent of the population: a level which is reportedly even higher than the average level of confidence in the judicial system registered in the EU states (45 percent)¹⁷⁵.

Nevertheless, it seems possible to draw up a few features that are common to the majority of justice system restorations in post-conflict situations¹⁷⁶:

- (i) a high level of destruction of judicial buildings with consequent missing official records (that implies problems, for example, in identifying property rights);

¹⁷⁴ R. Rennie, S. Sharma, and P. Sen, *Afghanistan in 2008: A Survey of the Afghan People* (Kabul: The Asia Foundation, 2008), 76, <http://asiafoundation.org/publications/pdf/418>. However, the report highlights that the level of trust changes from region to region. It is much higher in the North West of Afghanistan, followed by the West and the central regions around Kabul. Unsurprisingly, the highest level of dissatisfaction with the justice system is consistently found in the South West. Respondents from these provinces have been also particularly reticent about giving a personal opinion on the court system.

¹⁷⁵ The highest level of confidence is registered in Denmark (79 percent); the lowest in Italy (32 percent). The level of public trust in the domestic justice system is reportedly higher in Afghanistan than in the UK (49 percent) or France (46 percent) (J.V. Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends 2004-05* (Ottawa: Ministry of Public Safety and Emergency Preparedness, November 2004), 10, http://ww2.ps-sp.gc.ca/publications/corrections/pdf/200405-2_e.pdf).

¹⁷⁶ R. Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template', 12(1) *Journal of Conflict and Security Law* 2007, 65-94, at 70-71.

- (ii) a domestic judicial system characterized by the strong interference of local executive authorities (corruption and so-called 'telephone justice');
- (iii) the law in force not integrally consistent with international human rights standards and/or its validity contested by the population;
- (iv) the presence of a parallel/unofficial system of justice;
- (v) limited human and material resources.

4.5.1 Collapse of the Previous Justice System

In the aftermath of a conflict, the domestic justice system has often collapsed, hence, at the beginning of the intervention, peace-builders frequently face emergency situations. As argued by a practitioner in 1999, «[e]stablishing the judicial system in East Timor entails building a system 'from scratch'»¹⁷⁷. Over 70 percent of all administrative buildings were partially or completely destroyed, while most courts had been torched or looted, resulting in the loss of registers, records, archives and other legal resources. The first recruiting campaign for personnel to serve in the judicial administration was carried out by launching leaflets from an aeroplane throughout the region¹⁷⁸. The UN administration found that only about 70 Timorese citizens, who still lived in the country, had graduated from law school, while none of them had been practicing law under the Indonesian control of the

¹⁷⁷ H. Strohmeyer, 'Building a New Judiciary for East Timor: Challenges of a Fledgling Nation', 11(3) *Criminal Law Forum* 2000, 259-285, at 266.

¹⁷⁸ H. Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', 95(1) *American Journal of International Law* 2001, 46-63, at 50.

country¹⁷⁹. Other sources confirm that the number of indigenous lawyers remaining after the referendum on independence was less than ten¹⁸⁰.

In Kosovo, it was apparent as from the very beginning of the UN mission that the law enforcement and judicial system had collapsed. To overcome the lack of buildings and personnel, a judicial mobile unit, comprised of nine among judges and prosecutors (including three Serbs) was initially established, while in three weeks their number had increased up to 28¹⁸¹. In Afghanistan the formal system of justice in place during the Taliban period (founded on both Islamic courts and tribal councils) collapsed with the downfall of Kabul in late 2001. Judicial buildings were almost crumbling and correctional facilities were close to nonexistent (excluding the *Pul-e-Charkhi* complex, outside Kabul). In addition, since July 1964, no one had made a compilation of the applicable laws passed during the 30 years of turbulent history, since due to past destructions there was no complete set of Official Gazette available for reference.

4.5.2 Insecurity and Judicial Corruption

The functionality of the justice system may be also threatened by the security situation. In Kosovo, at the beginning of the UN mission, due to the Milošević post-1989 purge of administrative personnel, only 30 out of 756 judges and prosecutors were Kosovar Albanians. Following the re-entry of the Albanian refugees and displaced people, most of the Serbian magistrates moved back beyond the Serbian borders. The few who decided to stay were considered to be linked to the previous regime and immediately threatened, as was the case for the members of

¹⁷⁹ J. Dobbins, S.G. Jones, K. Crane, A. Rathmell, B. Steele, R. Teltschik, and A. Timilsina, *The UN's Role in Nation – Building From the Congo to Iraq* (Santa Monica, CA: Rand Corporation, 2005), 169.

¹⁸⁰ Strohmeyer, *Building a New Judiciary*, p. 263.

¹⁸¹ Strohmeyer, *Collapse and Reconstruction*, p. 48 and 53.

the Council in charge of initial judicial appointments¹⁸². As a consequence, local judges are reported to have often ruled in favour of Kosovar defendants even though the law supported the Serbian plaintiffs, for fear of reprisals¹⁸³.

In Rwanda, over 300 survivors, who were also witnesses in genocide trials before state courts, were murdered between 1994 and 1997, paralysing the justice system¹⁸⁴. A solution to the threat of reprisal has often been found by staffing local courts with international judges, thus creating different types of 'hybrid courts'¹⁸⁵. These courts may be also employed during the transitional justice phase, as in the case of Sierra Leone (Special Court for Sierra Leone)¹⁸⁶, East Timor (Special Panel in the Court of Dili)¹⁸⁷, Cambodia (Extraordinary Chambers in the Courts of Cambodia)¹⁸⁸ and Bosnia (War Crimes Chamber of the Court

¹⁸² *Ibid.*, at 52.

¹⁸³ M.N. Pepys, 'Corruption Within the Judiciary: Causes and Remedies', in Transparency International, *Global Corruption Report 2007* (New York: Cambridge University Press, 2007), 3-10, at 5.

¹⁸⁴ J. Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case', 95(1) *American Journal of International Law* 2001, 64-75, at 67-68.

¹⁸⁵ See OHCHR, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (New York/Geneva: United Nations, 2008), <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

¹⁸⁶ C.L. Sriram, 'Wrong – Sizing International Justice? The Hybrid Tribunal in Sierra Leone', 29(3) *Fordham International Law Journal* 2006, 472-506.

¹⁸⁷ S. Linton, 'Prosecuting Atrocities at the District Court of Dili', 2(2) *Melbourne Journal of International Law* 2001, 414-458.

¹⁸⁸ D. Turns, "'Internationalized" or Ad Hoc Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia', (2001) *Austrian Review of International and European Law* 6, 123-180, at 134, 141, 146, 159.

of Bosnia and Herzegovina, established in 2005)¹⁸⁹. In Kosovo, international judges serve under a two-track system. On the one hand, international judges are appointed to the regular courts, while on the other hand, special internationalised panels are created for the most sensitive war crimes trials¹⁹⁰. Basically, international judges in Kosovo do not receive case assignments from the president of the court in which they sit, but from the UN administration's Department of Justice: thus they act as a *de facto* parallel (i.e. special) jurisdiction¹⁹¹. However, the recent self-proclaimed Kosovo's independence will soon lead to the sunset of the existing international legal and institutional framework. This will entail the replacement of the current UN Administration with a EU-led civilian mission (European Union Rule of Law Mission in Kosovo – EULEX) in charge of assisting Kosovo authorities, judicial authorities and law enforcement agencies¹⁹². In consequence, the domestic justice system will be probably reorganized, along with the presence of legal and judicial international staff.

It is easy to imagine that corruption is another decisive factor that weakens the credibility of justice in post-war countries. According to the Corruption Perception Index 2007, almost all the countries, in which state-building missions are in charge for the legal reforms, are

¹⁸⁹ S. Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', 4(2) *Journal of International Criminal Justice* 2006, 327-341.

¹⁹⁰ Stahn, *The Geometry of Transitional Justice*, p. 438.

¹⁹¹ T. Perriello and M. Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo* (New York: International Center for Transitional Justice, March 2006), 15, <http://www.ictj.org/static/Prosecutions/Kosovo.study.pdf>.

¹⁹² The EU Mission is scheduled to become fully operational in Autumn 2008. EULEX is regarded as a technical mission which should mentor, monitor and advise whilst retaining a number of limited executive powers (see the EULEX official website at <http://www.eulex-kosovo.eu/?id=1>).

among the most corrupt in the world¹⁹³. In Afghanistan, the judiciary is also considered to be the most corrupt among state institutions by the population¹⁹⁴. In order to overcome any destabilizing factor, the UN doctrine suggests vetting the bench and excluding individuals associated with past abuses¹⁹⁵. However, vetting the judicial personnel for their impartiality or competence may entail initial judicial vacuum or allegations of system's politicisation. A good compromise¹⁹⁶ could be that of requiring judicial personnel to resign and reapply through a more transparent procedure, as done in the Brčko District in Bosnia¹⁹⁷.

4.5.3 Reform of the Applicable Law

The applicable law is a recurring issue in peace-building operations. In the first instance, the population may see the domestic law, formally in force, as an instrument from the previous regime and thus perceive it as radically unfair or illegitimate, as was the case in Kosovo. Domestic law may also violate international human rights law provisions, as in

¹⁹³ Iraq received a score of 1.5 out of 10; Haiti: 1.6; the DRC: 1.9; Afghanistan: 1.8; Cambodia: 2.0; Sierra Leone: 2.1; Burundi: 2.5; Rwanda: 2.8; Timor Leste: 2.6 (See Transparency International, *Corruption Perceptions Index 2007*, http://www.transparency.org/policy_research/surveys_indices/cpi/2007).

¹⁹⁴ Center for Policy and Human Development, *Bridging Modernity and Tradition: Rule of Law and the Search for Justice – Afghanistan Human Development Report 2007* (Kabul: CPHD, 2007), 61, <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name.3408.en.html>.

¹⁹⁵ UN Doc. A/61/636 – S/2006/980, p. 9, 13.

¹⁹⁶ L. Aucoin, 'Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict', 8(1) *Whitehead Journal of Diplomacy and International Relations* 2007, 33-49, at 38.

¹⁹⁷ M.G. Karnavas, 'Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries', 97(1) *American Journal of International Law* 2003, 111-131, 122.

the case of several Indonesian laws applied in East Timor, or be discriminatory against women, as in Haiti. Moreover, domestic law may be outdated and may not contain relevant crimes such as trafficking, money laundering and organised crime (as in the penal codes of Angola, dating back to 1886, and Haiti, dating back to 1925)¹⁹⁸. Eventually, the presence of parallel administrative bodies, as a reaction to the imposition of past tyrannical or colonial rule, may entail the spread of non-statutory customary law.

Whatever role they formally play in the reconstruction of the sector, international actors often support the re-establishment of the legislative framework in force prior to the previous regime, often «solely for practical reasons»¹⁹⁹. This has frequently accompanied the repeal of those provisions of law incompatible with human rights standards (and with the regulations issued by the UN administration where appropriate), as has occurred during the UN missions in Kosovo, Timor Leste, Somalia and Afghanistan. In Kosovo, the UN administration decided on the law in force as of 1989 (pre-Milošević era). In East Timor, at the very beginning of the intervention, the laws in force remained provisionally those applied before the UN mission, even though a list of Indonesian laws – contrary to human rights – to be repealed, was also published²⁰⁰.

Usually, domestic criminal law is the first to be abolished. The reform often encompasses the amendment of both substantive and procedural provisions. In Somalia, the application of the 1962 Somali criminal code was decided by the SRSG himself, although specific habeas corpus provisions were added to the code in order to make it compliant with human rights law. Eventually, the UN authorities

¹⁹⁸ O'Connor, *Traversing the Rocky Road*, p. 236.

¹⁹⁹ Strohmeyer, *Collapse and Reconstruction*, p. 58.

²⁰⁰ S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor', 25(1) *Melbourne University Law Review* 2001, 122-180, at 136.

assisted local delegates in the constitution making process²⁰¹. During the international administration of the Brčko District, the criminal procedure code was redrafted. The new code was inspired by a party driven approach, also abolishing the investigating judge and allowing the judge to play a more limited role²⁰². The UN administration in East Timor repealed the Indonesian Criminal Procedure Code²⁰³ and enacted new Transitional Rules of Criminal Procedure, while the UN mission in Cambodia set forth new substantive and procedural criminal provisions to be applied during the transitional period²⁰⁴. The UN administration in Kosovo followed this trend by issuing a Provisional Criminal Procedure Code and a Criminal Code in 2003.

In Afghanistan, at the beginning of the international intervention, it was established that the interim legal system in force would consist of the 1964 ‘monarchical’ Constitution and of the full compilation of domestic laws and regulations passed since that time, unless in contrast with the Constitution itself or the Bonn Agreement²⁰⁵. A former Italian magistrate also drafted an interim criminal procedure code to be applied in Afghanistan, pending the enactment of a new code by the Afghan parliament²⁰⁶.

²⁰¹ C. Stahn, ‘The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis’, 5 *Max Planck Yearbook of United Nations Law* 2001, 105-183, at 131.

²⁰² Karnavas, *Creating the Legal Framework*, p. 122.

²⁰³ M.A. Fairlie, ‘Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code’, 18(5) *American University International Law Review* 2003, 1059-1102, 1085.

²⁰⁴ O'Connor, *Traversing the Rocky Road*, p. 240.

²⁰⁵ See para. 6.1.

²⁰⁶ L. Miller and R. Perito, *Establishing the Rule of Law in Afghanistan* (Washington, D.C.: USIP, Special Report No. 117, March 2004), 8, <http://www.usip.org/pubs/specialreports/sr117.pdf>.

4.5.4 Parallel or Unofficial Justice Systems

As for the existence of unofficial justice systems in post-conflict operations, it may be acknowledged that in many developing countries, customary systems operating outside the state administration «are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa [...]. Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana»²⁰⁷. In 1999, customary law was reported to be largely spread in the countryside of East Timor, although the role of traditional dispute resolution mechanisms were defined «indispensable» for the stability of the country's justice system²⁰⁸. In Kosovo, the establishment of parallel judicial institutions by the Albanian population during the Milošević regime was followed by the birth of parallel municipal courts, ruled by Kosovo Serbs, after the UN intervention²⁰⁹. Two different non-statutory legal and judicial systems, that is, Islamic law and customary law (called 'Xeer'), existed (and still exist) in Somalia at the beginning of the UN intervention. In particular, they represent a consolidated normative framework in rural areas²¹⁰. A similar situation takes place in Afghanistan, where councils of elders, applying both customary and Islamic law, couple with statutory courts in the provinces outside Kabul²¹¹ and settle up to 80 percent of the disputes²¹².

²⁰⁷ Chirayath et al., *Customary Law and Policy Reform*, p. 3.

²⁰⁸ H. Strohmeier, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor', 24(1) *University of New South Wales Law Journal* 2001, 171-182, at 179.

²⁰⁹ OSCE Mission in Kosovo, *Parallel Structures in Kosovo 2006-2007*, (Pristina: OMIK, April 2007), 15, http://www.osce.org/documents/html/pdf/tohtml/23925_en.pdf.html.

²¹⁰ Sannerholm, *Legal, Judicial and Administrative Reforms*, p. 72.

²¹¹ See A. Senier, 'Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law', *Al Nakhlah*, Spring 2006, http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf.

4.5.5 Limited Human and Material Resources

Lack of financial and human resources for the restoration of justice is a common feature of reconstruction missions. In this respect, the reestablishment of a police service is often considered more important than the judicial system for short-term stability: this, for instance, was the case of the UN mission in Somalia²¹³. However, it has obviously been noted that a successful strategy may not depart from both services being fully operational and working in partnership²¹⁴. In this respect, in order to give a clear idea of the priorities of the international donors in Afghanistan, it might be noted that until early 2005, the justice sector had only received 2-4 percent of the financial resources allocated to the entire security sector²¹⁵.

Lack of funds for the judicial system is also reported in the case of Sierra Leone, where the priority given to police reform and the establishment of the special court for the prosecution of serious crimes committed during the conflict, have drawn financial resources away from the development of the justice system²¹⁶. In East Timor, the shortage of both physical and financial resources is reported as having hampered even the functioning of the Special Crime Panels established

²¹² CPHD, *Bridging Modernity and Tradition*, p. 96.

²¹³ M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (The Hague: Kluwer Law International, 1999), 78.

²¹⁴ Aucoin, *Building the Rule of Law*, p. 38.

²¹⁵ M. Sedra, 'Security Sector Reform in Afghanistan: The Slide towards Expediency', 13(1) *International Peacekeeping* 2006, 94-110, at 100.

²¹⁶ United Nations, *Lessons Learned from United Nations Peacekeeping Experiences in Sierra Leone* (New York: UN DPKO, September 2003), 51, <http://pbpu.unlb.org/pbpu/library/SL-LL%20Report.pdf>.

within the Dili Court²¹⁷. In Somalia, in order to overcome the lack of qualified judicial personnel, the restoration of law and order at district level relied on 'neighbourhood forums'. The Australian force used to identify former judges who were acceptable to local community members, and convince them to resume their role²¹⁸.

4.6 Current Situation

The goals accomplished by state-building missions in the reestablishment of justice do not appear encouraging. The situation in Africa is particularly critical. In the DRC the status of lawyers' associations seems weak and access to justice is seriously restricted for the majority of people²¹⁹. In several parts of the country, the military and civil justice systems are reported as non-functioning. In August 2006, it was the president of the Congolese Military High Court to denounce the ineffectiveness of the court system, corruption and the need of law reforms. Only 60 out of 180 officially set up courts of first instance really exist, while only 30 of them seem to be actually functioning. Moreover, there is a wide gap (about half) in the number of judges required for the system to sustain. Such inefficiencies, coupled with the population's lack of trust, have led the customary justice system to flourish²²⁰.

²¹⁷ S. Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', 16 *Harvard Human Rights Journal* 2003, 245-278, at 259, 263-264.

²¹⁸ Widner, *Courts and Democracy*, p. 66.

²¹⁹ A. Tsunga and D. Deya, 'Lawyers and Corruption: a View from East and Southern Africa', in Transparency International, *Global Corruption Report 2007* (New York: Cambridge University Press, 2007), 92-98, at 95.

²²⁰ E. Mobekk, *MONUC: DDRRR, DDR, Military and Rule of Law Reform – Reducing Violence against Women* (London: Action Aid, October 2006), 19, http://www.actionaid.org/assets/pdf%5CUN_DRC.pdf.

In Sierra Leone, functioning courts are currently concentrated in the sole capital city Freetown, together with most of the judges and attorneys (90 out of 100 practicing lawyers in the country work in Freetown)²²¹. Customary law is spread all over the remaining part of the territory – to some extent fostered by the British colonial regime. According to a study of the World Bank, «approximately 85% of the population falls under the jurisdiction of customary law»²²², which is also sanctioned in the Constitution. Integration between formal and informal systems of justice occurs within the statutory ‘local courts’, which apply local customary law and whose judges are appointed by local administrative leaders with the approval of the Ministry of Local Government & Community Development²²³. Notwithstanding this, the population ‘perceives the judicial system to be slow, ineffective and corrupt’²²⁴.

In Somalia the UN mission (UNOSOM II) achieved limited success in stabilizing the security situation and in reconstructing the Somali justice system²²⁵. By March 1995, at the end of the UN mission’s mandate, 11 Appeal, 11 Regional and 46 District Courts were operating in the country. However, «this mean[s] that not all of the 18 Regional and 92 District councils had a judicial system in place to support the maintenance of order»²²⁶. Currently, the UNDP is managing a Rule of Law & Security Program (ROLS, originally established in 1997)

²²¹ V. Maru, ‘Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide’, 31(2) *Yale Journal of International Law* 2006, 427-476, at 436.

²²² Chirayath et al., *Customary Law and Policy Reform*, p. 3

²²³ S. Golub, ‘The “Other 90 Per Cent”: How NGOs Combat Corruption in Non-Judicial Justice Systems’, in Transparency International, *Global Corruption Report 2007* (New York: Cambridge University Press, 2007), 129-137, at 135.

²²⁴ International Crisis Group, *Sierra Leone: The State of Security and Governance* (Freetown/Brussels: ICG, Africa Report No. 67, 2 September 2003), p. 21.

²²⁵ Stahn, *International Territorial Administration*, p. 127-128.

²²⁶ Kelly, *Restoring and Maintaining Order*, p. 77-78.

throughout the country, although its activities appear to be concentrated in Somaliland, due to more stable political conditions. The programme's efficacy has yet to be assessed.

In East Timor, a research by the Judicial Sector Monitoring Programme confirms that a high number of cases concerning sexual abuses or domestic violence is informally settled by village councils. Police sources admit that law enforcement officials often prefer to refer complainants of minor crimes to such forums instead of formally charging the suspects²²⁷. In addition, the Serious Crime Special Panels at the Dili Court ended their activities in May 2005 with meagre results: only 101 out of 440 indicted persons came before the court, while just 87 were tried to a verdict²²⁸. The Cambodian justice system is reported as being in a «catastrophic state»²²⁹, while in Haiti the violent crime rates are among the highest in the world: the Organisation of American State estimates that from September 2004 to April 2005 there have been about 600 murders, including 19 police officers²³⁰. In Kosovo, the overall level of confidence in the judiciary is reported as being relatively low (30.8 percent), although the public perception of results differs on the basis of ethnic origin. Corruption is considered to be the greatest challenge for the system to sustain, while undue political interference

²²⁷ C. Nyamu-Musembi, 'Gender and Corruption in the Administration of Justice', in Transparency International, *Global Corruption Report 2007* (New York: Cambridge University Press, 2007), 121-128, at 126.

²²⁸ G. MacCarrick, *The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor)*, Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26-30 June 2005, p. 49, <http://www.isrcl.org/Papers/2005/MacCarrick.pdf>.

²²⁹ Linton, *Safeguarding the Independence*, p. 329.

²³⁰ Justice Studies Center of the Americas, *Report on Judicial Systems in the Americas 2006-2007*, June 2007, <http://www.cejamericas.org/reporte>.

would still condition the courts' rulings²³¹. Although crime rates were dramatic at the beginning of the mission (in the period from January to August 2000 international authorities reported 14,878 criminal offences and arrested 3,734 persons²³²), the number of violent crimes has progressively decreased in the first three years of reconstruction²³³, even if in 2003 still one third of the prisoners in Kosovar detention facilities (about 400) were accused of murder²³⁴. In 2003, 6,282 persons were convicted for criminal offences by municipal and district courts²³⁵. However, these statistics do not include the judicial consequences of the March 2004 riots, hence figures are probably higher.

²³¹ South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), *SALW Survey of Kosovo* (Belgrade: SEESAC, 2006), 47–48, <http://www.seesac.org/reports/KOSOVO.pdf>.

²³² Strohmeyer, *Making Multilateral Interventions*, p. 111.

²³³ J.M. Wilson, 'Law and Order in an Emerging Democracy: Lessons from the Reconstruction of Kosovo's Police and Justice Systems', 605(1) *Annals of the American Academy of Political and Social Science* 2006, 152-177, at 168.

²³⁴ Jones et al., *Establishing Law and Order*, p. 45.

²³⁵ OMIK, *Review of the Criminal Justice System*, p. 49.

5 The System of Justice in Afghanistan before the US Military Intervention of 2001

Contrary to appearances, Afghanistan owns a fairly long legal tradition, which may be traced back to 1923 – the year when its first constitution was written. Prior to that, for many centuries, the law in force consisted of a combination of Islamic law (*sharia*) and the *pashtunwali*, the code of conduct of *Pashtun* tribes. In the absence of a centralized administration of justice, disputes were mainly settled by the council of elders called *jirgas/shuras*²³⁶. These strong traditional and religious roots couple with a fragmented political history and culture, characterized by the absence of centralized state institutions. In this respect, the influence of religious culture has deeply conditioned the formation of a national state, and therefore it has been often difficult for

²³⁶ For a definition of *jirga*, see A. Wardak, 'Jirga: power and traditional conflict resolution in Afghanistan', in J. Strawson (ed.), *Law after Ground Zero* (London: Routledge-Cavendish, 2002), 187-204, at 189. Wardak reports the definition of *jirga* as contained in the 'Pashto Descriptive Dictionary' (*Pashto Descriptive Dictionary* (Kabul: The Academy of Sciences of Afghanistan, 1978), 1272). According to the latter, in its common use *jirga* would mean the gathering of a few/large number of people, otherwise 'consultation'. Wardak also quotes the Carter and Connor's definition (L. Carter and K. Connor, *A Preliminary Investigation of Contemporary Afghan Councils* (Peshawar: ACBAR, 1989), 7), which describes *jirga* as the product of the *Pashtun* tribal society, «operat[ing] according to the dictates of the *pashtunwali*, an inclusive code of conduct guiding all the aspect of the *Pashtun* behaviour and often superseding the dictates of both Islam and the central government». *Shura* is the *Dari* (Afghan Persian) word for *jirga*. For a comprehensive overview of the Afghan traditional justice system, see International Legal Foundation, *The Customary Law of Afghanistan* (New York/Kabul: ILF, September 2004), <http://www.theilf.org/Customary%20Laws.pdf>.

the government to incorporate religious leaders within the state administrative system²³⁷. The persistence of traditional legal and social codes has directly opposed any attempts of social reorganization. For the past 150 years there has been a major confrontation between the urban elites attempting to expand the rule of law in the countryside and the rural population and the elite considering it as an arbitrary imposition of authority²³⁸. Although Islam has always strongly influenced the Afghan social and cultural life, tradition has had a deeper impact than religion in a number of provinces. Some of these traditional rules are not in accordance with Islamic principles. Nevertheless, they have become an integral part of the population's lifestyle²³⁹.

Indeed, the Afghan legal system has maintained its indigenous character, never coming entirely under the European legal influence²⁴⁰. This might help to explain, for instance, the historical lack of practicing lawyers in the country, since, traditionally, the Islamic law requires defendants to be present without defence in criminal cases, while in civil cases it permits a litigant to appoint an agent of one's own choice, without imposing any qualification on the latter²⁴¹. On the whole, the Afghan justice system may be defined as a system influenced by western legal thought (mainly French), moderate Islam (Turkey), radical Marxism and again radical Islam. «These influences, by and large, reflected the values, ideologies, and politics of the various

²³⁷ A. Rashid, *Taliban: Islam, Oil and the New Great Game in Central Asia* (New York/London, I.B.Tauris, 2002), 83.

²³⁸ T.J. Barfield, 'On Local Justice and Culture in Post-Taliban Afghanistan', 17(3) *Connecticut Journal of International Law* 2002, 437-444, at 440.

²³⁹ M.H. Saboory, 'The Progress of Constitutionalism in Afghanistan', in N. Yassari (ed.), *The Shar•a in the Constitutions of Afghanistan, Iran, and Egypt* (Tübingen: Mohr Siebeck, 2005), 5-22, at 6.

²⁴⁰ W. Maley, 'Political Legitimation in Contemporary Afghanistan', 27(6) *Asian Survey* 1987, 705-725, at 710.

²⁴¹ S.H. Amin, *Law, Reform and Revolution in Afghanistan: Implications for Central Asia and the Islamic World* (Glasgow: Royston, 3rd rev. ed., 1993), 141-142.

governments that Afghanistan has witnessed since its emergence as a politically organised society»²⁴².

In consequence, a relative knowledge of Islamic law and jurisprudence is essential in order to conduct a study on the Afghan justice system. In this respect, the first paragraph of this chapter will briefly examine the most relevant principles of Islamic law, which may be of interest for this study. The following sections focus on the influence of Islamic law over the Afghan legal system, and the justice sector in the 'pre-American era', which comprises the study of legal and judicial reforms during the Taliban regime. This 'legal path' will lead to the subsequent chapter, which includes a concise history of the Afghan justice system and a more extended analysis of the justice system currently in force. The latter is the product of the post-2001 institutional reforms, which, as regards the justice sector, culminated with the new 2004 Constitution, the reorganization of the judicial administration and the enactment of basic substantive and procedural laws.

5.1 Brief Outlines of Islamic Law

Islamic law²⁴³ may be considered as a combination between the religious and the legal phenomenon. Traditionally, it is composed of four major sources of law: *Quran*, *Hadiths* (actions and sayings of the Prophet), *ijma* (consensus of the scholars over specific cases – similar to an *opinio iuris*) and *qiyas* (cases decided by analogical reasoning). *Qiyas*

²⁴² A. Wardak, 'Building a post-war justice system in Afghanistan', 41(4) *Crime, Law & Social Change* 2004, 319-341, at 319.

²⁴³ Among the vast literature on the topic, see the classic J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964); L. Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989). For a historical account see also W.B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005).

are only admitted by Sunni legal scholars, while Shiites usually use a technique known as *aql* (intellect), which relies on individual conscience and thus on a more independent moral judgment. What does basically make Islamic law different from statutory law is that it has not been elaborated by the state but by private schools of jurists (called *madhab*) which have been further recognized by state authorities. In addition, traditional Islamic culture does not respect the principle of separation of powers. Indeed, on the one hand, legal scholars (*ulama*) identify prescriptions and obligations through the interpretation of the norms contained in the Scriptures, so that this doctrine represents a kind of basic source of law for the Islamic community; while, on the other hand, they also settle disputes, acting as judicial authorities. In the latter case, they may act as state officers or privately – thus delivering a *fatwa*. «Law is [therefore] epitomized, not in a system of objective, formal, general, public, compulsory rules, but in the unique decision of an individual conscience (*ijtihad*) applied to the evaluation of a concrete act»²⁴⁴. This conception of law clearly clashes with the Western-oriented idea of rule of law. *Ijtihad* (literally ‘endeavour’ or ‘self-exertion’) may be described as the process of deriving or extracting legal norms from the main sources of law. *Ijtihad* is the judge’s endeavour to formulate a rule on the basis of evidence found in the Scriptures. The opposite of *ijtihad* is *taqlid* (imitation), which instead refers to the acceptance of a rule drawn from past decisions of authoritative legal scholars²⁴⁵.

Therefore, Islamic law is not originally composed of codified, universal, general principles of law, but, on the contrary, it includes a huge number of hypothetic and real case-law²⁴⁶. In addition,

²⁴⁴ F. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 23.

²⁴⁵ B. Weiss, ‘Interpretation in Islamic Law: The Theory of Ijtihad’, 26(2) *American Journal of Comparative Law* 1978, 199-212, at 199-200.

²⁴⁶ O. Giolo, *Giudici, giustizia e diritto nella tradizione arabo-musulmana* (Turin: Giappichelli, 2005), 59.

«there is no system of judicial precedent (*stare decisis*) [...]. Judges do not need to follow the decisions of previous judges, or even their own decisions in similar previous cases. Instead, scholars are supposed to use their vast knowledge of Islamic law and its authoritative sources, or the accepted sources of their legal school»²⁴⁷.

«Muslim judges always say that a principle like deciding similar cases similarly would be unjust because people are different and even the same individual's situations vary from moment to moment. [...] To judge without considering context would be to violate all sense of justice»²⁴⁸. This makes it clear that, basically, Islamic law does not originate from 'law sources' but from 'legal authorities'. In a traditional Islamic society, the *ulama* are indeed «not in theory, but in fact the lawmakers of Islam»²⁴⁹. In order to maintain power and authority, *ulama* have often opposed the codification of the law, trying to resist the adoption of codes and other statutes. Although, traditionally, the role of political elite in determining the applicable law is virtually nonexistent, it may have an important part to play in the success or failure of a religious school. On the one hand, rulers granted economic and political support to religious/legal scholars; on the other hand, the latter «constituted the linkage between this elite and the masses, providing an efficient instrument to the ruling elite for gaining political control and legitimacy»²⁵⁰. For instance, during the kingdom of the first King of Afghanistan, Ahmad Shah Durrani (1747), the *ulema* strongly

²⁴⁷ B. Etling, *Legal Authorities in the Afghan Legal System (1964-1979)* (Cambridge, MA: Harvard Law School, Islamic Legal Studies Program, Afghan Legal History Project, 2004), 5, <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>.

²⁴⁸ L. Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (New York: Oxford University Press, 2000), 171.

²⁴⁹ J. Schacht, 'Law and Justice', in P.M. Holt, A.K.S. Lambton, and B. Lewis (eds.), *The Cambridge History of Islam*, Vol. 2B (Cambridge: Cambridge University Press, 1970), 539-568, at 540.

²⁵⁰ Hallaq, *The Origins and Evolution*, p. 205.

supported the new monarchy, in exchange for economic and social privileges²⁵¹.

With regard to criminal law, *sharia* only provides for a few Islamic offences (*hudd*). Due to the lack of a general theory of Islamic criminal law, the main distinction among Islamic crimes originally concerned the relative penalties. The latter are divided into *hudud* and *tazir*. *Hudud* mean 'Allah's restrictive prescriptions', traditionally known as enclosed in the Koran, while *tazir* are 'discretionally punishments' applied by the *qadi* (judge) after balancing the punishment with the tort. *Hudud* punishments are considered to be given and immutable by Islamic jurists and, therefore, leave no discretion to the judge. *Hudud* are provided in cases of adultery, rape, fornication, theft, wine drinking and highway robbery²⁵². *Tazir* punishments include offences like fraud, forgery, false witness, prostitution against nature and extortion, as well as *hudud* offences in cases when not all the conditions to proceed against the defendant are satisfied²⁵³. Among Islamic criminal offences, *qassass* (or *quisas*) are intentional crimes against the person and are based on the concept of retaliation (*lex talionis*). In such cases, the victims or their families can forgive the offender and accept a compensation in the form of a sum of money or property (*diat* and *irsy*, respectively)²⁵⁴.

Currently, in all Islamic countries *sharia* and statutory law coexist. Thanks to the law reforms undertaken in the Ottoman empire in the XIX century, most Arab countries have further adopted comprehensive legal codes, that usually combine elements of French

²⁵¹ M.H. Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: Brill, 1985), 7.

²⁵² Among *hudud*, for instance, there is the stoning to death of an adulterer if certain evidential requirements are fulfilled.

²⁵³ Giolo, *Giudici, giustizia e diritto*, p. 83-84.

²⁵⁴ S. Zubaida, *Law and Power in the Islamic World* (London/New York: I. B. Tauris, 2005), 208.

and Islamic law²⁵⁵. While the majority of Muslim countries, including Egypt, Iraq and Kuwait, imported the French codes and organised their legal systems according to the civil law legal tradition, a few countries, such as Pakistan, Indonesia and Malaysia introduced British-inspired common law systems, which they supplemented with various statutory laws²⁵⁶. Generally, legal scholars (*ulama*) and state authorities (government and parliament) share the jurisdiction over the applicable law. Sometimes, especially where the Executive is vested by a monarchy or where the religious scholars are powerful enough, Islamic law may bind state authorities in their legislative power. In a number of Islamic countries *sharia* is also a parameter for the constitutional review of laws as well as for their interpretation²⁵⁷. Such prescription might represent «the belief that an Islamic state ha[s] both to sustain, and to be guided by, Islamic Law, conceived of as a set of God-given principles»²⁵⁸. In other Muslim nations, the constitution does not allow any revision of those articles concerning Islamic principles or Islam as state religion²⁵⁹. On the other hand, there are a few lay countries, such as Turkey, Albania and a number of former Soviet Republics (e.g. Uzbekistan and Turkmenistan), which do not mention *sharia* in their Constitution.

²⁵⁵ N.J. Brown, *The rule of law in the Arab world: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997), 2.

²⁵⁶ K.A. El Fadl, 'Islam and the State: a Short History', in C. Benard, N. Hachigian (eds.), *Democracy and Islam in the New Constitution of Afghanistan* (Santa Monica, CA: Rand Corporation, 2003), 13-16, at 15).

²⁵⁷ Principle embedded, for instance, in the constitutional charters of Pakistan (Art. 227), and Iran (Art. 4). For a comprehensive account see B. Johansen, 'The Relationship between the Constitution, the Shari'a and the Fiqh: the Jurisprudence of Egypt's Supreme Constitutional Court', 64(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2004, 881-896, at 883.

²⁵⁸ R. Owen, *State, Power and Politics in the Making of the Modern Middle East* (London: Routledge, 2nd ed., 2000), 178.

²⁵⁹ See e.g. the Constitution of Morocco (Art. 106), and that of Algeria (Art. 178).

While in secular countries state authorities retain the full control over law-making, in Islamic countries (excluding a few lay states) the degree of state control over particular law matters results in a significant parameter to assess its secularization. Normally, family law is under the jurisdiction of religious scholars. On the contrary, administrative, commercial and international law are regulated by statutory norms. A further distinction concerns the jurisdiction over civil and criminal law. In Saudi Arabia, for instance, the latter are under the jurisdiction of Islamic scholars. Conversely, in Egypt, civil and criminal law are placed under state jurisdiction²⁶⁰. However, since judicial cases frequently involve more than one matter, conflicts of jurisdiction sometimes arise.

5.2 The Islamic Tradition in Afghan Justice System

Historically, in Afghanistan, secular law and Islamic jurisprudence have often coexisted, both regulating important sectors of society²⁶¹. However, these bodies of law have sometimes intersected and overlapped. In particular, statutory law was expected to be in harmony with *sharia* and to supplement it, while both were supposed to overlay tribal codes or customs²⁶². *Sharia* governed the legal system until 1925, when King Amanullah first introduced a criminal code and the state assumed the task of training *ulema* to become Islamic judges. The *Sharia* Faculty in Kabul, established in 1946, has been the main centre for the

²⁶⁰ Etling, *Legal Authorities*, p. 3-4.

²⁶¹ The most detailed contemporary study on the influence of Islamic law into the Afghan legal system is probably that of Professor Massimo Papa (University of Bologna). See M. Papa, *Afghanistan: tradizione giuridica e ricostruzione dell'ordinamento tra shari'a, consuetudini e diritto statale* (Turin: Giappichelli, 2006).

²⁶² M.G. Weinbaum, 'Legal Elites in Afghan Society', 12(1) *International Journal of Middle East Studies* 1980, 39-57, at 39.

integration of the new secular law with traditional Islamic jurisprudence²⁶³.

With regard to the latter, the overwhelming majority of Afghan Sunnis (representing about 85 percent of the population) are followers of the *Hanafi* School²⁶⁴. Conversely, the Shiites (the other 15 percent of the population) are largely followers of the *Jafari* School²⁶⁵. The *Hanafi* School is founded on rules inspired by the Scriptures (*fiqh*²⁶⁶) and by traditional Muslim practices based on divine/natural law originating from *Allah*²⁶⁷. Since the *Hanafi fiqh* results in a set of rules gathered from the social life of old Islamic communities, it is subject to continuous reinterpretation for its readaptation to modern times.

In Afghanistan, the modernization of the old *fiqh* was carried out at the beginning of the twenties by King Amanullah's legists. Before the

²⁶³ Rashid, *Taliban*, p. 83-84.

²⁶⁴ The *Hanafi* school is the first of the 4 main Sunni legal schools created between the VIII and the IX century. The others are the *Shafii*, *Hanbali* and *Maliki* Schools. Founded in Kufa by *Abu Hanifa* it bases its teachings in particular on analogical reasoning and traditionally focuses on public interest. Nowadays, it represents the majority of the population in Turkey, Syria, Iraq, Egypt, Afghanistan, India and South-East Asia. See C. Turner, *Islam: The Basics* (Abingdon, UK/New York: Routledge, 2006), 209-210.

²⁶⁵ Wardak, *Building a post-war justice*, p. 323. The *Jafari* School is the 5th school of Islamic law. It focuses on the correlation between reason and revelation. Hence, it uses *aql* instead of *qiyas*, as in the Sunni schools, in order to cover issues of law not included in the Scriptures.

²⁶⁶ Originally the word *fiqh* meant 'understanding' or 'knowledge'. *Fiqh* is an interpretative technique, used with the aim to create a complete system of social rules in accordance with the principles of Islam, when the issues concerned are not exactly regulated in the Scriptures. As a legal category, it represents the opposite of '*ilm*', which instead requires the interpreter to have the exact knowledge of the legal concepts as defined in the main religious texts. While '*ilm*' basically results in copying the rules as listed in the Scriptures, *fiqh* entails a procedure of judgement and abstraction.

²⁶⁷ Weinbaum, *Legal Elites*, p. 39.

this modernization process, *qadi* and assistant judges (*mufti*) were mostly Afghan clerics who had completed religious studies in their homeland or abroad, especially in Pakistan, India, Uzbekistan and Kirghizistan²⁶⁸. Reforms (often called the *Nizamnama* reforms) were also specifically aimed at eliminating any form of discrimination and reducing the influence of the *ulema* in the judiciary, by opening the judicial posts to other suitable candidates²⁶⁹. Amanullah was probably influenced by the process of secularization which was taking place in Turkey, under the leadership of Kemal Ataturk. The country acquired a written constitution and became fully independent, but some of the reforms were unrealistic and probably unnecessary²⁷⁰. In particular, a new penal code, which mostly consisted in codified Islamic law, was adopted by the King in 1925. Therefore, since «*ulema* were no longer allowed to extract their own interpretation from the religious texts, but had to follow the compulsory interpretation of the law, this codification significantly reduced their influence and undermined the position of the religious leadership at the tribal and village level»²⁷¹. In addition, the introduction of administrative, commercial and reconciliation courts (the latter lasted only until the mid-thirties) led to the transfer of power from Islamic courts to these new tribunals. Unsurprisingly, tribal and religious leaders pushed the quasi-constitutional monarchy to the downfall in 1929²⁷².

A further period of reforms began after the adoption of the 1931 Constitution. At that time, Afghan legal scholars began to reorganize

²⁶⁸ A.S. Sirat, 'The Modern Legal System of Afghanistan', 16(4) *American Journal of Comparative Law* 1968, 563-569, at 563.

²⁶⁹ Kamali, *Law in Afghanistan*, 15 and 204.

²⁷⁰ H. Kakar, 'The Fall of the Afghan Monarchy in 1973', 9(2) *International Journal of Middle East Studies* 1978, 195-214, at 198.

²⁷¹ R. Moschtaghi, 'Organisation and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement', 10 *Max Planck Yearbook of United Nations Law* 2006, 531-590, at 538.

²⁷² Kamali, *Law in Afghanistan*, 15.

and translate old legal materials into *Dari*, basing their interpretation of the texts on the *Hanafi* school doctrine. However, the task was rather uneasy, as old sources of Islamic law were originally written in classical Arabic, and that made them hardly understandable for Afghans²⁷³. Given the threat posed by religious schools, reforms advanced more cautiously. Some of the most controversial legislations, adopted only a few years before, were cancelled and the jurisdiction of Islamic courts strengthened²⁷⁴. The principle that Islam is the religion of the state and that judicial decisions must respect *sharia* teachings was also embedded in the constitution²⁷⁵. Until the establishment of the Faculty of Law and Political Science and the Faculty of *Sharia* at the University of Kabul in the early forties, certificates from religious schools alone served as educational credentials to access the administration of justice²⁷⁶. Even after the establishment of the two faculties, the knowledge of *Hanafi fiqh* remained a prerequisite for judicial appointment, as stated in the Civil Procedure Code of 1957 (Art. 4)²⁷⁷. The latter defined a judge (*qadi*), as «the ruler of Sharia who is appointed by the sovereign or his regent, and who settles the disputes before him in accordance to the provisions of Sharia» (Art. 2). According to the code, a judge should «be fully knowledgeable in *fiqh*, especially in *Hanafi fiqh* and be able to apply the authoritative rules thereof in settling the disputes before him» (Art. 3). However, his knowledge should not be limited to Islamic law, as it should also embrace local customs (Art. 4), as well as statutory law,

²⁷³ Sirat, *The Modern Legal System*, at 563-564.

²⁷⁴ Moschtaghi, *Organisation and Jurisdiction*, p. 544.

²⁷⁵ See Art. 1, Art. 87 and Art. 88 of the 1931 Constitution. Art. 1: «The religion of Afghanistan is the holy religion of Islam, and its official and general creed is that of the Hanafite. The King of Afghanistan should adhere to this religion»; Art. 87: «The judicial courts is the place where ordinary claims pertaining to Shariat are dealt with»; Art. 88: «The court of Shariat decides cases according to the Holy Hanafite creed» (*The Constitutions of Afghanistan (1923-1996)* (Kabul: Shah M. Book Co., 2004), 17 and 29).

²⁷⁶ Kamali, *Law in Afghanistan*, 207.

²⁷⁷ Moschtaghi, *Organisation and Jurisdiction*, p. 544.

especially those norms related to judicial affairs (Commentary to Art. 4)²⁷⁸. These provisions confirm that religion continued to exercise a strong influence over the judicial system.

Even with the adoption of the 'lay' Constitution of 1964, Islam and the *Hanafi* school of law continued to retain substantial power. Under the 1964 Constitution (Art. 8), the King had to be a *Hanafi* Muslim, while the parliament was required not to pass anti-Islamic laws (Art. 64)²⁷⁹. However, the same article did not require the laws in force to conform to *sharia* as such, but it included a 'repugnance clause', affirming that the same laws did not have to be «repugnant to the basic principles of the Islam»²⁸⁰. This reference to general principles, instead of specific rules, «provided the legislature with greater leeway to enact laws that presented some tension with the tenets of Islamic law taken literally»²⁸¹. Even though statutory law, rather than *sharia*, became the primary source of law for the Afghan justice system, those matters not covered by statutory law were to be regulated according to the *Hanafi* jurisprudence (Art. 69). This principle is also included in the 1977 Civil Code and it is due «to secure justice in the best possible way»²⁸². The penal code, first adopted in 1925 and then amended in 1976, goes even further, as it only concerns *tazir* crimes, leaving *hudud*, *qassass*, and *diat* to be regulated in accordance with the *Hanafi* jurisprudence (Art. 1). On the whole, even though the 1964 Constitution sought to harmonize

²⁷⁸ Kamali, *Law in Afghanistan*, 229.

²⁷⁹ Saboory, *The Progress of Constitutionalism*, p. 9.

²⁸⁰ 1964 Constitution, Art. 64 (*The Constitutions of Afghanistan*, p. 50).

²⁸¹ H. Travis, 'Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq', 3 *Northwestern University Journal of International Human Rights* 2004, at 6, <http://www.law.northwestern.edu/journals/jihr/v3/4>.

²⁸² 1977 Civil Code, Art. 1(2): «In cases the law has no provision, the court shall issue a verdict in accordance with the fundamental principles of *Hanafi* jurisprudence of Islamic *shariat* to secure justice in the best possible way». A collection of the most relevant Afghan laws from 1921 to 2002, translated in English is available at the IDLO database: <http://www.idlo.int/English/External/IPAfghanLaws.asp>.

statutory and Islamic law, the lack of interpretative provisions or criteria to settle potential conflicts of jurisdiction kept this dichotomy alive²⁸³.

During the sixties, the coexistence between Islamic and statutory law also reflected on the legal education. In 1968, the Supreme Court opened a new judicial training centre in Kabul, with the aim of overcoming the existing imbalance in the educational background of the graduates of the law/political science and *sharia* faculties. Indeed, this programme also favoured the progressive replacement of the old judicial elite with new cadres, having a modern legal background²⁸⁴. However, this legal elite would be decimated in the years to come, because of the continuous regime changes and the civil unrest. The vast majority of them would be either killed or imprisoned, otherwise would leave the country²⁸⁵.

In 1973, a successful coup ousted the King Zahir Shah and took the former Prime Minister Mohammad Daoud to power. The 1973 coup was the first regime change in Afghanistan orchestrated without the support of armed tribes. Previously, the latter had always been «the arbiters of power, exercised by a tribal aristocracy, relying on tribal patronage networks»²⁸⁶. This contributed to widen the separation between the regime and the Afghan society. The Daoud's regime enacted a new constitution in 1977. The 1977 Constitution integrated secular and religious values, by including a 'repugnance clause' in which basic Islamic principles were placed side by side with the republican order and other constitutional principles (Art. 64). In addition Art. 99 affirmed that courts should apply «the basic principles»²⁸⁷ (not the provisions) of Islam and *Hanafi* jurisprudence

²⁸³ Papa, *Afghanistan*, p. 137.

²⁸⁴ Kamali, *Law in Afghanistan*, 207.

²⁸⁵ Moschtaghi, *Organisation and Jurisdiction*, p. 550.

²⁸⁶ B.R. Rubin, 'Lineages of the State in Afghanistan', 28(1) *Asian Survey* 1988, 1188-1209, at 1206.

²⁸⁷ 1977 Constitution, Art. 99 (*The Constitutions of Afghanistan*, p. 87).

only if no provision existed in the constitution itself or in statutory laws. The same reference to the 'basic principles' of Islam is found at Art. 80, which required the Afghan President to protect the basic principles of Islam as well as to respect the constitution and other laws of Afghanistan. However, the 1977 Constitution was never truly implemented, due to the *coup d'état* that overthrew President Daoud in 1978.

After the coup, Afghanistan entered into its fourth and last secularisation process²⁸⁸. With the adoption of the 1980 'communist' Constitution, Islam ceased to be a source of law and even the official religion of the state. The constitution merely provided its «respect, observance and preservation»²⁸⁹ and gave believers the freedom to perform religious rituals (Art. 5). The Afghan Marxist government attempted to introduce an entirely lay justice system²⁹⁰, placed under the political control of the regime and in line with its ideological and political goals. However, frictions with both Islamic precepts and customary rules caused the whole system of governance to be widely rejected by the population²⁹¹. With the 1987 Constitution, enacted by the new Najibullah government, Islam was back among law sources. Art. 2 reintroduced the «principles of the sacred religion of Islam»²⁹² as a

²⁸⁸ Saboory, *The Progress of Constitutionalism*, p. 12.

²⁸⁹ 1980 Constitution, Art. 5 (*The Constitutions of Afghanistan*, p. 107).

²⁹⁰ Reforms also improved the condition of women:

«By 1985, 65% of the students at Kabul University were women. [...] By the time the communists lost power, women accounted for 70% of teachers, 50% of government workers, and 40% of doctors. [...] Afghan women increasingly appeared unveiled in public, as their counterparts in Soviet Central Asia had done decades previously. [...] Family courts were reported to be mostly presided over by female judges and protected women's rights in marriage and divorce and to equitable child custody and support» (Travis, *Freedom or Theocracy?*, p. 9).

²⁹¹ Wardak, *Building a post-war justice*, p. 325.

²⁹² 1987 Constitution, Art. 2 (*The Constitutions of Afghanistan*, p. 126).

constitutional parameter. In addition, the 1987 Constitutional Charter explicitly provided for the Afghan President to be a Muslim (Art. 73), as previously reported in the 1977 Constitution (Art. 77). After only three years the government convened a *Loya Jirga* (Grand Council)²⁹³ to promulgate a more Islamic constitution, which renamed Afghanistan as an Islamic state (Art. 1). This progressive restoration of Islamic principles reflected the attempt made by the government to regain the confidence of the people. Such efforts, however, did not succeed.

The arrival of *Mujahedins* in Kabul in 1992 led to a wide Islamization of the country. Uncertainty over the applicable law was widespread. Although the previous constitutions were not repealed, their validity was rather doubtful. In consequence, Islamic law and customary law were applied, being the sole available sources of law, especially in the war-torn countryside, where people had no access to courts and where statutory law was almost unknown²⁹⁴. Within this 'Hobbesian state of nature'²⁹⁵, the *Mujahedins* prepared a draft constitution, that was never promulgated. In the Draft Charter, Islam gained a certain relevance. Art. 2 specified that the legal system in force was to be based on the Koran. Art. 3 affirmed that laws should conform not only to the principles of Islam but also to the prescriptions of the Koran and the *Hadiths*. Art. 5 and 7 imposed Islamic principles as ruling private and public life of citizens. Art. 7 also declared *Hanafi* school as the country's official creed, leaving no room for any other statutory law²⁹⁶. As a consequence, courts began to deliver rulings

²⁹³ This 296 years old institution has proven to be very effective during the most traumatic periods of the Afghan history. It may be considered a (even limited) comprehensive melting-pot of the Afghan public will (A. Payind, 'Evolving Alternative Views on the Future of Afghanistan: An Afghan Perspective', 33(9) *Asian Survey* 1993, 923-931, at 929).

²⁹⁴ Saboory, *The Progress of Constitutionalism*, p. 16.

²⁹⁵ See S.M. Tarzi, 'Afghanistan in 1992: A Hobbesian State of Nature', 33(2) *Asian Survey* 1993, 165-174.

²⁹⁶ Saboory, *The Progress of Constitutionalism*, p. 16.

according to fundamentalist principles of Islamic law²⁹⁷. The integral 're-islamization' of the legal order may be considered as a reaction to the secularization imposed by the communist regime. Indeed, the 1992 Draft Constitution represents the antithesis of that of 1980, which was instead presented as a model of communist constitutional charter²⁹⁸.

In 1996, the Taliban stormed into Kabul. The new regime imposed a theocratic state ('Islamic emirate') based on a political-religious community which encompassed all the citizens. It adopted a radical version of Islamic law as the major source of law. As a consequence, the key function of law became that of protecting and promoting Islamic ideals and values. A Ministry of Virtue, responsible through its religious police for the enforcement of public morality, was then created. Criminal and civil cases were settled under a binary system. The claimant/plaintiff and the defendant had the possibility to choose between the *jirga* system or the *shariat*, the latter being the 'ordinary' judiciary in place in the country²⁹⁹. Punishment became a tool to promote an Islamic way of life among citizens. In consequence, the regime reintroduced the prosecution of *hudud* and *qassass* crimes³⁰⁰. Ultimately, it imposed the complete segregation of women, according to «a policy based on a mixture of conservative *Deobandi* teachings and traditional *Pashtunwali* conceptions of a woman's place and role in the society»³⁰¹.

²⁹⁷ Travis, *Freedom or Theocracy?*, p. 11.

²⁹⁸ Papa, *Afghanistan*, p. 242.

²⁹⁹ F. Mohammad and P. Conway, 'Justice and law enforcement in Afghanistan under the Taliban: How much is likely to change?', 26(1) *Policing: An International Journal of Police Strategies & Management* 2003, 162-167, 165-166.

³⁰⁰ Saboory, *The Progress of Constitutionalism*, p. 18.

³⁰¹ L.P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (Washington, D.C.: University of Washington Press, 2001), 118.

5.3 The Taliban Period

As reported above, the Taliban removed any reference to the communist era. They founded a theocratic regime aimed at shaping the society as a «community of the first generation of Muslims, imagined with a *Pashtun* rural twist»³⁰². In the wake of the capture of Kabul, the Taliban repealed all laws passed during the communist regimes and declared the 1964 Constitution to be in force, although its real validity is questioned³⁰³. Justice administration was basically taken back to that in force before the 1978 coup. The judiciary was essentially composed of *Shariat* courts established at district, provincial and central level, to which prosecutor's offices (*saranwali*) were attached. However, powers and jurisdiction of these courts over both civil and criminal cases were limited, as religious courts were often established on an ad hoc basis in order to hear and decide specific cases³⁰⁴. Both judges and prosecutors were employees of the Ministry of Justice (MoJ), being the whole justice system subjected to the government³⁰⁵. Unlike the justice system in place before the communist era, MoJ-Offices for civil rights (*Hoqooq*) were established in districts and provinces in 1999³⁰⁶. *Hoqooq* were supposed to arbitrate civil and commercial disputes, facilitating a mediation between the parties. They represented the first level of formal dispute settlement, but also consisted in a nexus between statutory/religious law and informal dispute resolution mechanisms,

³⁰² J. Burke, *Al-Qaeda* (London: Penguin Books, 2nd rev. ed., 2007), 130.

³⁰³ Interviewed by Ahmed Rashid in June 1997, the Taliban Attorney General, Maulvi Jalilullah Maulvizada declared that «the Constitution is the Sharia so we don't need a constitution!» (Rashid, *Taliban*, p. 107). He practically ignored that the 1964 Constitution was in force.

³⁰⁴ M. Lau, 'An Introduction to Afghanistan's Legal System', 8 *Yearbook of Islamic and Middle Eastern Law* 2001-2002 (2003), 27-44, at 36.

³⁰⁵ Mohammad and Conway, *Justice and law enforcement*, 164.

³⁰⁶ Law on the Procedure for Obtaining Rights (*Hoqooq*), Official Gazette No. 786, 5 August 1999, available at the USAID-ARoLP database of Afghan laws and regulations, <http://www.afghanistantranslation.com>.

as they received most of cases directly from local community representatives. In the case a mediation had been unsuccessful, *Hoqooq* would have referred the case to court³⁰⁷.

In criminal cases, the investigating phase was mainly managed by the police, the prosecutor performing a limited role of liaison with the *qadi*³⁰⁸. Apparently, the Taliban also issued a formal criminal code, which included those Islamic punishments introduced in 1996³⁰⁹. However, its real diffusion is doubtful. A law on the role and powers of defence attorneys was enacted in 1999³¹⁰. Following this law, the activity of legal professionals became strongly regulated and their association placed under the MoJ. According to the law, defence attorneys should either (i) hold a degree from an Afghan/foreign religious school or from a faculty of *sharia*, or (ii) have at least 10 years of professional and practical work experience in the MoJ (Art. 6). Again, the efficacy of the law in question is seriously questioned, given the inexistence of any functioning Lawyers' Association in the aftermath of the US military intervention. It is reported that the Lawyers' Association of Afghanistan established in 1985, was closed down by the Taliban in 1996, and was reopened in November 2001. In the late eighties it accounted about 5,000 members³¹¹.

5.4 The Justice System

³⁰⁷ Ministry of Foreign Affairs of Denmark (Evaluation Department), *Humanitarian and Reconstruction Assistance to Afghanistan 2001-05* (Copenhagen: MFA, October 2005), 68, <http://www.netpublikationer.dk/UM/5969/index.htm>.

³⁰⁸ Mohammad and Conway, *Justice and law enforcement*, 166.

³⁰⁹ A. Waldman, 'A Nation Challenged: The Law', *New York Times*, 22 November 2001, p. A1.

³¹⁰ Law on Regulating the Affairs of Defense Attorneys, Official Gazette No. 786, 5 August 1999, available at the USAID-ARoLP database.

³¹¹ Lau, *An Introduction to Afghanistan*, p. 38.

In order to draw a concise picture of the Afghan justice system's evolution up until 2001, one may start from the pre-1978 coup situation. Since the 1964 Constitution (Art. 97), the judiciary has been almost fully independent. However, excluding the Taliban domination, it has been part of the MoJ for limited periods of regime change, i.e. from the 1973 Revolution to the adoption of the 1977 Constitution, and after the 1978 coup to the enactment of the 1980 Constitution. To some extent, the 1977 Constitution represents a turning point in the Afghan constitutional history, because, for the first time, the country was proclaimed a republic after centuries of monarchy (Art. 20). The 1977 Charter provided for the complete nationalisation of all the natural and economic resources of the country (Art. 13) and generally drew on the basic framework of a centralized single party-socialist republic³¹² admitting a limited private property and a 'guided' market economy (Art. 17-18). Against this political background, the Constitution enlisted several general principles of criminal law such as the non-retroactivity, the prohibition of common law crimes, the personal criminal liability, the fair defence principle, along with the prohibition of inhumane or degrading punishments (Art. 30-31). The Supreme Court, together with the other courts, constituted the ordinary system of justice (Art. 96). The Supreme Court also acted as the highest administrative body of the Bench (Art. 102 and 112). It was granted a high level of supervisory jurisdiction over lower courts, also extending to their organisation, functioning and administrative affairs. Moreover, the Supreme Court held the administration of the entire budget of the judiciary. However, it is noteworthy that the constitution did not mention the judiciary as an independent state organ (Art. 96). In addition, the nine members of the Supreme Court (including the Chief Justice) were appointed by the President of the Republic, and possibly dismissed by the same President after a five years period (Art. 107). This would highlight an apparent decline in the independence of the judiciary³¹³.

³¹² Rubin, *Lineages of the State*, p. 1206.

³¹³ Moschtaghi, *Organisation and Jurisdiction*, p. 551.

The courts were organised according to the 1967 'Law of the Jurisdiction and Organization of the Courts of Afghanistan'³¹⁴. In addition to that of 1967, relevant provisions on the organization of courts were contained in the 1957 'Law of Administration of the Courts of Justice'³¹⁵, the 1945 'Law of Statutory Limitations for Primary, Appellate and Review Hearings of Civil and Criminal Cases'³¹⁶. These laws basically created a bi-partition of national courts, which were divided into general courts, including the Supreme Court, the Court of Cassation, the High Central Court of Appeal, provincial courts and primary (district) courts; and specialized courts, consisting of juvenile courts, labour courts, and other specialized courts established by the Supreme Court in case of need³¹⁷.

District courts owned a general jurisdiction, except for certain categories of cases, which included commercial and public security cases, as well as tax claims and cases of challenges of parliamentary elections and municipal or provincial council elections. Such cases were referred directly to provincial courts. The latter represented the intermediate-appellate level courts, receiving cases from the district (primary) courts. The High Central Court of Appeal, located in Kabul, was supposed to hear cases from all the provincial courts in the country³¹⁸. However, this court was further abrogated in 1968 and its duties transferred to the Central Public Security and Commercial

³¹⁴ Law on the Jurisdiction and Organization of the Courts of Afghanistan, 7 October 1967, available at the IDLO database.

³¹⁵ Law of Administration of the Courts of Justice, 4 March 1957, available at the USAID-ARoLP database.

³¹⁶ Law of Statutory Limitations for Primary, Appellate and Review Hearings of Civil and Criminal Cases in Afghanistan, 18 September 1945, available at the USAID-ARoLP database.

³¹⁷ Lau, *An Introduction to Afghanistan*, p. 38.

³¹⁸ See CRAFT, *Filling the Vacuum: Prerequisites to Security in Afghanistan*, March 2002, p. 22, <http://www.irglt.com/Resources/Publications/ANE/2002-03%20CRAFT%20-%20Afghanistan.pdf>.

Appeal Court in Kabul³¹⁹. Within the Supreme Court, was embedded a Court of Cassation, in charge of reviewing the Provincial Courts' decisions on issues of law, or on their conformity with the principles of *sharia*. The Court of Cassation was a court of last resort and its rulings could be considered as judicial precedents by the lower courts. Being the highest organ of the judiciary, the Supreme Court pronounced on issues of constitutionality as well as on the interpretation and application of laws³²⁰.

The further constitutions, adopted in 1980, 1987 and 1990 introduced only a few changes in the structure and functioning of courts. The 1980 Constitution reduced the independence of the judiciary. Judges were formally independent in their own decisions, but were indeed appointed by the Presidium of the Revolutionary Council. In addition, the Supreme Court was itself mandated to report to the Revolutionary Council about its performance (Art. 55-56). The communist regime also established a special 'Revolutionary Court' for crimes against revolution or state security. This system of special courts was amended and renamed several times until such special courts were abolished in 1990. However, this special judiciary was nothing but a peculiarity of the communist era and has had no influence on the current Afghan judiciary³²¹.

The Office of the Attorney General (*Saranwali*) was created in 1967³²² and placed under the authority of the MoJ (1964 Constitution, Art. 103; 1977 Constitution, Art. 106). Later, with the 1980 and 1987 Constitutions, the Attorney General's Office (AGO) became an independent organ accountable to the Revolutionary Council and to the

³¹⁹ Decree No. 415-1380, Oath of Judges, Official Gazette No. 117, 13 August 1968, quoted in Moschtaghi, *Organisation and Jurisdiction*, p. 549.

³²⁰ *Ibid.*

³²¹ *Ibid.*, p. 552.

³²² Law on Attorney General Office (*Saranwali*) of 1967, Official Gazette No. 73, 6 March 1967. *Saranwali* is a Pashto term meaning 'Office of the Public Prosecutor', while the term *Saranwal* denotes the public prosecutor.

President of the Republic, respectively (1980 Constitution, Art. 59; 1987 Constitution, Art. 119). Such provision disappeared in the 1990 Constitution. However, both the 1987 and the 1990 Constitutional Charters report that the AGO is appointed by the President of the Republic (Art. 119 in both constitutions). The AGO organizational structure followed that of courts, with AGO local offices attached to the district appellate courts and to the High Central Court of Appeal. Ultimately, the organization of the AGO was regulated again in 1991 to comply with the institutional changes that occurred in the previous years³²³. Given the historical conditions under which this law was adopted, its real application in those days seems questionable. However, it is currently applied, pending the enactment of a new law.

Traditionally, the Ministry of Justice has played a limited role within the Afghan justice system, mostly related to the drafting of laws and the administration of juvenile justice³²⁴. The MoJ department specialized in drafting laws and regulations is called *Taqnin*. The Department was initially established in 1962 to assist the Executive in drafting and reviewing all national legislation. Its tasks and goals were further detailed in 1999, under the Taliban regime³²⁵.

The rights to a defence counsel was initially established in Art. 26 of the 1964 Constitution and further remarked in the 1977 Constitutional Charter (Art. 31). Since 1964, the 'Law on the Administration of Government Cases'³²⁶ had established a State

³²³ Law on Structure and Authority of the Attorney General's Office, Official Gazette No. 738, April 1991, http://www.ago.gov.af/Content/Law&Leg/Regulation/Law_on_structure_and_authority_of_AGO.pdf. This law was further amended in 1995.

³²⁴ W.T. Loris and A. De Maio, 'La ricostruzione dello stato di diritto in Afghanistan', 6(2) *Itinerari d'impresa* 2003, 191-212, at 204.

³²⁵ Law on Rights and Privileges of Members of the Taqnin, Official Gazette No. 787, 1999, available in *Dari* at the IDLO database. *Taqnin's* tasks and goals are reported at MoJ website, <http://www.moj.gov.af/?lang=en&p=e5>.

³²⁶ Law on Administration of Government Cases, Official Gazette No. 12, 10 March 1964.

Attorney's Office within the MoJ. In consequence, the legal profession was regulated by the 1972 Advocates Law³²⁷. The constitutional provisions on the right to a defence counsel were included in the first articles of the Advocates Law (Art. 1-2). The latter also acknowledged the right to free legal aid for indigents (Art. 10). The Bar, however, was not an independent body, but was committed to the MoJ. In fact, the Law also stipulated the creation, within the MoJ, of a 'Control Committee', in charge of admitting candidates to the Bar and take disciplinary measures against the defence attorneys (Art. 4 and 35). To enter the Bar, the qualifications required were minimal, and included a degree from the Faculty of *Sharia* or Law and Political Science, otherwise an official *sharia madrassa* (Islamic school), or even a mere certification of proficiency by the Control Committee (Art. 5). The Taliban regime also issued an 'Advocates Law' in 1999³²⁸. As earlier mentioned, the latter maintained the Bar within the MoJ (Art. 3) and reduced the qualifications for candidates, who now could become defence attorneys with a simple degree from an official Afghan or foreign religious school, or with at least 10 years of professional and practical work experience at the MoJ (Art. 6). Licenses were issued by the MoJ as well (Art. 8).

5.5 The Applicable Law

As previously anticipated, in Afghanistan, substantive and procedural laws have always been influenced by both Islamic rules and principles. The possibility of applying Islamic jurisprudence along with statutory norms can be attributed to several factors. One is the lack of a proper legal education for judges and prosecutors, most of whom had obtained a degree at the Faculty of *Sharia*, instead of the Faculty of Law/Political Science. In addition, notwithstanding the launch of

³²⁷ Law for Organizing Affairs of Defense Attorneys of 1972, Official Gazette No. 206, 21 March 1972, available at the USAID-ARoLP database.

³²⁸ Law on Regulating the Affairs of Defense Attorneys of 1999.

several law reforms in the sixties and seventies, laws were not easily accessible to all the judicial personnel, so many judges and prosecutors either had a basic knowledge of their contents, or were reluctant to apply them³²⁹. In addition, from July 1964 to early 2002 no one had ever made a compilation of all the Afghan laws and regulations. Since 1963, laws were published in the Official Gazette (*Rasmi Jareda*). However, in 2001, international experts sent on site realized that a complete set of gazettes was simply inexistent. Those maintained in the MoJ and at the Kabul Law Faculty had been largely destroyed during the civil war, while the modest library of the Supreme Court mainly kept foreign law texts³³⁰. This does not mean that, at least on paper, the Afghan legal system was not a modern and a comprehensive one. The years going from 1973 to 1978 deserve to be remembered as the most intense period of codification in the whole Afghan legal history³³¹.

Indeed, in the wake of the adoption of the 1977 Constitution, penal, civil and commercial substantive³³² and procedural³³³ codes were in force in the country. The Penal Code of 1976 and the Civil Code of 1977 covered important aspects of social justice and represented the «major attempts to cope with elements of secular law, based on, but

³²⁹ C. Labastie-Dahdouh, *Regards sur la responsabilité civile en droit afghan: La responsabilité civile à la croisée des chemins* (Kabul/Rome: IDLO, August 2004), 5, <http://www.idlo.org/publications/37.doc>; Lau, *An Introduction to Afghanistan*, p. 29-30.

³³⁰ CRAFT, *Filling the Vacuum*, p. 19.

³³¹ Papa, *Afghanistan*, p. 161.

³³² See respectively, Penal Code of 1976, Official Gazette No. 347, 6 October 1976; Civil Code of 1977, Official Gazette No. 353, 5 January 1977; Commercial Code of 1955 (*Usulnameh* on the Commercial Law of Afghanistan), 15 December 1955. All but one (the civil procedure) codes are available at the USAID-ARoLP or IDLO databases.

³³³ See respectively, Criminal Procedure Code of 1965, Official Gazette No. 26, 16 May 1965 (further amended in 1974); Civil Procedure Code of 1957; Law of the Principles of the Commercial Courts, 30 December 1964 (published on 7 March 1965).

superseded by other systems»³³⁴, namely the Islamic and the traditional law systems. With regard to criminal law, the 1976 Penal Code, which is still in force nowadays, considers both Islamic and secular offences. Art. 1 shows a clear distinction between crimes and penalties which are to be dealt with either according to the *Hanafi* jurisprudence or the provisions included in the penal code itself. It therefore legitimises *de facto* the infliction of *hudud* penalties, which are clearly at odds with the ordinary principles of human dignity and thus contrary to both the 1964 Constitution (Art. 31 – in force at that time) and a number of Afghanistan's international legal obligations. The remaining *tazir* crimes are regulated according to the penal code and based on unremarkable European principles of criminal law³³⁵. The 1976 Penal Code also includes crimes to be punished by death, which are divided into two main categories: crimes against the security of the state and certain cases of aggravated murder. Other crimes punishable by death could be found in the 1987 'Law on Crimes against Internal and External Security', of Soviet inspiration³³⁶.

Concerning the criminal procedure law, the 1965/1974 Criminal Procedure Code (CPC) was later influenced by the 1979 'Law on the Discovery and Investigation of Crimes'³³⁷ (further amended in 1981). Under the latter, the secret services enjoyed exclusive jurisdiction to investigate the most serious crimes – such as those against external and

³³⁴ N. Dupree and T.E. Gouttierre, 'The Society and Its Environment', in A. Aghajanian (ed.), *Afghanistan: Past and Present* (Los Angeles, CA: Indo-European Publishing, 2007), 54-133, at 114.

³³⁵ Lau, *An Introduction to Afghanistan*, p. 39-40.

³³⁶ See on the matter, A. Deledda (with A. Hegazy and O. Saffee), *The death penalty in Afghanistan* (Kabul: IJPO, October 2005), 4-5, on file with the author. See, in particular, Art. 1(1d), 2, 3(1), 4(1), 5(2), 7(3), 12, 15 of the 'Law on Crimes against Internal and External Security, Decree No. 153, October 1987, available at the USAID-ARoLP database.

³³⁷ Law on the Discovery and Investigation of Crimes and Supervision of the Attorney on its Legal Enforcement, Official Gazette No. 424, 4 April 1979, available in Dari at the USAID-ARoLP database.

internal security – certain political crimes, kidnapping and the taking of hostages³³⁸. The prosecution of crimes was mandatory³³⁹. However, norms concerning preliminary investigations were rather unclear. During the investigation phase, the 1965 CPC addressed the interaction between police and prosecutors (Art. 14), as did both the 1967 Law on Attorney General Office (1967 AGO Law, Art. 8) and the 1978 Law on Discovery and Investigation of Crimes. Under the 1965 CPC, the prosecutor directed the investigations, while crime detection was the duty of both the police and the prosecutor (Art. 15-17). On the contrary, the 1967 AGO Law distinguished between the tasks of the police and the prosecutor more clearly, the former being in charge of crime detection and initial investigations, with the latter reviewing the work of the police and presenting the case to the court (Art. 12-13). The 1991 'Law on Structure and Authority of the Attorney General's Office' (1991 AGO Law) returned to a wider role of a prosecutor, who was now in charge of participating in the discovery and investigation of crimes together with the police, also instructing police officers to perform specific actions (Art. 19).

Once the crime investigation was commenced, the police were obliged to inform and report the prosecutor after 24 hours (Art. 17, 1965 CPC and Art. 12, 1967 AGO Law). The time-limit for provisional arrest by the police was 72 hours, after which the arrested persons had to be taken before the Prosecutor, who could extend the detention up to an additional seven days (Art. 29, 1965 CPC; Art. 19, 1967 AGO Law). Further pre-trial detention had to be authorized by a court and generally it could not exceed three months (Art. 86, 1965 CPC). In special circumstances the detention period could be extended, but within the maximum time-limit for pre-trial detention of nine months (Art. 87, 1965 CPC). The 1965 CPC also provided a maximum time-limit for the investigations, which normally did not exceed six months for

³³⁸ Lau, *An Introduction to Afghanistan*, p. 40.

³³⁹ 1965 CPC, Art. 1; Law on Structure and Authority of the Attorney General's Office of 1991, Art. 5.

the most serious crimes. However, this period could be extended for an additional three months in particular situations (Art. 88).

As reported earlier, the Afghan civil law has also been influenced by Islamic and customary principles. In this respect, Art. 1 of the 1977 Civil Code (currently still in force) states that in the absence of a statutory norm, the courts shall decide a case in accordance with the principles of *Hanafi* jurisprudence. Local customs may represent a law source of third instance in case the litigation may not be solved under statutory or Islamic law. However, customs must not be in contradiction with the statutory law or with the principles of justice (Art. 2). Islamic legal thought has also influenced the theory of civil liability, which introduces an objective liability for any civil damage: the simple fact of causing a tort implies an obligation to repair (Art. 758-759)³⁴⁰. Conversely, at the time of its enactment, the Afghan civil code already acknowledged the compensation for moral damage (Art. 778). As regards civil procedural law, the influence of Islam on the 1957 Civil procedure code has already been discussed in previous paragraphs. The code was further modified in 1990³⁴¹ by softening those provisions related to the Islamic background of judges. They should now have «grasp and understanding of the effective laws of the country and of the rules of the Islamic law», together with the «complete awareness of the general culture, manners and customs of the society» (Art. 498). This is because, in the absence of clear statutory rules, decisions were to be issued «according to the fundamental principles of the Islamic law» (Art. 501). The oath remained central among evidence, even if it could not be used in specific separation cases (Art. 113). The testimony was entirely regulated according to Islamic law (Art. 321 and 337). In addition, higher courts remained committed to Islamic law in reviewing the decisions of lower courts (Art. 451).

³⁴⁰ Labastie-Dahdouh, *Regards sur la responsabilité*, p. 9.

³⁴¹ Civil Procedure Code, Official Gazette No. 722, 22 August 1990, available at the USAID-ARoRL database.

At the end of this brief picture of the pre-2001 Afghan system of justice, we must advise the reader that there are no guarantees that the entire justice system was effectively functioning as described above. Lack of data and official reports undermine the effectiveness of any research on the matter. The only available data on the Afghan justice system in the 'pre-American' period was reported by Marvin Weinbaum in 1980³⁴². According to Weinbaum, at that time, the Afghan legal community was comprised of about 1,200 individuals: 715 judges, 170 prosecutors, 162 defence attorneys (not all licensed, as provided by law), 50 professors and some 100 lawyers in the various departments of the MoJ. However, much of this legal community was concentrated in Kabul. In the provinces, the lack of legal professionals was profound. Only one defence attorney (out of 28) was reported to reside in one of the 20 provinces. The remaining lawyers practiced in Kabul and Herat. At least one judge was assigned to each of the 220 district courts of the country, while panels of three judges existed in the provincial capital cities. In nearly 100 district courts the prosecutor office was missing. If we compare this data with the population of Afghanistan in 1980³⁴³ (around 15,200,000 inhabitants) and with its geographic extension (647,500 km² – as big as France), results are not encouraging. Adding the status of the internal ways of communication, which made it (and still make it) particularly difficult for the parties to a case to reach the nearest district court, it is more than likely that most of disputes were solved by alternative dispute resolution mechanisms (ADR), i.e. taking the cases before *jirgas/shuras*. On the one hand, the justice system could be then regarded as being almost completely in the hands of local

³⁴² Weinbaum, *Legal Elites*, p. 40. Other studies confirm that in 1975 there were 225 primary courts in the country. The number of courts grew after the overthrow of the monarchy. President Daoud was convinced that establishing more primary courts would have helped in increasing state influence across the country (C. Jones-Pauly, N. Nojumi, 'Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan', 52(4) *American Journal of Comparative Law* 2004, 825-857, at 833).

³⁴³ Data available at the World Bank – World Development Indicators Database, <http://devdata.worldbank.org/query/default.htm>.

actors; on the other hand, it had never been considered as fair and impartial by the local population. In early 2002, a few months after the beginning of the intervention in Afghanistan, the international community realized that it was not necessary to re-construct the justice system, but to build one up for the first time³⁴⁴.

³⁴⁴ Barfield, *On Local Justice*, p. 440.

6 Phase One – From Tokyo to London: The ‘Lead Nation Approach’

It is not yet clear that defeat in war may legally become the means of forcing a people to become free

John D. Montgomery³⁴⁵

In November 2001, an international coalition led by the United States overturned the Taliban regime. The Taliban immediately withdrew in the territories along and beyond the Pakistani border. In the years to come, they would resurge and start a long and exhausting guerrilla warfare against the new Afghan government and its international allies. After the Taliban’s defeat, in the first days of December 2001, the representatives of the winning factions met in Bonn under the auspices of the SRSG Lakhdar Brahimi to draw up the political future of Afghanistan. The Bonn meeting was established following a formal invitation issued by the Security Council in Resolution 1378 of 14 November 2001. After harsh negotiations among the parties and under substantial pressure by the international partners, the Afghan delegates signed an agreement on 5 December 2001³⁴⁶. The agreement was further

³⁴⁵ Ford Foundation Professor of International Studies, Harvard University, passed away on 3 April 2008. See J.D. Montgomery, *Forced to Be Free: The Artificial Revolution in Germany and Japan* (Chicago: The University of Chicago Press, 1957), 4.

³⁴⁶ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Bonn, 5 December 2001, [http://unama-afg.org/docs/nonUN%20Docs/ International-Conferences&Forums/Bonn-Talks/bonn.htm](http://unama-afg.org/docs/nonUN%20Docs/International-Conferences&Forums/Bonn-Talks/bonn.htm).

welcomed by the Security Council in Resolution 1383 of 6 December 2001.

The Bonn Agreement laid down the foundations of the new political order in Afghanistan. It established an Afghan Interim Authority (AIA), which consisted of an Interim Administration, a Special Independent Commission for the Convening of the Emergency *Loya Jirga*, and a Supreme Court of Afghanistan, as well as other courts, as set up by the Interim Administration (Art. I(2)). The Interim Administration consisted of a Chairman, five Vice Chairmen and 24 members (Art. III(A)(1)). It was inaugurated on 22 December 2001 with a six-month mandate. Within this deadline, an Emergency *Loya Jirga* would convene in Kabul to elect the members of the new Afghanistan Transitional Authority (ATA), which would include a Transitional Administration as its executive branch. Following on from that, the Transitional Administration would appoint a Constitutional Commission (Art. III(C)(6)) and convene a second (Constitutional) *Loya Jirga* within 18 months from its establishment. This process would open the door to the first free political elections in the country, to be held within two years from the first Emergency *Loya Jirga* (Art. I(4-6)).

The Emergency *Loya Jirga* took place in June 2002³⁴⁷. Involving over 1,600 delegates, who represented various ethnic groups and political factions within Afghanistan, the *Loya Jirga* elected the new Transitional Administration, and Hamid Karzai as its President³⁴⁸. In consequence, relying on the text drawn up by the Constitutional Commission, the provisional government drafted the new Constitution, which was released in early November 2003 and was adopted with

³⁴⁷ See for an analysis L.P. Goodson, 'Afghanistan's Long Road to Reconstruction', 14(1) *Journal of Democracy* 2003, 82-99, at 92-94.

³⁴⁸ See A. Saikal, 'Afghanistan after the Loya Jirga', 44(3) *Survival* 2002, 47-56, at 48: «By an overwhelming majority of 1,295 they voted for Karzai as the head of state. [...] Despite some irregularities in the election and selection of the delegates (including intimidation and arm-twisting); despite procedural difficulties; despite behind-the-scenes dealings [...], the Loya Jirga proved, broadly speaking, to be a success».

amendments by the Constitutional *Loya Jirga* on 4 January 2004. The Presidential elections took place on 9 October 2004 and Karzai was elected again as President of Afghanistan. Finally, parliamentary elections were held on 18 September 2005, finalising the transition to a constitutional democracy, as provided for in the Bonn Agreement³⁴⁹.

6.1 Initial Reforms after the Bonn Agreement

The Bonn Agreement declared (Chapter II) that, until the adoption of a new constitution, the interim legal system in force in Afghanistan would consist of the 1964 Constitution and the full compilation of domestic laws and regulations passed since that time, if not in contrast with the Constitution or the Agreement themselves. In addition, such norms had to be deprived of the provisions concerning the monarchy and in general to be in line with the international agreements to which Afghanistan was a party³⁵⁰. Probably, the reference to the 1964 Constitution was «an attempt to connect the peace process with

³⁴⁹ The constitutional process reportedly cost US \$ 13 million while US \$ 145.4 million was spent for the presidential elections (78.4 million on voter registration and 67 million on the presidential election *per se*). The presidential elections were held with a three-month delay on the Bonn timetable (Ministry of Foreign Affairs of Denmark, *Humanitarian and Reconstruction Assistance*, p. 57).

³⁵⁰ At that time, Afghanistan was a party, *inter alia*, to the International Covenant on Economic, Social and Cultural Rights (accessed on 24 January 1983), to the International Covenant on Civil and Political Rights (accessed on 24 January 1983), to the International Convention on the Elimination of All Forms of Racial Discrimination (accessed on 6 July 1983), to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on 4 February 1985, ratified on 1 April 1987), and to the Convention on the Rights of the Child (signed on 27 September 1990 and ratified on 28 March 1994). The Convention on the Elimination of All Forms of Discrimination against Women was signed on 14 August 1980 but never ratified. A list of multilateral treaties ratified by Afghanistan is available from the IDLO database.

memories of a more stable Afghanistan»³⁵¹. This is in a way similar to the solution adopted by international authorities in East Timor and Kosovo. However, what makes it different is that the Bonn Agreement specifically incorporates only international legal obligations to which Afghanistan is a party, rather than the entire corpus of internationally recognized human rights standards, as in previous interventions³⁵². The powers of Interim Authority were limited to the repeal or amendment of existing norms, without the possibility of passing new laws³⁵³. Accordingly, in February 2002, the Interim Authority repealed all laws and regulations inconsistent with the 1964 Constitution and the Bonn Agreement by means of a specific decree³⁵⁴.

Helped by UNAMA, the Interim Administration was requested to «establish a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions»³⁵⁵. In addition, a Human Rights Commission – lately renamed ‘Afghan Independent Human Rights Commission’ (AIHRC) – was established to support the constitutional process with the assistance of the UN³⁵⁶. The Judicial Commission was initially created in May 2002³⁵⁷, then dissolved and re-

³⁵¹ S. Chesterman, *Justice under International Administration: Kosovo, East Timor and Afghanistan* (New York: International Peace Academy, September 2002), 9, http://www.ipacademy.org/pdfs/JUSTICE_UNDER_INTL.pdf.

³⁵² *Ibid.*, p. 10.

³⁵³ Bonn Agreement, Art. II(1)(i).

³⁵⁴ Legislative decree of interim administration regarding repealing of decrees and legislative documents prior to first of Jadi 1380 (February, 2002), 5 February 2002, available at the USAID-ARoLP database.

³⁵⁵ Bonn Agreement, Art. II(2).

³⁵⁶ As provided in the Bonn Agreement, Art. I(6).

³⁵⁷ Interim Administration of Afghanistan, Decree No. 1243, 21 May 2002, available at the USAID-ARoLP database.

established in November 2002³⁵⁸ with the name of Judicial Reform Commission (JRC), consisting of ten diverse and better-credentialed members. The initial dissolution was probably due to frictions among the three main actors within the Afghan justice system, namely the Supreme Court, AGO, MoJ). In fact, «there was reportedly strong competition and recrimination between the Ministry of Justice and the Supreme Court, as both wanted to control the appointment of judges, and the Ministry of Justice wanted to control the Attorney-General's Office»³⁵⁹.

The JRC identified a list of priorities for the justice sector (included into a 'Master Plan'), which comprised a compilation of Afghan laws, their reformation in line with international standards and international law, the progressive rehabilitation of the justice sector, the establishment of a constitutional court, and intensive legal training for the personnel involved in the sector³⁶⁰. However, the JRC apparently failed to persuade the Afghan authorities (namely the Constitutional Commission or the same government) to decide structural changes within the justice system³⁶¹. The impossibility of major amendments were confirmed by the initial statements of the Commission's Chairman, Bahaaddin Baha (currently a 'moderate' member of the

³⁵⁸ Formation of the Judicial Reform Commission and its duties, Presidential Decree No. 153, 2 November 2002, available at the USAID-ARoLP database.

³⁵⁹ J.A. Thier, *Reestablishing the Judicial System in Afghanistan* (Stanford, CA: CDDRL Working paper No. 19, 1 September 2004), 8, http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf.

³⁶⁰ R. Mani, *Ending impunity and building justice in Afghanistan* (Kabul: AREU, December 2003), 15, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016655.pdf>.

³⁶¹ B.R. Rubin, H. Hamidzada, and A. Stoddard, *Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document* (The Hague: Netherlands Institute of International Relations, April 2005), 42, http://www.clingendael.nl/publications/2005/20050400_cru_paper_barnett.pdf.

Supreme Court), referring to the necessity of aligning the Afghanistan's legal system with traditional Islamic law³⁶². Reportedly, the JRC also represented, in many instances, the arena in which different donors confronted each other for the leadership in the sector, rather than representing an avenue for reconciling the interests and prerogatives of justice institutions³⁶³. The JRC failure to address the institutional changes within the justice sector, «turned the commission into an easy scapegoat for the international community when it became apparent that no real reform or reconstruction could happen without the direct involvement of the Afghan permanent justice institutions and their political will»³⁶⁴. The JRC was lately dissolved in 2005, to coincide with the end of the 'Bonn process'³⁶⁵.

The Bonn Conference was followed by a donor conference in January 2002 in Tokyo, held at ministerial level and co-chaired by Japan, US, EU and Saudi Arabia³⁶⁶. The Conference collected approximately US \$ 4.5 billion in aid of the country's reconstruction.

³⁶² M.A. Drumbl, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan', 42(2) *Columbia Journal of Transnational Law* 2004, 349-390, at 365-366.

³⁶³ Tensions are reported, for example, with regard to the adoption of the Master Plan by the JRC. The Plan identified 30 projects to be completed over an 18-month period. It was largely written by American consultants seconded to the Commission, although the latter was entirely financed by Italy. Reportedly, these circumstances gave rise to frictions between the Italian Embassy and the US authorities (Thier, *Reestablishing the Judicial System*, p. 12).

³⁶⁴ UNDP, *Security with a Human Face: Challenges and Responsibilities – Afghanistan Human Development Report 2004* (Kabul/New York: UNDP, 2004), 145, <http://www.cphd.af/nhdr/nhdr04/nhdr04.html>.

³⁶⁵ Decree on Dissolution of the Judicial Commission, Official Gazette No. 862, 22 September 2005, available at the USAID-ARoLP database.

³⁶⁶ International Conference on Reconstruction Assistance to Afghanistan, Tokyo, 21-21 January 2002, http://www.mofa.go.jp/region/middle_e/afghanistan/min0201.

Pledges were made by more than 60 countries and IFIs, covering the period 2002-2006. US \$ 1.8 billion were allocated for 2002, while another US \$ 1.7 billion was pledged for 2003³⁶⁷. The EU Member States and the European Commission pledged US \$ 546 million for 2002 and US \$ 2.1 billion through 2006³⁶⁸. In addition to their financial commitments, several Group of Eight (G8) states were entrusted with the 'lead' in the reform of specific sectors within the 'Security and Rule of Law' area – the US for the armed forces, the UK for counter-narcotics, Japan for disarmament, demobilization, and reintegration (DDR), Germany for the police sector and Italy for the justice sector. Italy was therefore tasked with being the 'lead nation' in this field, providing financial assistance, coordinating external commitments and overseeing reconstruction efforts in the rule-of-law sphere³⁶⁹.

At the Bonn Conference, an 'Implementation Group' was also established as a high level monitoring institution³⁷⁰. It first convened in Kabul on 10-11 April 2002 and then in October of the same year. In April 2002 the government released the National Development Framework (NDF), which «became the main mechanism of coordination and agenda setting during the transitional period and was

³⁶⁷ Central Intelligence Agency, *CIA World Fact Book, 2004 – Afghanistan* (Dulles, VA: Brassey's Editions, 2004), 2.

³⁶⁸ The European Union's contribution to the reconstruction process of Afghanistan, Brussels, EU Doc. IP/02/113, 22 January 2002, http://ec.europa.eu/external_relations/afghanistan/intro/ip02_113.htm.

³⁶⁹ For an extended and detailed analysis of the role of Italy in the reform of the Afghan justice system see E.L. Horner, *The Italian Pillar: Italian-Led Judicial Reform in Afghanistan* (Princeton University, NJ: Bachelor Thesis at the Woodrow Wilson School of Public and International Affairs, 9 April 2008), on file with the author.

³⁷⁰ At the Bonn Conference participants agreed that the Implementation Group (IG) would ensure strategic coordination among the AIA and international partners (donors and NGOs). The AIA would chair the IG, while other IFIs and development institutions (*inter alia*, the World Bank, UNDP, Asian Development Bank) would serve as vice-chairs. The IG would be held quarterly in Kabul.

the basis for the Afghanistan's state-budget»³⁷¹. The NDF was comprised of 12 national development programmes³⁷². The reform of justice was then conceived as a segment of a wider 'Security and the Rule of Law Programme', which was in turn encompassed within the 'Governance and Security' pillar. Programme groups, programme secretariats and programme working groups were also established and aligned with the NDF.

In December 2002, the programme groups were replaced by consultative groups, mandated to coordinate key government agencies and donor organizations within the NDF and the full range of national reconstruction programmes. Justice was one among the five working groups in CG No. 2, entitled Security & Rule of Law. Such working groups were modelled on the five 'leads' decided at the Bonn Conference. Every CG and working group included a focal point, designated by the lead Ministry, which replaced the existing programme secretariat³⁷³. The CGs met at least monthly and their work was regulated by specific Terms of Reference (ToR) agreed upon by the participants and accepted by the Chair Ministry. This procedure, adopted according to the 'local ownership' principle, was also followed in the establishment of working groups and would be implemented in the future for the creation of any other consultative body. Due to its

³⁷¹ Y. Hasegawa, 'The United Nations Assistance Mission in Afghanistan: Impartiality in New UN Peace Operations', 2(2) *Journal of Intervention and Statebuilding* 2008, 209-226, at 218.

³⁷² National Development Framework (NDF), Kabul, April, 2002, <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016262.pdf>.

³⁷³ CG No. 2 (Security & Rule of Law) included 5 working groups: 1) Afghan National Army; 2) DDR; 3) National Police; 4) Justice; and 5) Anti-narcotics. Each sector was supervised by a focal point, being the US, Japan, Germany, Italy and UK, respectively. CG participants normally consisted of: the Chair-Ministry; other Ministries involved in that specific Programme; one focal point donor (or donor/agency in partnership); other donor agencies and IFIs contributing in that particular Programme; UNAMA and/or another UN agency; as well as 2-4 NGO representatives (national and international).

relevance, the working group on justice was named ‘consultative group’ as well.

6.2 The Role of Italy

The Justice Sector Consultative Group (JSCG) was created in January 2003, although its formal ToR were only agreed upon in 2005. The JSCG was chaired by the MoJ, while Italy, being the ‘lead nation’, became the donor focal point. In addition, both UNAMA and Italy were granted the chairs of *ad hoc* working groups on specific topics. Within the JSCG, the role of Italy was basically that of: «maintain[ing] close contacts and exchanges with other donors with a view to sustaining interest in justice issues among donors. This include[d] working with UN agencies to facilitate donor coordination activities. Italy [should] also cooperate with other agencies in seeking out the best available sources of international expertise»³⁷⁴. In Tokyo, the choice probably fell on Italy because Italy had been involved in the Afghan political life since the early seventies. In fact, at the time of the 1973-coup which overthrew him, King Zahir Shah was in holiday in Italy. He lived in Rome until April 2002, leading the Afghan opposition from abroad. Exactly in Rome, the anti-Taliban groups of the Afghan *diaspora* met up in late November 2001, before leaving for Bonn to sign the agreement on the country’s political future. Italy was also one of the founders of the so called ‘Geneva G4 Group’, composed of states interested in the political development of Afghanistan³⁷⁵.

Therefore, according to the commitments undertaken in Bonn, Italy was in charge of leading and coordinating justice sector reform and funding activities. In view of that, in December 2002 a pledging

³⁷⁴ JRC, UNAMA and UNDP, *Rebuilding the Justice Sector of Afghanistan* (Kabul: UNDP Doc. AFG/03/001/01/34, January 2003), para. III, on file with the IJPO.

³⁷⁵ The others were Iran and Germany, being host countries for thousands of Afghani refugees, and the US.

conference on justice was held in Rome. The Conference registered commitments for approximately US \$ 30 million³⁷⁶. Later on, in February 2003, a former anti-mafia magistrate and Executive Director of UNDOC, Giuseppe Di Gennaro was appointed as ‘special advisor’ to the Italian government for the sector’s reconstruction. At the same time, Italy opened a dedicated office in Kabul, called ‘Italian Justice Project Office’ (IJPO), led by Di Gennaro himself. The IJPO was an independent office, subsidiary to the MFA but distinct from the Embassy of Italy in Kabul, financed with funds from *Cooperazione italiana*³⁷⁷. The IJPO mission was to provide assistance to the Afghan justice institutions (Supreme Court, AGO, MoJ) as well as to the JRC. Di Gennaro resigned in July 2004. His resignation was reportedly due to «lack of understanding with the Italian ambassador in Kabul and the carelessness of the Italian government», as well as to security concerns³⁷⁸. Frictions and lack of coordination between the IJPO and the Italian Embassy would be constant in future years. Di Gennaro was replaced by a ‘special coordinator’, Jolanda Brunetti Goetz, a retired ambassador recalled to duty, who would lead the Office until September 2006. In consequence, the post of special coordinator was abolished, while «the IJPO was downsized and committed to the First Secretary of the Italian Embassy in Kabul»³⁷⁹. The IJPO waned in November 2007 with the establishment of the Italian Development Cooperation Office (known by the acronym UTL – Unità Tecnica Locale – in Italian), led by Maurizio Di Calisto. That of justice then became one

³⁷⁶ Thier, *Reestablishing the Judicial System*, p. 12.

³⁷⁷ Directorate of the Italian Ministry of Foreign Affairs in charge for development aid,
<http://www.cooperazioneallosviluppo.esteri.it/pdgc/inglese/intro.html>.

³⁷⁸ F. Amaral, *Elezioni afghane: quel pasticciccio all’italiana* (Roma: Lettera 22, 5 October 2004), <http://www.lettera22.it/showart.php?id=1907&rubrica=25> [author’s translation]. See also G. Bocchi, ‘Giustizia modello Kabul’, *Espresso*, 19 July 2007, p. 89.

³⁷⁹ T.J. Röder, ‘Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan’, 11 *Max Planck Yearbook of United Nations Law* 2007, 307-312, at 309.

of the development programmes run by the UTL. However, to some extent the autonomy from the political guidance of the Embassy was restored, because even though the UTL is part of the Embassy, it is autonomous in managing development projects, and its director is answerable to the MFA – Directorate General for Development Cooperation.

As regards the reform strategy elaborated by Italian authorities, the first aim was to restore the ‘formal’ justice sector, as well as provide to physical restructuring. Secondly, it approached the informal justice sector by fostering the promotion of the basic human rights principles in provinces and villages far from Kabul. Accordingly, at the beginning, the Italian reconstruction projects focused on three main areas: (i) legislative reform, (ii) training and capacity building, and (iii) rehabilitation of infrastructure³⁸⁰. Thereafter, Italy carried out projects aimed at reforming provincial and district justice institutions, namely (iv) the ‘Provincial Justice Initiative’ – which was supposed to provide the training for the judicial personnel and the promotion of the basic legal principles in the provinces – and (v) the project ‘Access to Justice at the District Level’ – intended to foster human rights awareness in local communities, in order to achieve a more conducive environment for the further acceptance of statutory law.

The Italian leadership was put into practice under a pluralistic approach, so that other countries and international organizations also contributed to the reform of justice with both human resources and funds. In addition, it is remarkable to note that up until 2008, Italy has basically financed and carried out only bilateral projects, notwithstanding the fact that a number of activities have been often funded and given out by contract to international organizations and institutions, such as UNDP, UNODC, UNIFEM, UNICEF, UNOPS, IOM, IDLO, IMG and ISISC. Other projects, especially those regarding the restoration of judicial infrastructure and the reform of the

³⁸⁰ IJPO, *Italian Lead on Justice: Strategy and Achievements* (Kabul: IJPO, 2005), on file with the IJPO.

applicable law, have been implemented by the IJPO itself³⁸¹. In the first period of activity (2002-2003) the IJPO prepared an intervention strategy based on a careful assessment of the legislation in force as well as of human and structural resources at disposal. A first report, concerning the conditions of the judicial administration in ten main Afghan districts was released in June 2003³⁸². In a second phase, once the survey on the criminal law in force was completed, a further comparative study on the applicable law in other Islamic countries was carried out in order to seek comparable models. On the basis of these researches, the process of legislative reform could finally take place.

6.3 The 2004 Constitution

According to the Bonn Agreement (Art. I(6)), a nine-member Constitutional Commission was appointed by the ATA President Karzai on 5 October 2002. The Commission produced a preliminary draft constitution by mid-April 2003, which was submitted to the 33 members of the Constitutional Review Commission. From April to July 2003 the latter launched a mix of public education and consultation programmes inside the country as well as in the refugee camps in Iran and Pakistan, aimed at informing the population of the constitutional process and obtaining some feedback. A total of 484,450 questionnaires was distributed and more than 500 public consultation meetings took place³⁸³. This operation was clearly intended to expand the overall

³⁸¹ A list of projects is available at <http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/Speciali/Afghanistan/ands.htm>.

³⁸² IJPO, *The Afghan judicial system under review: The picture emerging from Survey's data* (Kabul: IJPO, June 2003), on file with the IJPO.

³⁸³ UNDP, *Democratization & Civil Society Empowerment Programme* (Kabul: UNDP, Afghanistan Country Office, 31 October 2004), 7, http://www.undp.org.af/Publications/KeyDocuments/factsheets/dcse/dcse_factsheet_01_10_04.pdf.

consensus of both the population and the tribal groups over the initiative. However, commentators lamented a lack of transparency and inclusiveness, influenced by an «opaque and secretive» appointment process of the same Constitutional Commission³⁸⁴. Moreover, the draft constitution prepared by the Constitutional Committee was not released during the initial consultations and this generated suspicions of external impositions³⁸⁵. On 14 December 2003, the 502 delegates of the Constitutional *Loya Jirga* convened in Kabul and took three weeks to reach a final compromise. The Constitution was then signed and promulgated by President Karzai on 26 January 2004³⁸⁶.

The 2004 Afghan Constitution may be considered a milestone in the country's 'transition paradigm'³⁸⁷. However, a successful study of its text, cannot avoid considering the historical and political conditions under which it was drafted. Such circumstances, in fact, have led to a constitution which opens the door to the country's modernization, without excluding references to Islam in many parts. This may be due to several factors. First of all, after 22 years of civil war (officially ended in 2001), as well as the atomisation of the society in tribal groups and the divisions between Sunnis and Shiites, the Islamic religion was probably the sole shared value around which the population could rally³⁸⁸. In addition, the lack of political plurality and the quest for legitimisation of new political movements born from the ashes of the militia groups, generated a political dynamic orientated towards

³⁸⁴ International Crisis Group, *Afghanistan's Flawed Constitutional Process* (Kabul/Brussels: ICG, Asia Report No. 56, 12 June 2003), 16, <http://www.crisisgroup.org/home/index.cfm?id=1639&l=1>.

³⁸⁵ Mani, *Ending impunity*, p. 20.

³⁸⁶ The official text of the 2004 Constitution is available at <http://www.president.gov.af/english/constitution.mspx>.

³⁸⁷ See Carothers, *The End of the Transition Paradigm*, p. 6-7.

³⁸⁸ A. Finkelman, 'The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002 – 2004', [2005] *Al Nakhlah* 2, p. 5, http://fletcher.tufts.edu/al_nakhlah/archives/spring2005/finkelman.pdf.

Islamic values and ideals³⁸⁹. Indeed, the country's political history had always lacked real political organisations with well-defined political goals. After the 1964 Constitution, the process of creation and legitimisation of political parties was very slow and candidates presented themselves individually at elections. For this reason, they were not involved in any kind of political project and only defended particular interests, concluding different political alliances at anytime. The communist regime worsened the situation. The 1977 Republican Constitution did not admit any political party other than the communist one and the powers of the president exceeded even those of the king in the previous constitution³⁹⁰.

In this respect, the drafters of the 2004 Constitution were probably aware that what led to the failure of the majority of past constitutions was that these merely presented a way to serve the interests of the rulers in power, rather than contained shared principles and values³⁹¹. As a consequence, they referred to the most modern constitutional charter the country had ever had, i.e., that of 1964, while they also attempted to follow the political path drawn up in the Bonn agenda. The outcome essentially remains a «relatively liberal Islamic constitution»³⁹². Even though it was described by a UN officer as «a package deal that contains potential contradictions to spark future conflicts»³⁹³, the 2004 Constitution may be generally considered a

³⁸⁹ M. Nawabi, *Islamic Law in Muslim Majority Countries: Afghanistan* (Atlanta: Association of American Law Schools, 2-6 January 2004), <http://www.aals.org/am2004/islamiclaw/majority.htm>.

³⁹⁰ D. Khalid, 'La posizione dell'islam e del diritto islamico nei vari stati: Afghanistan', in W. Ende and U. Steinbach (eds.), *L'islam oggi* (Bologna: EBD, 2004), 303-650, at 373-374.

³⁹¹ Saboor, *The Progress of Constitutionalism*, p. 21.

³⁹² B.R. Rubin, 'Crafting a Constitution for Afghanistan', 15(3) *Journal of Democracy* 2004, 5-19, at 5.

³⁹³ Cited in Finkelman, *The Constitution and Its Interpretation*, p. 3.

«break with the past»³⁹⁴ and, in the way, a good result for the country's political transition³⁹⁵. The influence of international actors was mainly exerted on balancing the recognition of the state as an Islamic republic and the lack of any explicit reference to *sharia* in the text³⁹⁶.

The first three articles of the 2004 Constitution describe the role of Islam within Afghan institutions. Art. 1 defines the country as an Islamic Republic³⁹⁷. Art. 2 specifies that Islam is the state religion, although the followers of other religions are almost free («within the bounds of law») to perform their religious ceremonies. Art. 3 is one of the most important provisions of the new constitutional text, as it introduces a 'repugnance clause'. Under this article, the legal system may not contain norms that «contravene the tenets and provisions of the holy religion of Islam». As previously explained, while the 1964 Constitution referred to a mere incompatibility with «the basic principles of [...] Islam» (Art. 64), and thus admitted laws and regulations in contrast with subsidiary Islamic norms, the 2004 Constitution apparently affirms the prevalence of the *Hanafi* jurisprudence over statutory law³⁹⁸. If one reads this provision together with that in Art. 121, which explicitly grants the power of judicial

³⁹⁴ C. Riphenburg, 'Afghanistan's Constitution: Success or Sham?', 12(1) *Middle East Policy* 2005, 31-44, at 31.

³⁹⁵ L.P. Goodson, 'Afghanistan in 2003: The Taliban Resurface and a New Constitution Is Born', 44(1) *Asian Survey* 2004, 14-22, at 20-21.

³⁹⁶ Rubin, *Crafting a Constitution*, p. 14.

³⁹⁷ There was much debate within the Constitutional Review Commission as on whether Art. 1 should include the term 'Islamic' (Republic). According to Kamali, «no other provision of the draft constitution had caused as much hesitation and uncertainty as Art. 1» (M.H. Kamali, 'Islam and its Shar•a in the Afghan Constitution 2004 with Special Reference to Personal Law', in N. Yassari (ed.), *The Shar•a in the Constitutions of Afghanistan, Iran, and Egypt* (Tübingen: Mohr Siebeck, 2005), 23-43, at 25.

³⁹⁸ Finkelman, *The Constitution and Its Interpretation*, p. 2.

review to the Supreme Court, it appears clear how powerful the latter may be in terms of political influence over government decisions³⁹⁹.

Striking a balance with previous articles, Art. 130 establishes that courts shall apply statutory norms in cases under consideration, while Islamic jurisprudence would be applied residually. This principle is also confirmed in Art. 7 of the Law on organization of courts of 2005⁴⁰⁰. It should induce a stronger degree of objectivity into the analogical reasoning and interpretation of Islamic norms by judges⁴⁰¹. Yet this maintains the Islamic criminal law as well as a part of the Islamic family law in force, which can be easily considered in contrast with Art. 7 of the same Constitution, under which the international human rights treaties signed by Afghanistan binds on state affairs⁴⁰². The latter provision seems itself in contrast with Art. 3 of the Constitution, as a number of «tenets and principles» of Islamic law may be held contrary to international human rights instruments⁴⁰³. A further contradiction

³⁹⁹ Thier, *Reestablishing the Judicial System*, p. 9. The author draws up a parallel with the Council of Guardians in Iran.

⁴⁰⁰ Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, Official Gazette No. 851, 21 May 2005, available at the USAID-ARoLP database.

⁴⁰¹ Finkelman, *The Constitution and Its Interpretation*, p. 2-3.

⁴⁰² Art. 7(1) states: « The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights».

⁴⁰³ For instance, *hudud* punishments or restricted civil rights for women are clearly in contrast with human rights law. See on the matter Riphenburg, *Afghanistan's Constitution*, p. 34 and 38. According to Niaz Shah, Art. 27 «could prove to be a strong constitutional shield in the case of honour killings in which the perpetrators commonly resort to taking the law into their own hands» (N.A. Shah, 'The Constitution of Afghanistan and Women's Rights', 13(2) *Feminist Legal studies* 2005, 239-258, at 245). For a broad survey on the relationship between Islamic legal tradition and human rights law see R. al-Sayyid, 'Il pensiero musulmano contemporaneo e i diritti dell'uomo: pluralità di posizioni e confronto con l'Occidente', in A. Pacini (ed.) *L'islam e il dibattito sui diritti dell'uomo* (Turin: Fondazione Giovanni

may be possibly found at Art. 27, which introduces the principles of legality and non-retroactivity of criminal law. It could be argued that Islamic provisions are not statutory laws and thus they do not fit into such basic principles⁴⁰⁴. The role of religion is also reported in Art. 17, under which the state is held to promote religious teachings, and in Art. 45, where it is provided that «the state shall devise and implement a unified educational curricula based on the tenets of the sacred religion of Islam [...] and develop religious subjects curricula for schools on the basis of existing Islamic sects in Afghanistan». It should be noted that previous constitutions did not make any reference to religion with regard to education⁴⁰⁵. The respect for both Islamic principles and constitutional values is also stressed in the articles concerning political parties (Art. 35). However, once again this provision leaves the question of the primacy between Islamic and statutory law in the case a political party's manifesto contravening Islamic tenets open, but focuses on the promotion of human rights⁴⁰⁶. The relevance of ethnic groups, together with the minority of *Shiia* followers, is provided in Art. 4 and Art. 131, respectively. Under Art. 131, Afghan courts can apply the principles of *Shiia* law when both parties are followers of the *Shiia* sect. Art. 4 includes a list of the ethnic groups «the nation of Afghanistan shall be comprised of». While a norm similar to Art. 131 is contained in

Agnelli, 1998), 137-154. On the human rights *status quo* in Afghanistan after the Bonn agreement, see N. Niland, 'Justice postponed: The marginalization of human rights in Afghanistan', in A. Donini, N. Niland and K. Wermester (eds.), *Nation-building Unraveled? Aid, Peace and Justice*, (Bloomfield, CT: Kumarian Press, 2004), 61-82.

⁴⁰⁴ Deledda, *The death penalty*, p. 5.

⁴⁰⁵ Saboory, *The Progress of Constitutionalism*, p. 20. On the contrary, the 1964 Constitution promoted a «balanced and universal education in Afghanistan» (Art. 34).

⁴⁰⁶ P. Häberle, *Diritto costituzionale nazionale, unioni regionali fra stati e diritto internazionale come diritto universale dell'umanità: convergenze e divergenze* (Rome: Associazione italiana dei costituzionalisti, 11 May 2004), http://www.associazionedeicostituzionalisti.it/materiali/anticipazioni/diritto_universale/index.html.

Art. 12 of the 1979 Iranian Constitution⁴⁰⁷, Art. 4 is totally new, as no other Afghan constitution has ever given relevance to *ethnos*⁴⁰⁸.

The 2004 Constitution also includes provisions declaring any discrimination based on gender as illegal, as well as equal rights and duties of citizens before the law (art. 22). The constitution also guarantees the participation of the female community in the public sector as well as in the parliament and government. According to the constitution there must be an average of two women representatives per province in the *Wolesi Jirga* (the lower house), and one half in the *Mesrano Jirga* (the upper house – Art. 83 and 84). Under Art. 58, the AIHRC becomes a constitutional organ. The AIHRC has now the authority to receive complaints about human rights violations but its powers are limited, as it can, at best, merely refer a case to judicial authorities and provide legal assistance to the victims. According to Art. 157, the supervision over the implementation of the constitution should be entrusted to a special independent commission. Such commission's powers and duties mirror those of the 'Constitutional Council' established under Art. 146 of the 1987 Constitution⁴⁰⁹. With regard to the death penalty, in line with the ICCPR, Art. 23 of the Constitution asserts the right to life, envisaging at the same time the possibility of its deprivation by the provision of law. However, capital punishment, decided on the basis of a decision issued by a competent court, requires the prior approval of the President to be enforced (Art. 129)⁴¹⁰.

⁴⁰⁷ Constitution of the Islamic Republic of Iran, adopted on 24 October 1979, in force since 3 December 1979 (as amended on 28 July 1989), http://www.oefre.unibe.ch/law/icl/ir00000_.html

⁴⁰⁸ Saboory, *The Progress of Constitutionalism*, p. 20.

⁴⁰⁹ Saboory, *The Progress of Constitutionalism*, p. 21.

⁴¹⁰ The author notes how similar provisions were already present in the 1964 (art. 101), 1977 (art. 105) and 1990 (art. 115) Constitutions (Deledda, *The death penalty*, p. 4).

6.4 The (New) System of Justice

Compared with the provisions included in the previous 1967 ‘Law of the Jurisdiction and Organization of the Courts of Afghanistan’, Articles 116-136 of the 2004 Constitution do not introduce any effective change to the organization of the court system, apart from the disappearance of the Court of Cassation and its absorption into the Supreme Court. Such inclusion in the judicial apparatus apparently reflects an insertion of common law institutions and bodies (mainly derived from the American legal system) into the domestic legal order⁴¹¹ – which was historically «modelled closely on civil law jurisdiction, but incorporating some elements of Islamic procedural and substantive laws and some Islamic rules of evidence»⁴¹². At first, it might appear as a convenient solution, given the context of the introduction of a purely presidential government system⁴¹³. Besides, during the drafting of the new Constitution, the presidential advisors rejected the proposal made by the Constitutional Commission for a separate constitutional court – a typical civil law body – as it could resemble the Council of Guardians in Iran. On the contrary, they pushed to grant the power of constitutional review to the Supreme Court: however, an organ that «has always been dominated by *ulama* trained in Islamic jurisprudence rather than constitutional law»⁴¹⁴, frustrating their initial intent of fostering the country’s modernization.

⁴¹¹ According to Professor Papa, this insertion of legal models derived from the Northern American common law system into the Afghan legal order is currently taking place «at the cost of the legal and linguistic heritage of the continental Europe, and, in a minor way, of the Islamic law» [author’s translation] (Papa, *Afghanistan*, p. 332).

⁴¹² Lau, *An Introduction to Afghanistan*, p. 36.

⁴¹³ C. Pinelli, *The New Afghanistan’s Difficulties: The Case of the Supreme Court* (Kabul: Presentation at the Conference ‘Reforms of the Judicial Institutions and Public Administration in Afghanistan’, 25 March 2006), p. 2, on file with the author.

⁴¹⁴ Rubin, *Crafting a Constitution for Afghanistan*, p. 15.

The ‘new’ justice system drawn up by the Constitution primarily consists of the judiciary, the Attorney-General, and the Ministry of Justice. The judiciary, in particular, comprises the Supreme Court, courts of appeal and primary courts.

6.4.1 The Organization of Courts

The Supreme Court remains the apex of the Bench, retaining full administrative powers over the sector, and also represents the court of last resort. The nine members of the court, including its chairman, are proposed by the *Wolesi Jirga* and appointed by the president of the state (Art. 117 of the 2004 Constitution)⁴¹⁵. The president also appoints ordinary judges, on the proposal of the Supreme Court (Art. 132), thus respecting Islamic tradition, according to which only the ruler of the Islamic community can choose a new judge⁴¹⁶. The Supreme Court is responsible for reviewing cases forwarded by the courts of appeal and for confirming the legality of the decisions made in the lower courts. Rulings may be reversed if they are *contra legem* or even contrary to the principles of *sharia*⁴¹⁷. The Supreme Court may reverse a judgement basing its decision on any legal grounds even if such breach of law is not mentioned in the appeal⁴¹⁸. The Supreme Court is also responsible for the appointment and dismissal of the whole administrative personnel of the judiciary as well as for the preparation and implementation of the budget of the Bench, subject to the further approval of the National Assembly as a part of the national budget (Art. 124-125). Furthermore, the Supreme Court can propose draft laws concerning the regulation of judicial affairs to the National Assembly⁴¹⁹.

⁴¹⁵ 2005 Law on Organization and Jurisdiction of Courts, Art. 17.

⁴¹⁶ Rubin et al., *Afghanistan 2005 and Beyond*, p. 42.

⁴¹⁷ 2005 Law on Organization and Jurisdiction of Courts, Art. 6(2) and 28(1).

⁴¹⁸ 2005 Law on Organization and Jurisdiction of Courts, Art. 26(1).

⁴¹⁹ *Ibid.*, Art. 24(2).

As previously mentioned, this broad autonomy for the Supreme Court has always been present in the constitutional history of Afghanistan.

Apart from the top administrative and disciplinary powers (under Art. 3 and 121 of the 2004 Constitution), the Supreme Court retains the power of judicial review in respect of any norms of the legal system, if it holds them to «contravene the tenets and provisions of the holy religion of Islam»⁴²⁰. Therefore, the Court is vested with the main role of coherently adapting old Islamic rules and jurisprudence with the current principles of human rights and rule of law. The Constitution also permits the members of the Supreme Court to own an educational background in Islamic jurisprudence other than secular law (Art. 118). In line with the Constitution, the 2005 Law on the Organization of Courts allows graduates in secular law or *sharia* to be appointed as judges. In addition, it even extends the possibility for individuals with a degree from an Islamic high school (*madrassa*) to serve as judges in provincial courts for the first three years (Art. 58(2)).

However, recent developments would indicate a shift from this tendency to the system's 'Islamization'. In Spring 2006 the Afghan parliament rejected Fazel Hadi Shinwari, the Saudi-backed Chief Justice⁴²¹, who was replaced by Karzai with Abdul Salam Azimi, described as a 'moderate' Islamic scholar and one of the key drafters of the 2004 Constitution. Following on from this, the entire Supreme Court was substituted with the appointment of new 'moderate'

⁴²⁰ M. Haars, 'Shari'a in Afghanistan', 69(2) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2005, 351-355, at 351.

⁴²¹ According to the ICG,

«under his guidance the court has appointed scores of non-university trained Muslim clerics to all levels of the court system. Shinwari has failed to follow the 1964 Constitution and applicable laws, exceeding the constitutionally allowed number of judges on the Supreme Court and creating a *fatwa* council to issue extra-judicial religious proclamations» (International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice* (Kabul/Brussels: ICG Asia Report No. 45, 28 January 2003), 10, <http://www.crisisgroup.org/home/index.cfm?id=1631>).

members⁴²². This substitution had been previously requested by a group of European diplomats, bringing a diplomatic *démarche* to President Karzai, demanding the reform of the Supreme Court⁴²³. The importance of such a changeover lies in the broad powers conferred to the Chief Justice within the new legal system⁴²⁴. For instance, the latter appoints the 36 judicial advisors to the Supreme Court⁴²⁵ and is also in charge of proposing, to the President of Afghanistan, the candidate to the post of Head of the Administration Office of the Judiciary⁴²⁶.

The courts of appeal have inherited the powers and functions of the old provincial courts. They are in charge of reviewing all evidentiary and procedural aspects of claims. They can amend, overturn, change, approve or nullify the lower court judgments and orders (Law on Court Organization, Art. 33). Primary courts lie under the jurisdiction of the courts of appeal. Commercial and juvenile courts are established in provincial centres, separate from other primary courts, which are instead located both in districts and provincial centres (Art. 40, 44-45). The primary courts of the provincial centres retain jurisdiction over 'public' crimes, crimes against public security, and criminal cases related to traffic accidents – the latter to be ruled by specific traffic violation tribunals (Art. 42). There are no juries but the courts should be generally composed of three members (Art. 6).

With regard to the powers and organization of the AGO, to date, the 1991 AGO Law remains in force, so that in principle there should not be changes in the overall functioning of the prosecutor's offices. A new law is currently being drafted by the AGO and it is circulating among the Afghan authorities. However, while the Legislative Plan

⁴²² J.A. Their, 'Order in the Courts', *New York Times*, 28 August 2006, <http://www.nytimes.com/2006/08/28/opinion/28thier.html?partner=rssnyt&emc=rss>.

⁴²³ Baldauf, *The West pushes to reform*.

⁴²⁴ See 2005 Law on Organization and Jurisdiction of Courts, Art. 30.

⁴²⁵ *Ibid.*, Art. 20-21.

⁴²⁶ *Ibid.*, art. 23.

presented by the *Taqnin* for the year 1386 (March 2007/March 2008) included the new AGO law among the bills to be discussed by the parliament, the 1387 Legislative Plan (March 2008/March 2009) does not even mention it⁴²⁷. According to Amnesty International, the fact that the Attorney General's Office remains responsible for both the appointment and overseeing of public prosecutors, may entail a lack of oversight of misconduct and lead to a conflict of interests⁴²⁸. Following the country's legal tradition, the MoJ remains a minor player within the justice system, as it is generally responsible only for law drafting, providing legal assistance to the Executive, and supervising the overall functioning of the public administration⁴²⁹.

6.4.2 Law Reform

As previously considered, while in many areas there has been a clear pragmatic compromise with existing institutions and practices, the reform of the Afghan law has been characterized by visible external input. These measures could be seen as helping to enforce the authority of the central state, but it would also seem that these externally-driven legal interventions may feed into and reproduce centre-periphery struggles. On the whole, law reform may be considered as the most evident outcome of the 'lead nation' approach in Afghanistan. Besides, since the Bonn Agreement did not change the law in force, at the beginning of the intervention it resulted mandatory to collect Afghan laws and other documents in order to put an end to the situation of

⁴²⁷ According to the Head of the *Taqnin* Department, in March 2008 a draft law, drawn up by the AGO, was circulating among the Afghan authorities (Presentation of the Draft Legislative Plan for the year 1387, Kabul, MoJ, 12 March 2008).

⁴²⁸ Amnesty International, *Afghanistan: Re-establishing the rule of law* (London/Kabul: AI Index No. ASA 11/021/2003, 14 August 2003), 21, <http://archive.amnesty.org/library/index/engasa110212003>.

⁴²⁹ Rubin et al., *Afghanistan 2005 and Beyond*, p. 42.

legal anarchy. In preparation for an assistance programme financed by Italy, IDLO started collecting Afghan legal material in late 2001. The outcome of this extensive research was a database of more than 2,400 texts in *Dari* and *Pashto*, and 100 in English, dating from 1921 to 2001⁴³⁰. Moreover, between 9 March 2002 and 6 March 2007, 119 new items of civil, commercial, criminal law, as well as the criminal procedure law were added to this large *corpus iuris*⁴³¹. In January 2007, the Ministry of Justice declared that 188 new legislative documents had been adopted, with an average of 37 laws and regulations passed each year, i.e., three per month⁴³². Reform initially avoided concentrating on substantive provisions, given the sensitivity of issues such as the influence of Islam over family and criminal law. Nevertheless, lawmakers attempted to focus on procedural law in order to indirectly affect the enjoyment of substantive rights by individuals.

An Interim Criminal Procedure Code (ICPC) was prepared by the Head of the IJPO, Giuseppe Di Gennaro, assisted by US consultants, and further adopted by the Afghan government⁴³³. The code has been the source of some controversy, due to the relatively limited input or support for the initial draft by the Afghan justice institutions that only adopted it under strong external political pressure⁴³⁴. While such foreign-supplied pressure does not seem surprising, given the current Afghan government's extreme reliance on international actors for continuous economic and military support, commentators argue that

⁴³⁰ Database available at <http://www.idlo.int/English/External/IPAfghanLaws.asp>.

⁴³¹ UNODC, *Thematic Evaluation of the Technical Assistance Provided to Afghanistan by the United Nations Office on Drugs and Crime*, Vol. 4 – Rule of Law Programme (Vienna: UNODC – Independent Evaluation Unit, May 2008), 3, <http://www.unodc.org/documents/evaluation/2007-afghanistan4.pdf>.

⁴³² Data presented at the IV JCMB Meeting held in Berlin on 30th January 2007, <http://www.moj.gov.af/?lang=en&lang=en&p=events&nid=177>.

⁴³³ Interim Code of Criminal Procedure for Courts, Official Gazette No. 820, 25 February 2004, available at the USAID-ARoLP database.

⁴³⁴ Miller & Perito, *Establishing the Rule of Law*, p. 8.

the potential perception of the code as a foreign imposition of law might have fuelled the conflict between the centre and the provinces, which has plagued the country throughout the twentieth century⁴³⁵. The code has been defined by the Italian Undersecretary of State as «a simplified text designed to make the work of the criminal police and judges easier and compliant with international human rights»⁴³⁶. It consists of 98 articles which reproduce the bulk of provisions in the Italian criminal procedure code. The right to defence for suspects and accused, as well as the right to be notified of this right in the pre-trial phase are both provided in Art. 5(7), 18 and 19. Other basic norms to prevent arbitrary arrest and pre-trial detention are listed at Art. 4, 6, 30, 34, and 35, while provisions on the right to call and examine witnesses are contained in Art. 49 and 51.

However, the code leaves some critical questions unresolved; for example, it fails to clarify the duration of pre-trial detention for arrested individuals, and to provide an effective mechanism for reviewing the legality of the arrest itself. As for the latter issue, the ICPC only includes a general possibility for the accused to denounce violations of procedural provisions in the pre-trial phase, together with the duty of the Court to assess the legality of the arrest at the first hearing (Art. 16(1) and 53(3)(b)). As concerns pre-trial detention, while the 1965 code provided for a maximum time-limit of nine months (Art. 87), the 2004 code is not clear enough on that point. Under Art. 36, following the arrest, «the arrested person shall be released if the *Saranwal* has not presented the indictment to the court within 15 days», while during the trial the court can extend the detention for two additional months at primary and appeal level, and for five additional months at the Supreme Court level (Art. 6(2)). Hence, such provision does not address the period between the arrest and the trial. Eventually, the code does not repeal the entire previous 1965 Criminal Procedure Code

⁴³⁵ F. Ahmed, 'Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code', 29(1) *Hastings International and Comparative Law Review* 2005, 93-134, at 105.

⁴³⁶ Hon. Margherita Boniver, talk held in Doha (Qatar) on 18-19 May 2004, available at http://www.margheritaboniver.it/conferenza_008.htm.

but only those provisions which are incompatible with it (Art. 98). As a result, magistrates have to evaluate the validity and the effectiveness of any single rule, raising questions over the applicable law in the internal legal order.

Precisely, in criminal law reform, the supply-driven approach created a situation where experts from different countries developed different laws and programmes, sometimes contradicting each other, and generating considerable confusion⁴³⁷. Let's consider, for instance, the powers of police and prosecutors in the investigation phase. The 2004 Constitution, in Art. 134, apparently separates the discovery of crimes from further investigations, affirming that «the discovery of crimes is the duty of the police, and investigation and prosecution are conducted by the Attorney General's Office in accordance with provisions of the law». The duty of the police to discover crimes is also reported in the Police Law, adopted in 2005⁴³⁸. However, the ICPC extends the powers of prosecutors, who may also discover crimes by themselves (Art. 22) and direct the police during the investigation activities (Art. 23). In fact, the police are duty bound to report any *notitia criminis* to the *Saranwal* within 24 hours (Art. 21). Again, as regards the pre-charge detention, the maximum time-limit that used to be 10 days in the 1978 Law on Investigation and Discovery of Crimes, was reduced to 24 hours in the ICPC (Art. 31) and extended again to 72 hours in the 2005 Police Law (Art. 15 and 25), generating confusion among legal professionals. Unsurprisingly, according to a report issued by UNAMA in late 2005, the application of the ICPC has been «highly problematic». Reportedly, the least applied provisions were exactly those related to the duration of pre-trial detention, together with the right to legal assistance for the defendant. Ultimately, UNAMA

⁴³⁷ A. Wilder, *Cops or Robbers? The Struggle to Reform the Afghan National Police* (Kabul: AREU, July 2007), 50, <http://www.areu.org.af>.

⁴³⁸ Police Law, Official Gazette No. 862, 22 September 2005, available at the USAID-ARoLP database.

confirmed the existence of cases concerning prosecution of women for conducts that were not defined as crimes under (statutory) law⁴³⁹.

Naturally, law reform has extended beyond the criminal law area. Other two important codes, drafted with major input from the IJPO, were the juvenile code and the penitentiary code, both adopted by the Afghan government in 2005. As for the reform of juvenile justice, following a proposal of UNICEF submitted to the Italian authorities in January 2003, a drafting team, coordinated by the IJPO, released a Juvenile Code in early 2005, which was turned into law in March of the same year⁴⁴⁰. The Juvenile Code raised the age of criminal liability from 7 to 12 years (Art. 5), and made it clear that a child is anyone under the age of 18 (Art. 4). According to the code, juvenile courts shall hear cases concerning not only crimes committed by minors but also cases of children who are at risk and in need of care and protection (Art. 29). The investigation and prosecution of juvenile crimes are under the responsibility of special juvenile prosecutor offices, to be established in Kabul and in provincial capital cities (Art. 9). In addition, the code specifies that punishments for minor offenders should be proportional to the penalties applied to adults for the same crime, and should take into consideration the age of the accused (Art. 39(1)). A fine is given to a minor's legal representative for failing to appear along with him/her before the juvenile prosecutor office, once summoned (Art. 25(1)).

A penitentiary code – drafted in collaboration with Italian and UNODC officials – was adopted by the Afghan government in May 2005⁴⁴¹. The code makes a distinction between ‘prisons’ and ‘detention centres’: the latter are reserved for accused individuals awaiting trial, while prisons are for offenders convicted after a final decision (Art. 6-7). According to the code, the human rights enjoyed by detainees and

⁴³⁹ UNAMA, *Afghan Justice Sector Overview* (Kabul: UNAMA-RoL Unit, December 2005), 2-3, on file with the IJPO.

⁴⁴⁰ Juvenile Law, Official Gazette No. 846, 23 March 2005, available at the USAID-ARoLP database.

⁴⁴¹ Law on Prisons and Detention Centers, Official Gazette No. 852, 31 May 2005, available at the USAID-ARoLP database.

prisoners may be «partially restricted» only when «order, discipline and security of the detention centres and prisons are in jeopardy», and even in such cases with the approval of the General Director of the prisons and the Minister of Justice (Art. 4). Moreover, the code provides that «the accused individuals and prisoners above 18 and below 25 shall be held separately in detention centers and prisons» (Art. 9(3)). Forced labour is not permitted, hence the prisoners and detainees who decide to work for private companies during their detention must be remunerated (Art. 33(3)). Punishments and the use of force in case of disorders are listed in Art. 43 and Art. 46.

6.4.3 Training and Capacity-Building

Training and capacity-building activities have been carried out by a number of organizations which have largely acted as contractors and sometimes as sub-contractors of foreign governments. Since the beginning of the international intervention and up until mid-2005, this field was mainly covered by organizations financed by Italy. The main Italian contractor in this area was IDLO⁴⁴². IDLO has in turn contracted out part of the activities to other organizations, such as, inter alia, the *Istituto Superiore Internazionale di Scienze Criminali* (ISISC), based in Siracusa (Italy)⁴⁴³. Other Italian contractors in this area included UNODC, UNDP and UNICEF, while UNIFEM⁴⁴⁴ played a minor role.

⁴⁴² For an extensive account of the projects financed by Italy and carried out by IDLO in Afghanistan, see S. Reed, C. Foley, and H. Hamed, *IDLO Italian-Funded Projects (2005 – 2008) for Legal and Judicial Reform in Afghanistan: Evaluation Report* (Rome: IDLO, August 2008), <http://www.idlo.int/DOCNews/277DOC1.pdf>.

⁴⁴³ The International Institute of Higher Studies in Criminal Sciences (ISISC) was established in Siracusa in 1972. It is a not-for-profit, educational and research institution, focusing on international law, criminal justice and human rights. The President of ISICS is Prof. M. Cherif Bassiouni.

⁴⁴⁴ The UNIFEM Project ‘Gender & Justice Programme’ was financed by Italy in 2003-2005, but it is still ongoing at the time of writing (October 2008). The

Part of the strategy for local capacity-building involved tackling the lack of judicial personnel by training groups of local trainers (the 'training the trainers' method) which would keep costs down, enabling nationals to undertake training work at the fraction of the price of hiring international staff (as in other state-building missions, for example, in the Balkans and East Timor). At first, training was intended to assess and improve the legal background of Afghan judicial and legal personnel, focusing on the new laws and regulations adopted, under a clear top-down and supply-driven approach. Predictably, the training activities started in Kabul, with the aim of being further exported to the provinces and possibly to the districts.

When the new criminal procedure code came into effect, the IJPO organized an intensive training course on new procedural norms in collaboration with ISICS⁴⁴⁵. Based on a memorandum with the University of Kabul (where the lessons took place), a course was organised in the period May-June 2004, involving 100 judges, attorneys, judicial police officers and lawyers. The goal of the training was to

project included the training of 20 defence attorneys and the organization of courses for 2,300 persons in 23 provinces (See Cooperazione Italiana allo Sviluppo, *Le attività multilaterali*, <http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/Speciali/Afghanistan/attivitamultilaterali.htm>). A further project, entitled 'Violence Against Women in Afghanistan' was financed by Italy in 2007. Bilateral projects ended in March 2008, with the establishment of the 'Elimination of Violence Against Women Special Fund' as a part of the international UN Trust Fund in Support of Actions to Eliminate Violence Against Women. UNIFEM will administer the fund for the first 2 years before handing this role over to a national organization. The fund is managed with the assistance of an Advisory Board composed of 11 members, among whom the Ministry of Women Affairs and Ministry of Education. Following its establishment a number of donors committed US \$ 3 million to the fund.

⁴⁴⁵ Project: 'Training the Trainers Course on the Interim Criminal Procedure Code', implemented by ISICS in May/June 2004. See Cooperazione Italiana allo Sviluppo, *Le attività bilaterali*, <http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/Speciali/Afghanistan/attivitabilaterali.htm>.

create a qualified group of Afghan legal professionals who could subsequently provide training to colleagues throughout the country. Previously, as an IDLO sub-contractor, ISICS had organized a 300 hours in-depth training course in civil, criminal, administrative and commercial law, and its participants were previously selected by the JRC and the Supreme Court⁴⁴⁶. 450 participants, including judges, prosecutors and MoJ staff, more than 50 of whom women⁴⁴⁷, attended this course from July 2003 to December 2004. This group was divided into 15 smaller groups of 30 participants each. Five groups were from Kabul and ten groups were from the provinces. Each of the participants received 300 hours of practical training over a period of 16 months, in order to put the lessons, learnt during the training, into practice within the courts. For the criminal law part, programme trainers were Egyptian judges, prosecutors and academics, chosen because of the similarity between the Egyptian and the Afghan legal system. Subsequently, two international study tours were organised in Egypt and Italy so that a selected group of participants could receive additional training⁴⁴⁸. Financed by Italy, UNDP carried out the training of 120 judges and 130 law graduates, to be employed within justice institutions⁴⁴⁹. UNODC provided the training (also in English language and computer skills) of judicial and legal personnel working in the field

⁴⁴⁶ Project: 'Interim Training for the Afghan Judiciary', implemented by ISISC (as IDLO subcontractor), from July 2003 to October 2004. The cost of the project was US \$ 3 million (*ibid.*).

⁴⁴⁷ M. Lombardo Pijola, 'In Afghanistan con un obiettivo: dare vita ad un sistema giudiziario', *Messaggero*, 17 February 2006, p. 2.

⁴⁴⁸ The first study tour was organized in November 2003 and involved 20 members of the Afghan judiciary, 5 of whom were women. The participants also visited the National Judicial Studies Centre in Egypt and ISISC in Italy. The second study tour was organised in July 2004. A selected group of Afghan legal professionals spent a week at ISISC headquarters, engaging in an intensive seminar on current human rights problems in the country.

⁴⁴⁹ Project: 'Rebuilding the Justice Sector of Afghanistan', implemented by UNDP in 2003-2005. Italy invested in the project US \$ 2.75 million (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

of juvenile⁴⁵⁰ and penitentiary justice⁴⁵¹. UNODC further realized training courses in management, informatics and English language for MoJ staff (10 participants in 2003, and about 90 in 2004-2005), as well as for 71 officers in *Gardez, Kunduz, Mazar-e-Sharif* and *Jalalabad*. In 2003, 16 senior officers from the Central Prison Department attended study tours to Germany and Italy, with a follow-up workshop attended by 40 staff⁴⁵². Ultimately, in 2006 UNODC run training courses outside Kabul for staff from all Afghan provinces⁴⁵³.

Other projects concerned the diffusion of the new legislation and the judicial framework in provinces and districts. Financed by Italy, ISISC implemented a new strategy called 'Provincial Justice Initiative' (PJI)⁴⁵⁴, aimed at improving the judicial administration in the provinces. Once again, the PJI was based on the 'training the trainers' methodology. It also focused on mooted and the practical knowledge of criminal procedure. In practice, the PJI prepared a core group of trainers who used ISISC methodology and material to run capacity

⁴⁵⁰ Project: 'Reform of the Juvenile Justice System', No. AFG/R40, training provided in 2003. Italy spent US \$ 1,026,000 for this project (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)). A list and a brief description of UNODC projects in Afghanistan is available at http://www.unodc.org/afg/en/projects_ongoing.html.

⁴⁵¹ Project: 'Reform of the Penitentiary System in Afghanistan', No. AFG/R41, training provided in 2004-2005. The whole project cost around US \$ 2 million (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

⁴⁵² See UNODC, *Thematic Evaluation of the Technical Assistance*, p. 18. Project: 'Criminal Law and Criminal Justice Capacity Building', No. AFG/R41, activities realized in 2004. On the whole, Italy spent US \$ 3,137,000 for this project (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

⁴⁵³ Project: 'Reform of the Penitentiary System, Extension to the Provinces', No. AFG/R87. The Italian government contributed to the project with US \$ 5 million (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

⁴⁵⁴ Project: 'Provincial Justice Initiative', Phase 1 of the project was realized in December 2004 – March 2005. Cooperazione Italiana allo Sviluppo, *Le attività bilaterali* (cit.).

building programmes for judicial staff in the provinces. The PJI started in December 2004 with a pilot project of three months in the provinces of *Gardez*, *Paktia*, and *Balkh*, involving about 50 local justice operators in each province (18 judges, 18 prosecutors, 8 judicial police, and 6 defence lawyers)⁴⁵⁵.

With the Italian support⁴⁵⁶, UNICEF prepared a comparative analysis between the code and the International Convention on Childhood Rights, issued at the beginning of 2005, and a study on the rights of children under customary law. Finally, the new didactic *curricula* of the Faculties of Law/Political Science and *Sharia* were developed by UNDP in 2005, with the final goal being that of harmonizing teachings within the two faculties⁴⁵⁷.

6.4.4 Judicial Infrastructure

At the beginning of the international intervention, the status of judicial infrastructure was appalling. Both Kabul and the main cities in the

⁴⁵⁵ Embassy of Italy in Kabul, *Pilot phase Provincial Justice Initiative ends up*, Press Release, 23 March 2005, <http://www.unama-afg.org/news/pr/english/Others/2005/05mar23-PJI%20press%20relaese.doc>.

⁴⁵⁶ Project: 'Juvenile Justice and special protection measures for children in conflict with the law', activities implemented in 2003-2005. Italy provided € 700,000 for the project (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

⁴⁵⁷ Project: 'Rebuilding the Justice Sector of Afghanistan' (see Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)). The new curricula were submitted to the University of Kabul and to the Ministry of Higher Education in 2005 and were to be first applied as from March 2006. However, at the moment they are still not used, pending the adoption of new curricula in other faculties.

provinces lacked functioning judicial and correctional facilities⁴⁵⁸. Efforts in this area have been massive and included a large number of donors. It is unfeasible to give the exact account of projects in this area, but we may concentrate on those activities carried out under the Italian 'Lead'. Again, some of the projects were implemented directly by the IJPO, whereas others were contracted out to a few organizations and agencies.

In September 2005 Italy started the restoration and rehabilitation of the National Security Court, which was completed five months later⁴⁵⁹. In addition, financed by Italy, the UNDP (and UNOPS as its subcontractor) completed the construction of different judicial facilities in the provinces of *Kunduz*, *Badakshan*, *Nangarhar* (court buildings), and *Herat* (multi-functional centre). In Kabul, the library of the law faculty was restored, while the AGO (Anti-Narcotics Department) and the MoJ received renovation works⁴⁶⁰. Within the UNODC 'Reform of the Juvenile System' project, a Juvenile Justice Department was established within the MoJ in 2005. In addition, the Kabul Juvenile Court was restored and building works for a new 'closed' juvenile rehabilitation

⁴⁵⁸ Amnesty International, *Afghanistan: Crumbling Prison System Desperately in Need of Repair* (Kabul/Geneva: AI Index ASA 11/017/2003, July 2003), 20, <http://www.amnesty.org/en/library/info/ASA11/017/2003>. According to the Kabul University's Center for Policy and Human Development, apart from the *Pul-e-Charkhi* prison, in 2007 there were the 242 district detention centers throughout Afghanistan, with 6,156 persons under provisional arrest (204 women) and 4,423 inmates serving their sentence (86 women) (See CPHD, *Bridging Modernity and Tradition*, p. 78-79). Other sources report that 14 of 34 provincial prisons (42 percent) were located in rented homes (Bassiouni and Rothenberg, *An Assessment of Justice Sector*, p. 26).

⁴⁵⁹ Project: 'National Security Court', carried out from September 2005 to February 2006. The cost of the project was US \$ 180,000 (Cooperazione Italiana allo Sviluppo, *Le attività bilaterali* (cit.)).

⁴⁶⁰ Project: 'Justice institutions' premises rehabilitation', activities carried out in 2003-2005 (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

center (CJRC) started in the north of the city⁴⁶¹. Within another project, centred on the rehabilitation of correctional infrastructure, UNODC provided equipment and refurbishment of the Central Prison Department, which was transferred in the meantime from the Ministry of Interior (MoI) to the MoJ. During 2004, as part of the same project, UNOPS (as a UNODC subcontractor) and its local contractors started to restore both the Female and the Male Detention Centres in Kabul. Other works were completed in block one of the *Pul-e-Charkhi* detention complex, located just outside Kabul⁴⁶². With a separate project, in 2004, Italy attempted to build a new block for the MoJ, but the project has not been implemented so far, due to bureaucratic difficulties on the Italian side⁴⁶³. Another project provided for the construction of additional two prisons in *Gardez* and *Mazar-e-Sharif*, as well as the realization of a national database of inmates⁴⁶⁴. However, both prisons have not been completed yet at the time of writing for lack of funds⁴⁶⁵. Ultimately, Italy financed a UNICEF project for the construction of an 'open'

⁴⁶¹ Project: 'Reform of the Juvenile Justice System', No. AFG/R40. (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)). Activities commenced in 2003. The CJRC was completed in 2005 but its hand over to the Afghan authorities was done only in 2007, due to lack of equipment and trained personnel. The structure is currently in need of additional works.

⁴⁶² Project: 'Reform of the Penitentiary System in Afghanistan' (see Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)). The transfer of the Central Prison Department from the MoI to the MoJ took place in 2003. Other building works started in 2004. The restoration of the *Pul-e-Charkhi* prison was completed in 2005. The Female Detention Centre was handed over to the Afghan authorities in January 2008.

⁴⁶³ Italy initially provided US \$ 177,000 for this project (see Cooperazione Italiana allo Sviluppo, *Le attività bilaterali* (cit.)).

⁴⁶⁴ Project: 'Reform of the Penitentiary System, Extension to the Provinces'.

⁴⁶⁵ UNODC, *Thematic Evaluation of the Technical Assistance*, p. 25-26.

juvenile rehabilitation centre in the same site of the 'closed' centre and a few Juvenile Primary Courts in Kabul, *Mazar-e-Sharif* and *Jalalabad*⁴⁶⁶.

6.5 Assessment

On the whole, during this first phase, the justice system reform was often criticised as being too slow, compared with other areas of activity⁴⁶⁷. However, in order to evaluate the situation of justice in Afghanistan during the period 2002-2006 and the impact of international policy-interventions being undertaken, one should consider that the restoration of the justice system started from a very weak base. Moreover, justice sector reform cannot be seen in isolation from the overall context. The elements that normally form the core of domestic security, namely the police, military, and justice system, should be regarded as intertwined and interdependent. In the first instance, the central government's lack of capacity to reduce the power of warlords and to extend its control over the country inevitably undermined the effective implementation of reform projects⁴⁶⁸. There has also been conflicting aims and priorities among prominent international policy stakeholders. For example, while the UN and Japan were actively involved in the demobilization of non-regular militias⁴⁶⁹,

⁴⁶⁶ Project: 'Support the Reform of the Juvenile Justice sector and the development of a child-right based legislative framework in Afghanistan'. The project also included training and legal awareness activities. The 'Open Juvenile Rehabilitation Center' was handed over to Afghan authorities on 23 November 2006. It has not been used for about two years. The first children were sent in the 'open' centre during Spring 2008, on provisional basis, according to decisions of the Kabul Juvenile Court.

⁴⁶⁷ I. Ingravallo, 'L'azione internazionale per la ricostruzione dell'Afghanistan', 59(3) *La comunità internazionale* 2004, 525-550, at 549.

⁴⁶⁸ Jones et al., *Establishing Law and Order*, p. 99 and 103.

⁴⁶⁹ S.G. Simonsen, 'Ethnicising Afghanistan?: Inclusion and Exclusion in post-Bonn Institution Building', 25(4) *Third World Quarterly* 2004, 707-729, at 726.

the US policy of paying warlords to fight the Taliban by proxy increased the power of regional tribal leaders⁴⁷⁰.

With the lack of a clear national plan or a common policy among the different players involved in the process of reconstruction⁴⁷¹, the final implementation strategy resulted from a mixture of orientations. As noted earlier, this is a common feature of most state-building interventions, where the reconstruction of the justice system has, so far, often been led by improvisation rather than by principles⁴⁷². In the case of Afghanistan, instead of bridging the gaps between national institutions, international stakeholders turned into «additional factional players in the arena»⁴⁷³. This initially prevented the shaping of a unique strategy to guide reforms, also fragmenting the process into «a constellation of overlapping and often incompatible programmes advanced independently»⁴⁷⁴. In fact, while the Bonn Agreement had drawn benchmarks and timetables for political changes, since the beginning of its implementation, no coordinating mechanisms were provided to harmonize these political measures⁴⁷⁵. The injection of a massive international semi-administrative apparatus, with more than 40,000 Afghans working for international NGOs and agencies⁴⁷⁶ undoubtedly caused problems in coordination and undermined common efforts. In this regard, it is reported that the «absence of systematic coordination» between the multilateral programmes established by international agencies, together with the bilateral

⁴⁷⁰ Goodson, *Afghanistan's Long Road*, p. 90.

⁴⁷¹ Thier, *Reestablishing the Judicial System*, p. 11.

⁴⁷² S. Chesterman, 'Rough Justice: Establishing the Rule of Law in Post-Conflict Territories', 20(1) *Ohio State Journal on Dispute Resolution* 2005, 69-98, at 70.

⁴⁷³ Sedra, *Security Sector Reform*, p. 100.

⁴⁷⁴ *Ibid.*

⁴⁷⁵ B.R. Rubin, 'Peace Building and State-Building in Afghanistan: Constructing Sovereignty for Whose Security?', 27(1) *Third World Quarterly* 2006, 175-185, at 184.

⁴⁷⁶ Goodhand, *Afghanistan in Central Asia*, p. 78.

operations of Italy and other donors, «delayed implementation, caused a lengthy negotiation process and lack of synergy between interventions»⁴⁷⁷. If links and coordination among donors were rather poor, the liaisons among the local justice institutions (Supreme Court, AGO, MoJ) were not better. Instead of implementing a sort of mutually-reinforcing strategy to govern the sector at best, relationships between such institutions has been reportedly «quixotic at best and hostile at worst»⁴⁷⁸. On the whole, the system has clearly suffered from inadequate leadership on the Afghan side⁴⁷⁹.

Indeed, instead of struggling with reforming institutions which are refractory to change, so as to kick-start the process of reconstruction, the international community appears to have preferred to bypass local authorities in the establishment of a Judicial Reform Commission, by staffing it with English speaking Afghans returning from Western countries. As a consequence, the JRC has avoided taking hard political decisions, which would carry little weight without the direct involvement of Afghan institutions. As a result, the JRC has become a forum for turf wars between the donors more than one for facilitating dialogue among the different domestic stakeholders in the justice institutions.

The plurality of stakeholders involved in the reconstruction process generated a bundle of reciprocal interactions which could hardly survive without frictions. For instance, tensions are reported to have occurred between the JRC (including the JRC consultants of the USAID-funded Asia Foundation) and the Italian authorities in the drafting of the January 2003 judicial sector rebuilding strategy, entitled 'Rebuilding the Justice Sector of Afghanistan'. Frictions concerned the 'leadership' in the final draft⁴⁸⁰. Since the 2002 Rome Conference, there

⁴⁷⁷ Ministry of Foreign Affairs of Denmark, *Humanitarian and Reconstruction Assistance*, p. 69.

⁴⁷⁸ Thier, *Reestablishing the Judicial System*, p. 8.

⁴⁷⁹ Horner, *The Italian Pillar*, p. 73.

⁴⁸⁰ Thier, *Reestablishing the Judicial System*, p. 12.

have also been reports of opposition, from UNAMA and other donors, to Italian attempts at defining a top role for the IDLO in the sector. In one occasion, a document concerning a strategic analysis on judicial reform, drafted by the IDLO and distributed to the conference attendees by the Italian Ministry of Foreign Affairs, was never tabled for discussion⁴⁸¹. According to Antonella Deledda, former IJPO executive officer: «Rather than building on each other[']s successes, the different programmes of nations and international organizations [have] spent [...] most of the energies of their staff in fighting each other and trying to blame others for the collective failures»⁴⁸².

The lack of coordination also partly derives from UNAMA's patchy performance, reflecting the limited mandate of the United Nations in Afghanistan. In fact, UNAMA is usually defined as a 'hybrid' UN 'integrated mission', to mark the distance from previous operations, such as in Kosovo, characterized by broad powers of government⁴⁸³. However, the limited impact on the ground was not purely a technical problem in lack of coordination, to be laid at the door of the UN, Italy or the US. The problem was at heart a political one, deriving from the lack of clear strategic goals, which would be drawn up in the next months. This political problem was then given a technical or organizational form in the absence of a clear and mutually recognized sharing of tasks between all the actors concerned in the post-conflict phase. Integration is successful only when a common strategic objective is delineated and all the relevant actors achieve a general understanding of their mandates and functions⁴⁸⁴. If the leadership (either Afghan or international) which has to identify needs and priorities at the operational level lacks accountability and clear

⁴⁸¹ International Crisis Group, *Afghanistan: Judicial Reform*, p. 9.

⁴⁸² Quoted in Horner, *The Italian Pillar*, p. 85.

⁴⁸³ Eide et al., *Report on Integrated Missions*, 13 and 15.

⁴⁸⁴ E.A. Weir, *Conflict and Compromise: UN Integrated Missions and the Humanitarian Imperative* (Accra: Kofi Annan International Peacekeeping Training Centre, Monograph No. 4, June 2006), 13, <http://www.regjeringen.no/upload/UD/Vedlegg/missions/weir.pdf>.

lines of responsibility then coordination and the 'integration' of tasks may merely add to misunderstandings and contribute to evasion and buck-passing⁴⁸⁵.

Moreover, it is reported that the practice of recruiting consultants to be seconded into the Afghan public administration has sometimes delayed the effective starting of activities. Observers addressed criticism towards Italy for its initial approach after taking the 'leadership' of the sector, considering the 'subcontracting' of Italian judicial reform assistance to IDLO as responsible not only for delaying the process but also for not fully engaging all the relevant government institutions (the MoJ in particular) in the reforming activities⁴⁸⁶. However, the problem cannot be so easily solved. Promoting a reduction in the number of foreign consultants in the Afghan public administration, allowing the Afghan government to decide autonomously, appears insufficient unless considered in a broader dimension. Are national authorities really able to set up a truly functioning public administration? The answer to such a question brings us back to a more generic and still unresolved issue, regarding the successful transferring of strong institutions to countries recovering from conflicts.

Therefore, on the whole, this 'lead nation' approach has been characterized by «a lack of close coordination, an imbalance in the level of committed resources, and the absence of a unified developmental concept»⁴⁸⁷. It generated a donor-oriented system, with broad bilateralization of planning and programming. Under this bilateral scheme, donors were supposed to perform justice reform by influencing the political will of local authorities through direct financial and technical support. However, on the one hand, financial assistance was initially even too fast, given the country's slow absorption

⁴⁸⁵ Noble et al., *Integrated Approaches to Peacebuilding*, p. 5.

⁴⁸⁶ International Crisis Group, *Afghanistan: Judicial Reform*, p. 8.

⁴⁸⁷ A.A. Jalali, 'The Future of Afghanistan', 36(1) *Parameters* 2006, 4-19, at 10.

capacities; while, on the other hand, the changes in national politics have been partial at best⁴⁸⁸.

Generally, the substantial failure of bilateral aid may be due to the limited powers, financial capacities and expertise of the selected 'lead nations'. According to the Rand Corporation research director in the field of state-building, James Dobbins, «Italy simply lacked the expertise, resources, interest and influence needed to succeed in such an undertaking»⁴⁸⁹. Recently, Italy was also criticised by the International Crisis Group⁴⁹⁰. Other studies are less critical, and confirm that «Italy has done a respectable job», considered «its minimal expertise and the immense challenge it faced»⁴⁹¹. Indeed, in the first period of activities, the Italian authorities were reported to have implemented their own projects after limited consultation with their Afghan counterparts, even though the latter's efforts to coordinate reconstruction, without Italian support, have been unsuccessful⁴⁹². For instance, in the case of personnel training, reports lamented the lack of coordination between IDLO and the JRC-backed Legal Education Centre (LEC) in Kabul – the former training judges and prosecutors, while the latter provided training for lawyers⁴⁹³. It must be considered that this coordination gap is a basic consequence of the overall absence of political will, shown by both the Afghan government and the international actors, with regard to this sector. Besides, the failure of the 'lead nation approach' in Afghanistan is not only restricted to the

⁴⁸⁸ UNDP, *Security with a Human Face*, p. 144.

⁴⁸⁹ J. Dobbins, S.G. Jones, K. Crane, and B.C. DeGrassie, *The Beginner's Guide to Nation-Building* (Santa Monica, CA: Rand Corporation, 2007), 101.

⁴⁹⁰ International Crisis Group, *Afghanistan: The Need for International Resolve* (Brussels/Kabul: ICG Asia Report No. 145, 6 February 2008), 6, http://www.crisisgroup.org/library/documents/asia/south_asia/145_afghanistan_the_need_for_international_resolve.pdf.

⁴⁹¹ Horner, *The Italian Pillar*, p. 82.

⁴⁹² Thier, *Reestablishing the Judicial System*, p. 13.

⁴⁹³ Amnesty International, *Afghanistan: Re-establishing the rule of law*, p. 14.

justice sector. Lack of success concerns all the 'leads', and it is probably due to very similar reasons⁴⁹⁴. Nevertheless, what is disconcerting, «is how long it took for the international community to realize that Italy was not up to the task of leading this 'fundamentally important sector', and for others to step in and provide leadership and resources»⁴⁹⁵.

On the other hand, doubts arise on whether one may really talk about an Italian 'lead' in the justice sector reform. Some data on funding activities reveals a very different situation. For 2001-2003, only about US \$ 25 million were allocated to the reconstruction of the justice sector, by mainly Western donors, although the overall request of the Afghan government amounted to \$ 190 million up to 2006⁴⁹⁶. The Afghan 2003-2004 budget request for justice sector funding was US \$ 27 million and was almost entirely covered by the Italian government with a contribution of US \$ 20 million. Up until 2006, Italy had invested about US \$ 57 million in reform and reconstruction projects in Afghanistan⁴⁹⁷, US \$ 45 million in 2001-2005, and US \$ 12 million in

⁴⁹⁴ According to Emma Sky, fellow in the War Studies Department at Kings College, London: «The lead nations [were] seeking to implant a Western liberal democratic model on Afghanistan without regard to the circumstances, capacities and traditions of the country» (E. Sky, 'Afghanistan Case Study: The Lead Nation Approach' in L. Nathan et al., *Local Ownership of Security Sector Reform: A Guide For Donors* (London: Crisis States Research Centre, January 2007), 59-67, at 62, <http://www.crisisstates.com/download/others/SSRReformNathan2007.pdf>).

⁴⁹⁵ Andrew Wilder, Research Director for Policy Process at the Feinstein International Center, Tufts University (US), quoted in Horner, *The Italian Pillar*, p. 83.

⁴⁹⁶ K. Ammitzboell, *Rebuilding justice and the rule of law in post-conflict Afghanistan: A call for legal innovation* (Warwick, UK: LLM dissertation at Warwick University, Law in Development School of Law, 2005), 38, on file with the author.

⁴⁹⁷ D. Stasio, 'A Kabul per una giustizia più giusta', *Sole 24 ore*, 2 April 2006, p. 4.

2006⁴⁹⁸. In practice Italy invested around US \$ 10 million per year in the reform of Afghan justice during that period⁴⁹⁹. Conversely, according to the Rand Corporation, in 2004 the United States provided approximately the same amount (US \$ 10 million) to the judicial sector, out of a total of US \$ 2.1 billion assistance to the country⁵⁰⁰. However, this data is probably underestimated, as shown in chapter seven. Indeed, other sources confirm that in May 2004, USAID (the US international cooperation agency) alone granted to one of its contractors, namely Management Systems International (MSI), US \$ 16.8 million under a project called 'Accelerating Success Initiative'. With the money received,

«MSI provided technical assistance and logistical support to the constitutional commission and its secretariat and to the constitutional loya jirga that took place in December 2003. [...] MSI also built or rehabilitated 7 of 10 targeted courthouses by September 30, 2004; helped review, draft, and track the status of legislation; surveyed and compiled laws and legal texts; mapped courthouse administration functions; and conducted training for about 300 legal professionals»⁵⁰¹.

This data clearly shows that, even in the first years of the international intervention, the leadership over the sector's reconstruction was exercised *de facto* by the US. Besides, it is evident that the US economic potential is remarkably bigger than the Italian one, and so are its assets

⁴⁹⁸ Baldauf, *The West pushes to reform*.

⁴⁹⁹ See Italian MFA – Directorate for International Development Cooperation, *L'impegno della cooperazione italiana per la ricostruzione dell'Afghanistan* (in Italian), <http://www.cooperazioneallosviluppo.esteri.it/pdgcs/italiano/pubblicazioni/pdf/afghanistan.pdf>.

⁵⁰⁰ Jones et al., *Establishing Law and Order*, p. 78.

⁵⁰¹ US Government Accountability Office, *Afghanistan Reconstruction: Despite Some Progress, Deteriorating Security and Other Obstacles Continue to Threaten Achievement of U.S. Goals* (Washington: Report to Congressional Committees No. GAO-05-742, July 2005), p. 24, <http://www.gao.gov/new.items/d05742.pdf>.

on field. With its money, expertise and organizational capacity the US could (and still can) influence the political will of local actors (including justice institutions) hundreds of times more than other donors. Moreover, this difference in financial and economic resources spent by the US and other donors in the reform of justice would, in the next years, increase to such an extent that the projects being carried out by international actors other than the US would only be a fraction of the entire assistance to the sector. According to the 'Donor Activity Matrix' included in the first attachment to the National Justice Programme⁵⁰², by March 2008 the US had started 280 different justice reform activities (216 at provincial level and 64 at national level), out of a total of 396 initiatives put in place on the whole by donors within justice sector (71 percent)⁵⁰³.

A further assessment may be done on the number of functioning courts and the qualification of judicial and administrative personnel, bearing in mind that the available data is partial and that justice reform may take time before achieving visible effects. However, figures will not change significantly in future years, notwithstanding the increased international efforts in the reform of Afghan justice. In this respect, generally, authoritative critics affirm that judiciary was an area in which no controversies arose during the consultations for the drafting of the constitutional charter⁵⁰⁴. This may appear to be somewhat of a paradox, but can be explained by the fact that the relevant actors, both internal and external, agreed that the sector could not immediately be

⁵⁰² NJP, p. 179 ff. See para. 7.3.2.

⁵⁰³ The list of past or ongoing reform activities carried out by other donors includes Italy (23 and 7 initiatives at national and provincial level, respectively), the Netherlands (5 national and 4 provincial initiatives), Egypt (3 national initiatives), Canada (22 national and 11 provincial initiatives, of which 8 national and 7 provincial activities have been implemented by CIDA), Germany (6 national and 16 provincial initiatives), the EC (6 national and 2 provincial initiatives), the UNODC (5 national initiatives), the UNDP (1 national initiative), the UK (4 provincial initiatives), and Australia (1 provincial initiative).

⁵⁰⁴ Rubin, *Crafting a Constitution*, p. 17.

reformed in depth and that the existing balance of powers between political and judicial elites should be maintained. This compromise is also reflected in the continuing traditional independence enjoyed by the Afghan Bench, often described as a «self-perpetuating caste»⁵⁰⁵, and, in this period, «dominated by religious conservatives who have more in common with the Taliban than with Karzai»⁵⁰⁶. On the other hand, it may be noted that, undeniably, «[a] strong and independent judiciary can have a destabilizing effect on a legal system whose very foundations are unsettled and considered controversial»⁵⁰⁷.

In a 2005 report, Amnesty International described the judicial system as being «ineffective, corrupt and susceptible to intimidation from armed groups», with courts that hardly functioned in rural areas. Judges and lawyers were frequently portrayed as being ignorant of the applicable law and accused of turning a blind eye even to the most severe cases of discrimination against women⁵⁰⁸. An earlier report of Amnesty indicated that a little over 2,000 judges were serving in 2003, together with approximately 3,000 prosecutors attached to Afghan courts. With regard to the judges, only around 20 percent of them were properly qualified and less than 2 percent were women⁵⁰⁹. In the same period, it is reported that there were no women among the 100-plus senior judges and that most of the female judges were employed in

⁵⁰⁵ *Ibid.*

⁵⁰⁶ M. Kaufman, 'U.S. Role Shifts as Afghanistan Founders', *Washington Post*, 14 April 2003, p. A10.

⁵⁰⁷ M. Lau, 'The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution', 64(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2004, 917-927, at 926.

⁵⁰⁸ Amnesty International, *Report 2005* (London: Amnesty International, AI Index No. POL 10/001/2005, 25 May 2005), 36.

⁵⁰⁹ Amnesty International, *Afghanistan: Re-establishing the rule of law*, p. 7, 12 and 15

administrative sections⁵¹⁰. Other sources report that in early 2006 the judiciary was composed of 1,500 judges, among which only 60 were women⁵¹¹. In addition, in 2005, according to statistics obtained from the Supreme Court, only 100 judges had university degrees in law and political science; 500 had a degree in sharia; 200 had a 12th or 14th grade education; 250 had below a 12th grade education; while 523 posts were vacant⁵¹². Due to the lack of judicial personnel, in 2004, 9 percent of the courts and 12 per cent of the prosecutor offices were run by administrative personnel only. However, the administrative staff were in short supply too, since in the same period the number of court administrative personnel was approximately 60 percent of the number of judges and the number of administrative staff in the prosecutor offices was approximately 23 percent of the number of prosecutors, posing a serious challenge to the administration of the courts⁵¹³. During the first years, the sector's reconstruction was mostly concentrated in Kabul. In 2003 only 35 percent of judges were located in the provinces due to low pays and poor working conditions⁵¹⁴. In 2004, out of the total number of prosecutors, 44 percent worked in Kabul, 30 percent in the provincial capitals, and only 26 percent in the districts. In the case of judges, 31 percent served in Kabul, 23 percent in the provincial capitals and 46 percent in the districts. It was also estimated that women judges represented only 3 per cent and women prosecutors 5 per cent of the

⁵¹⁰ C. Johnson, W. Maley, A. Thier and A. Wardak, *Afghanistan's political and constitutional development* (London: Overseas Development Institute, January 2003), 26, <http://www.odi.org.uk/hpg/papers/evaluations/afghandfid.pdf>.

⁵¹¹ D. Stasio, "'Troppe discriminazioni': L'accusa della presidentessa delle donne in Toga", *Sole 24 ore*, 2 April 2006, p. 4.

⁵¹² UNAMA, *Afghan Justice Sector Overview* (December 2005), p. 8.

⁵¹³ UNAMA, *Securing Afghanistan's Future: Considerations on Criteria and Actions for Strengthening the Justice System* (Kabul: UNAMA – RoL Unit, 8 February 2004), 19, on file with the IJPO.

⁵¹⁴ Johnson et al., *Afghanistan's political and constitutional development*, p. 7 and 26.

entire professional staff⁵¹⁵. Corruption among judges and prosecutors was another difficult problem, which would characterize the sector in the years to come. This can be explained by the low salaries for judges and civil servants, which in 2004 amounted to around US \$ 28 per month for state employees, US \$ 50 for an ordinary judge, and US \$ 80 for a Supreme Court judge⁵¹⁶, but it might also be down to the general lack of experience in public administration. The status of the Bar was obviously really poor: reportedly in 2005 only 170 lawyers were registered and licensed within the MoJ, while other sources confirm that those practicing were even less – approximately only 50⁵¹⁷. In 2006, according to the AIHRC, from a sample of 8,000 interviewed persons, about 60 percent did not have confidence in the justice system⁵¹⁸.

As considered above, the legal system still permits both Islamic and secular offences and penalties⁵¹⁹, together with an Islamic family law which can be easily considered to contradict the international

⁵¹⁵ UNAMA, *Securing Afghanistan's Future*, p. 19.

⁵¹⁶ *Ibid.*, p. 20; Chesterman, *Justice under International Administration*, p. 43.

⁵¹⁷ UNAMA, *Afghan Justice Sector Overview* (December 2005), p. 5.

⁵¹⁸ S. Samar, Presentation held at the Conference 'The Reform of the Judicial Institutions and Public Administration in Afghanistan: A Possible Roadmap', (Kabul, Serena Hotel, 25-26 March 2006), on file with the IJPO.

⁵¹⁹ The application of Islamic law in criminal proceedings has recently come to the forefront with the cases of Abdul Rahman (an NGO worker sentenced to death for apostasy and then fled in Italy), Perwiz Kambakhsh (a young journalist sentenced to a 20-year prison term for blasphemy) and Ghows Zalmai (a former journalist and AGO spokesman arrested for an unauthorized translation of the Koran). See respectively: M. Knust Rassekh Afshar, 'The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution', 10 *Max Planck Yearbook of United Nations Law* 2006, 591-605; Abdul Waheed Wafa, 'No Death Sentence for Afghan Journalist', *New York Times*, 21 October 2008, <http://www.nytimes.com/2008/10/22/world/asia/22afghan.html?hp>; A. Kroeger, 'Afghan Koran distributor arrested', *BBC News*, 4 November 2007, http://news.bbc.co.uk/2/hi/south_asia/7077892.stm.

human rights treaties signed by Afghanistan and the 2004 Constitution. There remains a clear contradiction in the founding principles of the justice system, which is the result of two complementary efforts: strengthening domestic institutional capacity through the introduction of Western legal norms and international human rights protections and the need to restore legitimacy to the central authorities by adapting the justice system to Afghan rural and Islamic traditions and conventions. These compromises are partly a reflection of the short-term approach taken for the development of the sector in this first phase.

However, at the same time, the most relevant laws adopted in 2002-2006 were influenced by external actors – Italy above all. As noted earlier, this was the case of the ICPC, the 2005 Juvenile Code, and the 2005 Law on Prisons and Detention Centres. With regard to the ICPC, the procedural rules included in it seem consistent with the Afghan civil law legal tradition and are intended to merely offer some basic legal safeguards to be applied in the course of trials. The code has been issued after an intense period of study, specifically aimed at integrating the new procedural norms with the substantive provisions of the 1976 Penal Code, still in force. The whole process has been conducted with the aim of avoiding giving the impression that the code has just been dropped in from above. Nevertheless, the international authorities have not merely introduced a new procedural code but have also influenced the relevant substantive norms. Guarantees for suspects and the arrested may profoundly affect the practical enjoyment of individual rights deriving from substantive law. Moreover, the code imposes methods and safeguards when obtaining evidence which clearly contradicts traditional Islamic rules of evidence (which give central importance to the oath and oral testimony in criminal and civil trials). In the end, the code might provide a circuitous way to influence the handling of trials for religious offences (still possible under the current Afghan criminal code), which would be hampered if the process was forced to follow Western legal standards.

Nevertheless, scepticism and allegations of inconsistency have been expressed by some commentators, with regard to the code's implementation plan, especially concerning the low number of judges

and prosecutors involved initially⁵²⁰. Other critics have suggested redrafting the criminal procedure code with the aid and participation of a diverse council of Afghan *ulema* and tribal leaders, in order to guarantee a broader consensus on the initiative⁵²¹.

⁵²⁰ Miller & Perito, *Establishing the Rule of Law*, p. 8.

⁵²¹ Ahmed, *Judicial Reform in Afghanistan*, p. 127.

7 Phase Two – From London to Paris and Beyond: Implementing the Local Ownership Principle in Justice Sector Reform

7.1 The End of the Bonn Process

A major evolution within the justice sector policy-making structure began in 2005. Early that year, the government started preparing its long-term vision, which was included in the Afghanistan first Millennium Development Goals Country Report, presented in September 2005 at the UN World Summit in New York⁵²². On 15 August 2005, an MoJ policy paper entitled 'Justice for All'⁵²³ was delivered at a national justice consultative conference, held in Kabul. The document, which was further revised and finally adopted on 10 October 2005, represented the primary medium-term development strategy for the justice sector, covering a period of up to 12 years. It established initial targets for justice system reform, along with programming and funding requirements, which were set out in 1-3, 3-5 and 5-10 year time-frames. Its drafting involved staff from the MoJ, AGO, Supreme Court, as well as international advisors from the UN (UNAMA and UNDP) and other international actors⁵²⁴. In the same month a 'Law Reform Working Group' was established under the auspices of the JSCG in order to

⁵²² Government of Afghanistan, *Millennium Development Goals Islamic Republic of Afghanistan Country Report 2005: Vision 2020* (Kabul: GoA, 2005), www.ands.gov.af/src/src/MDGs_Reps/MDGR%202005.pdf.

⁵²³ Government of Afghanistan, *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan* (Kabul: Ministry of Justice, October 2005), <http://www.rolafghanistan.esteri.it/NR/rdonlyres/B0DB53D0-A1F9-468E-8DF0-3F485F1959A7/0/JusticeforAll.pdf>.

⁵²⁴ CPHD, *Bridging Modernity and Tradition*, p. 120.

manage and coordinate international and national input into the legislative draft process. Italy joined the group together with UNDP, USAID and UNAMA. However, the implementation of 'Justice for All' started only in December 2005, with the creation of six working groups and one advisory group, once again participated by relevant national and international stakeholders. Some of the working groups established sub-working groups⁵²⁵.

Other crucial developments occurred at the London Conference on Afghanistan, which took place at the end of January 2006. The conference saw the signing of the Afghanistan Compact⁵²⁶ and the presentation of the Interim Afghanistan National Development Strategy (I-ANDS)⁵²⁷, which also represented the country's I-PRSP. The former was basically a political agreement between the Afghan Government and the international community towards the achievement of 42 benchmarks within a five-year term. The Compact's rule of law component was made up of 4 benchmarks, which mirrored those within the I-ANDS. Such benchmarks were related to the adoption and dissemination of new codes and laws, the establishment of functioning justice institutions, the adoption of anti-corruption procedures, as well as the construction and rehabilitation of judicial infrastructure⁵²⁸. The London Conference gathered pledges for

⁵²⁵ UNAMA, *Afghan Justice Sector Overview* (Kabul: UNAMA-RoL Unit, April 2007), p. 3.

⁵²⁶ Islamic Republic of Afghanistan, *Afghanistan Compact*, Document presented at the London Conference on Afghanistan, 31 January – 1 February 2006, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/E534BE67-A528-4E31-BFDA-215F3CFAB4CB/0/AfghanistanCompactFinalFinal.pdf>.

⁵²⁷ Islamic Republic of Afghanistan, *Afghanistan National Development Strategy: An Interim Strategy for Security, Governance, Economic Growth & Poverty Reduction*. Document presented at the London Conference on Afghanistan, 31 January – 1 February 2006, <http://www.ands.gov.af>.

⁵²⁸ According to the Compact:

approximately US \$ 10.5 billion, to be disbursed within five years. The Compact was eventually endorsed by the Security Council, which also welcomed the I-ANDS adoption⁵²⁹. In line with the World Bank's CDF model, the event also created the Joint Coordination and Monitoring Board (JCMB, effectively established in April 2006), designed to monitor progress towards the achievement of the benchmarks included in the Compact⁵³⁰. The JCMB composed of 28 members, three fourths of

i) By end of 2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be set up, distributed to all judicial and legislative institutions and made available to the public.

ii) By end of 2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible.

iii) A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by the end of 2006 and fully implemented by the end of 2010; by the end of 2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General's Office, the Ministry of the Interior and National Directorate of Security).

iv) By the end of 2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles.

⁵²⁹ See UNSC Res. No. 1659, UN Doc. S/RES/1659, 15 February 2006.

⁵³⁰ More specifically, the JCMB is mandated to:

i) provide high-level oversight of progress in the implementation of the political commitments of the Afghanistan Compact;

ii) provide direction to address significant issues of coordination, implementation, financing for the benchmarks and timelines in the Compact, and any other obstacles and bottlenecks identified either by the government or the international community;

iii) report on the implementation of the Compact to the President, National Assembly, the UN Secretary General, the donors, and the public.

(JCMB Terms of Reference, available at http://www.diplomatie.gouv.fr/en/IMG/pdf/JCMB_TOR_-_English.pdf).

whom are international actors⁵³¹. The remaining seven include the most relevant Afghan Ministers⁵³², who therefore represent the minority of participants, even though the Afghan government co-chairs the Board together with UNAMA. The JCMB meets at least four times per year and its meetings are preceded by the preparatory meetings of consultative and working groups.

Following the London Conference, the CGs were reformed to align with the I-ANDS structure, having two main functions: to coordinate the implementation of the I-ANDS itself, and to assist in preparing the national budget. The new policy-making structure was reformed accordingly. Still nowadays, it consists of a Government Oversight Committee (OSC), a Consultative Group Standing Committee (led by the Ministry of Finance, lately replaced by a Coordination Team – CT), eight Consultative Groups (one for each I-ANDS sector, grouped in turn into three macro-pillars), five Cross-Cutting Thematic Groups (one for each cross-cutting sector), and 28 working groups. The CGs receive indications from the WGs. Such indications are further collected into reports to be sent to the OSC through the CT⁵³³. The information within these reports is eventually used for presentations given during the JCMB quarterly meetings.

⁵³¹ The 21 members include UNAMA as the Co-chair; the US, the UK, Japan, Germany, the EU, and India, being the six largest development assistance contributors; Pakistan, Iran and China, as neighbouring states; other 3 regional countries, namely Saudi Arabia, Turkey and Russia; ISAF and the Coalition Enduring Freedom, providing strong military support; 4 additional major troop contributors, namely Canada, the Netherlands, Italy and France; and 2 IFIs which largely invest in the country, i.e. the World Bank and the Asian Development Bank.

⁵³² The government representatives are the Senior Economic Advisor to the President (as the JCMB Co-Chair), the Minister of Foreign Affairs, the Minister of Finance, the Minister of Economy, the National Security Advisor, the Minister of Education, and the Minister of Justice.

⁵³³ Government of Afghanistan, *Consultative Group Manual: Terms of Reference and Procedures* (Kabul: GoA, 4 March 2007),

Among the CGs, CG No. 2, entitled ‘Governance, Rule of Law and Human Rights’, has approximately 75 members, more than a half of whom are international experts⁵³⁴. It is divided into eight working groups, one of which is the (Advisory) Rule of Law Working Group (RoL WG), chaired by the MoJ, with UNAMA and Italy being key international partners. The RoL WG itself includes sub-working groups on particular topics. Since March 2007, all the WGs and sub-WGs were renamed Technical Working Groups (TWGs). The TWGs included within the RoL WG are now: 1) Law Reform (divided into a Criminal Law Committee and a Civil Law Committee); 2) Justice Physical Infrastructure; 3) Justice Institutions and Judicial Reform (divided into three committees on the reform of Judiciary, AGO and MoJ, respectively); 4) Legal Education and Training (sub-WGs on Legal Higher Education, Professional Training, Establishment of the National Legal Training Centre); 5) Access to Justice and Legal Aid; and 6) Corrections (sub-WGs on Reconstruction and Rehabilitation of Prisons, Training, Administrative Reforms, Establishment of a High Maximum Security Facility at *Pul-e-Charkhi* Prison). In addition, the RoL WG established a ‘Technical Advisory Group on Women and Children in Justice’ (TAG) to mentor and monitor gender mainstreaming in the sub-WGs. The TAG is being co-chaired by UNICEF and UNIFEM. CG No. 2 also includes other working groups somehow related to justice: land registration/reform, human rights (including transitional justice), counter-narcotics and anti-corruption⁵³⁵.

The opening of the London Conference may be deemed as ‘the end of the Bonn process’, since it concluded the constitutional transition with the settlement of the new Afghan parliament in December 2005⁵³⁶. However, although at that time the basic pillars of the new justice system could be considered established, the local

<http://www.ands.gov.af/ands/jcmb/site/src/WGs%20and%20CGs/CG%20Manual%20-%20English.pdf>.

⁵³⁴ CPHD, *Bridging Modernity and Tradition*, p. 121.

⁵³⁵ UNAMA, *Afghan Justice Sector Overview* (April 2007), p. 4.

⁵³⁶ Deledda, *Afghanistan – The End*, p. 157

ownership of sector reform was still missing. With the increasing number of IFIs activities within the Afghan 'reconstruction market' and the growing US financial and material assistance, the role of 'lead nations' was rapidly reconsidered to that of 'key partners'. Notwithstanding the increasing use of pooled financing mechanisms – i.e., the trust funds administered by WB and UNDP⁵³⁷ – to support the reform of Afghan public administration, justice sector development was still passing through a myriad of single projects, each advancing independently. The need for more coordination among donors led to the establishment of the International Coordination Group for Justice Reform (ICGJR) on 31 October 2006, in order to improve donor communication regarding justice sector policies. In consequence, the International Coordination for Legal Training (ICLT) was constituted on 7 May 2007, as an ICGJR sub-working group, with the aim of coordinating the plethora of legal training programmes operated by a number of international agencies and organizations. However, improving coordination among donors did not necessarily entail the improvement of the local ownership of reforms as well. Indeed, the path towards its achievement still lacked a fundamental step, that of the Afghan government adopting a clear strategy for sector development.

7.1.1 The Status of Justice before the Rome Conference

⁵³⁷ See *i*) the Afghanistan Reconstruction Trust Fund (ARTF) – a multi-donor trust fund administered by the World Bank and funded by 27 donors, which has mobilized over US \$ 2.4 billion by March 2008; *ii*) the Law and Order Trust Fund (LOTFA), administered by the UNDP and funded by 15 donors, which was created to administer funding for supplies for the police and other law enforcement agencies; and *iii*) the Counter Narcotics Trust Fund (CNTF), run by the UNDP as well and participated by 19 states and agencies, which was established to finance the National Drug Control Strategy (NDCS). The ARTF and the LOTFA were established in 2002, while the CNTF was inaugurated on 29 October 2005.

The last updated data on the status of justice in Afghanistan dates back to early 2007, before the Rome Conference. It can be noted that figures had slightly changed since 2004. Data is mainly gathered from an in depth survey carried out in 2007 by the Kabul University's Center for Policy and Human Development, which sketched a discouraging picture of the Afghan justice system⁵³⁸. According to the Supreme Court, there should exist 442 courts in Afghanistan (34 provincial courts and 408 primary courts), with 1,415 judges. However, in 2007 only 356 courts were really functioning (81 percent)⁵³⁹, while the number of working judges was only 1,107, given the numerous vacancies⁵⁴⁰. This means that in 2007 in Afghanistan there were an estimated 21,317 persons per judge. 58.6 percent of judges served in primary courts, 30.5 percent in provincial appeal courts, and the remaining 10.9 percent in the Supreme Court. Women judges represented only 3 percent of the Bench⁵⁴¹. About 56 percent of judges had a university degree. 44 percent had a degree in Islamic law, while only 11.6 percent had a university degree in law/political science. Remarkably, 7.7 percent of judges had a non-legal educational background, 16.1 percent were educated in *madrassas*, and, above all, 20.5 percent had only primary, secondary or high school education. Half of judges (54.8 percent) did not have access to legal books or codes, 82.8 percent ignored Supreme Court's decisions, while 36.3 percent did not have sufficient access to the laws and regulations in force. As a consequence, rulings were (and still are) largely based on the judge's personal opinion. Yet in 2007, most of the cases discussed in

⁵³⁸ If not otherwise specified, data are gathered from CPHD, *Bridging Modernity and Tradition*, p. 70-80.

⁵³⁹ Bassiouni and Rothenberg, *An Assessment of Justice Sector*, p. 26

⁵⁴⁰ 12 percent of existing judges were appointed before 1978.

⁵⁴¹ In addition, the number of female candidates to the post of judge is rather low. In the 2005-2006 judicial stage course, there were only 12 women out of 170 candidates who passed the final examination. For the 2007 stage course there were 635 applications for 200 posts. However, only 30 applicants were women, and only 17 of them passed the admission test.

the Afghan courts concerned criminal law (42 percent). There then followed civil law cases (37 percent), public security cases (14 percent), and commercial cases (7 percent)⁵⁴². Judicial infrastructure required (and still requires) urgent assistance. In 2007 almost all the Afghan court houses (97.8 percent) were in need of construction or rehabilitation. Ultimately, in 2007 there was a back-log of 6,000 appeal cases awaiting adjudication.

The MoJ, in 2007, employed 1,919 people. However, only 1,325 positions were filled, 90 of which by women. 42 women were employed in professional posts at the MoJ headquarters in Kabul and seven in the provinces. 80 percent of the MoJ staff had a high school diploma, while only 13 percent had a university degree. The remaining 7 percent had less than a high school diploma. The AGO had 4,900 employees, but there were only 74 women out of 2,500 prosecutors. Only one of 34 provincial prosecutors was a woman. Other 247 female officers worked as administrative and support staff. Some 80 districts lacked a prosecutor office, while reportedly a large number of prosecutors did not have a university degree in law or *sharia*. For instance, over half of the 238 prosecutors who worked at AGO headquarters in Kabul had a degree in law or *sharia*. Conversely, in the AGO provincial office of Kabul, only 37 percent of the 282 prosecutors had a university degree. In other AGO provincial offices, less than 20 of prosecutors were graduates. Still in 2007, salaries of judges and prosecutors were rather low. Salaries of judges ranged from US \$ 50 to 142 per month, while prosecutors were paid an average salary of US \$ 60 per month⁵⁴³.

With regard to the status of the Bar, in 2007 there were 236 lawyers registered with the MoJ but only a few of them provided legal

⁵⁴² L. Armytage, 'Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War', 67(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2007, 185-210, at 195.

⁵⁴³ Bassiouni and Rothenberg, *An Assessment of Justice Sector*, p. 25-26.

aid to indigents⁵⁴⁴. A new law creating an independent bar association was adopted in December 2007. As a consequence, candidates are now required to meet a number of conditions for accreditation, respect a code of conduct and be subject to disciplinary procedures set up by the new Afghan Bar Association⁵⁴⁵. The number of registered lawyers is now approximately 600, 130 of them being women⁵⁴⁶. The status of juvenile justice was not encouraging as well. A research, made in 2007 but published in June 2008, surveyed 247 minors detained in juvenile rehabilitation centres. According to such research, 12 percent of boys and 32 percent of girls were charged with adultery or sodomy, while 24 percent of girls were held in custody for running away from home, and 14 percent of girls were simply lost or without a refuge⁵⁴⁷.

7.2 From Rome to Paris and Beyond

The process of gradually empowering national actors with the decision over the reform of justice evolved with the Conference on the Rule of Law in Afghanistan, held in Rome at the beginning of July 2007⁵⁴⁸. The event represented a cornerstone for the evolution of sector policies and

⁵⁴⁴ 19 lawyers who provide legal aid currently work at the Supreme Court Legal Aid Office and in a few NGOs.

⁵⁴⁵ Advocates Law, Official Gazette No. 934, 17 December 2007, available at <http://www.moj.gov.af/?lang=en&p=e14>. The law was signed by President Karzai on 29 November 2007 and entered into force on 17 March 2008.

⁵⁴⁶ *The situation in Afghanistan and its implications for international peace and security*, Report of the Secretary-General, UN Doc. A/63/372 – S/2008/617, 23 September 2008, para. 29.

⁵⁴⁷ UNICEF Afghanistan and AIHRC, *Justice for children. The situation of children in conflict with the law in Afghanistan* (Kabul: UNICEF & AIHRC, 24 July 2008), http://www.aihrc.org.af/Juvenile_Detention_eng.pdf.

⁵⁴⁸ Conference on the Rule of Law in Afghanistan, Rome, Ministry of Foreign Affairs, 2-3 July 2007, <http://www.rolafghanistan.esteri.it/ConferenceRol>.

paved the way to a new process of reforms, oriented towards the full Afghan ownership. At the Conference, it was decided to set up, as a part of the upcoming ANDS, a National Justice Sector Strategy (NJSS) to be implemented by a National Justice Programme (NJP) ⁵⁴⁹, elaborated under the SWAP logic. The NJP, in particular, was initially conceived as a SDP – derived from the sector strategy. The Programme would be finalized with the assistance of the World Bank and funded in significant part through the ARTF, thus establishing a real pooled financing mechanism for justice development. Accordingly, the ‘Justice Sector Reform Project’ (ARTF Justice Project), financially sustained by the ARTF and administered by Afghan authorities, with the overall control performed by donors and the WB, was established. Operationally, such a multilateral approach was intended to gradually replace the ‘bilateralization of aid assistance’⁵⁵⁰ experimented at the beginning of the international intervention. This would have implied an evolution from a ‘supply-driven’ to a ‘demand-driven’ approach, characterized by the capacity of Afghan Government to articulate a plan for sector development, which in turn would have expanded the local ownership of reforms.

In addition, at the Rome Conference donors agreed to adopt a coordinated approach for the reconstruction of justice at central and provincial levels. To this aim, it was decided to establish a Provincial Justice Coordination Mechanism (PJCM), chaired by UNAMA, as well as to finance 15 high priority, quick implementation projects presented by Afghan justice institutions (five projects each). In the state-building theory, this method to collect funds (also called the ‘wedding registry’ budget) is normally portrayed as an interim step towards the full

⁵⁴⁹ Both the ANDS main text and the NJSS, which also encompasses the NJP, are available at http://www.ands.gov.af/ands/ands_docs/index.asp.

⁵⁵⁰ See e.g. J. Macrae, *The bilateralization of humanitarian response: implications for UNHCR* (Geneva: UNHCR Report No. EPAU/2002/15, December 2002), <http://www.unhcr.org/research/RESEARCH/3db7c7114.pdf>.

autonomy of government to prepare a proper development budget⁵⁵¹. Each Afghan justice institution also presented its development strategy for the years to come⁵⁵².

However, the process of adoption of both the NJSS and the NJP was rather extensive and problematic. At the Rome Conference, a seminar for their adoption was planned to take place in October of the same year in Kabul. As the conditions for its organization were lacking, all the stakeholders began to concentrate most of their efforts on coordinating documents and policies, in order to shape a more rational and coherent policy-making system. Eventually, after extensive consultation, on 23 February 2008 the ANDS final draft was circulated among stakeholders. It included the Draft NJSS as an attachment. A month later (24 March 2008), the NJP final draft was presented to the donors during a special session of the ICGJR. As initial criticisms by both the IMF and the WB about the ANDS document appeared in the media⁵⁵³, the National Development Strategy was completely redrafted and simplified⁵⁵⁴. The document lost all its attachments, which were

⁵⁵¹ M. Carnahan, N. Manning, R. Bontjer and S. Guimbert (eds.), *Reforming Fiscal and Economic Management in Afghanistan* (Washington, D.C.: World Bank, 2004), 24.

⁵⁵² The strategies of the Supreme Court, AGO and MoJ are available at <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gliuffici>.

⁵⁵³ J. Boone, 'Afghan failure to meet IMF target casts doubt on debt relief', *Financial Times*, 2 April 2008, http://www.ft.com/cms/s/0/94314c9c-0059-11dd-825a-000077b07658.html?ncklick_check=1.

⁵⁵⁴ The new version is shorter and its chapters subdivided on the basis of the three ANDS macro-pillars (i.e. security, governance and rule of law, economic development). More emphasis is placed on the Provincial Development Plans, in order to stress the alleged wide diffusion of the development process (Chapter 2). Most attachments were removed, but the National Action Plan (NAP) was maintained. A new matrix, drafted by the JCMB, on the achievement of the NAP targets was further added (Appendix II). The expected results reported in the matrix consist of the Afghanistan Compact's benchmarks and several other targets, to be met by 2013 – the

kept separate and individually adopted by relevant government agencies. On 21 April 2008, the ANDS was finally approved by the President of Afghanistan and submitted to the Boards of both the IMF and the WB, being also the country's PRSP. On the very same day, the final version of the NJSS was presented for approval to the Afghan justice institutions, which signed the document in May. Soon after, the NJP was practically embedded into the NJSS document as an attachment. The ANDS was eventually presented to the donor community at the Paris Conference on Afghanistan, which took place on 12 June 2008⁵⁵⁵. The ANDS contains a short paragraph explicitly dedicated to justice system reform, which summarizes the three main policy reform goals included into the NJSS and NJP⁵⁵⁶. Remarkably, the ANDS explicitly affirms that «donors should not attempt to impose an external judicial system that may not be accepted throughout the country»⁵⁵⁷. At the conference, participants pledged US \$ 21.4 billion for the implementation of the new development strategy. However, the Afghan government was not able to produce a National Public Investment Programme (PIP) together with the ANDS, as it is normally required for a PRSP. A PIP, generally turns sector strategies into a multi-year programme of expected costs and financing sources. Indeed, a PIP is required to highlight funding gaps, so that additional financial resources may be collected during a Donor Pledging Conference, like in Paris. In consequence, the MoF could have integrated the ANDS sector strategies into the 1388 (2009/2010) Afghan development budget. On the contrary, once again in Paris funds were given blindly.

end of the ANDS. With regard to justice system reform, the verbose description of the NJSS macro-goals disappears from the text. In addition, the table with the NJP key objectives has been rationalized (p. 68).

⁵⁵⁵ International Conference in support of Afghanistan, Paris, 12 June 2008, http://www.diplomatie.gouv.fr/en/country-files_156/afghanistan_498/international-conference-in-support-of-afghanistan-paris-12th-june-2008_6366/index.html.

⁵⁵⁶ ANDS, p. 65-69.

⁵⁵⁷ *Ibid.*, p. 69.

Accordingly, both the NJSS and NJP were not ‘costed’, apart from the ARTF Justice Project.

7.3 The National Justice Sector Strategy and the National Justice Programme

7.3.1 The NJSS

The NJSS is a comprehensive five-year strategy for justice system reform, which provides a systems approach to planning and programming. The Strategy builds on the three strategies presented individually by the Afghan justice institutions at the Rome Conference. Indeed, the full independence and autonomy of the Supreme Court, AGO and MoJ is taken into due account in the document. In line with the local ownership principle, the NJSS focuses on stimulating the internal ‘demand for justice’. It is acknowledged that such demand depends in part on access to justice, and in part on the credibility of justice institutions. Accordingly, the Strategy is divided into three macro-goals: *i)* improving institutional capacity to deliver sustainable justice services; *ii)* improving coordination and integration within the justice system and with other state institutions; and *iii)* improving the quality of justice services. Such major targets are structured into sub-programmes. The developing strategies, the expected results and the potential difficulties, together with the detailed roles and the functions of Supreme Court, MoJ, AGO and NLTC, are then highlighted in each sub-programme. However, the NLTC has a minor role and its tasks are described rather vaguely. Briefly summarized is also the role of PJCM. Among the amendments to the applicable law, the adoption of the new criminal procedure code by 2009 is considered a priority⁵⁵⁸. The document also envisages a first review of the provisions of the civil procedure code and the civil code relating to divorce, child custody,

⁵⁵⁸ NJSS, Chapter 3, p. 3.

and conditions for marriage⁵⁵⁹. Conversely, there is no reference to the amendment of substantive criminal law.

Remarkably, the NJSS does not address the issue of traditional and community-based ADR, which are then excluded from any ‘institutional’ development plan, though required in the ANDS⁵⁶⁰. The issue was examined during the consultations which led to the final adoption of the Strategy but its full inclusion into the document encountered fierce opposition by the Afghan justice institutions. In the end, the relationship between the ‘formal’ and ‘informal’ justice system was left to a policy document to be further developed by the Government⁵⁶¹. The Strategy envisages traditional ADR essentially like an arbitration. According to the NJSS, Afghan people can lawfully recur to *jirga/shuras* only in civil law disputes, with the agreement of all litigants and in the absence of any kind of discrimination. Final decisions are to be consistent with Islamic law, the Constitution and human rights⁵⁶². Another pretty sensitive issue, namely transitional justice, is touched on in a single paragraph. On the point, the NJSS generically mentions the Government’s Action Plan for Peace, Reconciliation and Justice, but does not refer to vetting the Afghan public administration of those officers linked with past abuses. As for the adoption of a specific law on the matter, the Strategy only affirms the possibility of «drafting legislative documents, as necessary». Prosecution policy is limited to «assisting, where appropriate, investigations and prosecutions being conducted *outside Afghanistan* [italics added] on abuses committed in Afghanistan or by Afghans». Ultimately, it is important to note that the NJSS also includes provisions on the establishment of truth-seeking mechanisms⁵⁶³.

⁵⁵⁹ *Ibid.*, Chapter 4, p. 6.

⁵⁶⁰ ANDS refers to «the necessary interaction and with the informal justice systems, which are prevalent throughout the country» (p. 65).

⁵⁶¹ NJSS, Chapter 4, p. 5.

⁵⁶² *Ibid.*, p. 6-7.

⁵⁶³ *Ibid.*, p. 9-10.

7.3.2 The NJP

The NJP represents the NJSS implementation mechanism. It «identifies objectives and outputs associated with each of the expected outcomes articulated in the NJSS, and establishes mechanisms that will allow the Government and donors to define specific projects designed to achieve the outcomes»⁵⁶⁴. The NJP rationale is rooted in the need for a coordinated approach to assistance in the justice sector, avoiding fragmentation, duplication and overlapping of reform projects. The NJP is based on two major funding options, being the pooled financing mechanism established via ARTF (ARTF Justice Project) and the 'classic' bilateral approach, which characterizes the projects enlisted in Part Four of NJP. Accordingly, the document is composed of four parts: 1) an introductory chapter; 2) a logical framework of actions, expected results and bottlenecks; 3) the ARTF Justice Project (which represents the Programme's multilateral funding channel); and 4) a matrix of future activities to be carried out bilaterally by donors. In addition, the document encloses two attachments. The first reports all the current and recently completed reform programmes, organized according to the NJSS sub-programmes. The second attachment contains: *i*) those parts of NAP and the ANDS monitoring matrix – both attached to the ANDS document as well – related to justice sector reform, including the Afghanistan Compact's benchmarks and several other targets to be met within five years (annexes I and II, respectively); *ii*) a list of existing reform projects, chosen by the Afghan government, to be financed through the core or external budget (annex III); *iii*) a list of programmes and projects at provincial level identified as priorities in the Provincial Development Plans⁵⁶⁵.

⁵⁶⁴ NJP, p. 16.

⁵⁶⁵ Provincial Development Plans represent the outcome of a sub-national consultation process undertaken by the ANDS Secretariat. Provincial Development Plans subdivide justice sector priorities into four different tiers, which are excerpted for reference in the second attachment.

The NJP implementation structure is composed of three main bodies, namely the Programme Oversight Committee (POC), the Board of Donors (BoD), and the Programme Support Unit (PSU). In addition, Programme Units (PUs) should be established within each justice institution. POC and BoD form the NJP strategic level. The PSU acts at the operational level, while the PUs work at the tactical level, being in direct contact with the Supreme Court, the AGO and the MoJ. The POC oversees project implementation. It comprises the Chief Justice, the Minister of Justice, the Attorney General, and the Minister of Finance. The PSU is responsible for the effective execution of the ARTF Justice Project, in compliance with the Grant Agreement between the World Bank – the ARTF administrator – and the MoF. The PSU will also serve as the secretariat of the POC and will monitor and coordinate the NJP implementation. The BoD is composed of those states and agencies willing to finance justice sector reform. However, the Board should at minimum include the ARTF Justice Project’s donors, as the BoD advises the POC on its strategic direction and potential challenges. To this aim, the BoD and POC meet at least quarterly. The POC generally supervises the work of the PSU. To this aim, *inter alia*, it receives, reviews and eventually endorses the PSU reports on NJP activities and financial status⁵⁶⁶. The POC should liaise with the BoD and the PJCM on the status of activities.

The PSU has the double role of coordinating the plethora of bilateral projects and managing the ARTF Justice Project. In practice it connects the two NJP ‘souls’, namely the bilateral and the multilateral parts, within the same operational framework. Indeed, on the one hand, the PSU coordinates and monitors the implementation of both the NJSS and NJP, also serving as the POC secretariat. On the other hand, it is responsible for the ARTF Justice Project’s execution and management. The PSU consists of: *i*) a director, who is appointed by the POC and answerable to it; *ii*) a programme coordinator, responsible for the coordination and monitoring and evaluation of NJSS and NJP (in practice the coordination of bilateral and multilateral projects); *iii*) four senior local and/or regional experts; *iv*) two regional and/or

⁵⁶⁶ NJP, p. 22-23.

international experts in procurement and financial management; and *v*) two or three junior assistants. Furthermore, national and international consultants may be added to the PSU staff. The project director is recruited through an international call. The programme coordinator and the PSU staff are hired on a competitive basis by the POC, subject to the World Bank clearance⁵⁶⁷. With regard to bilateral projects, the PSU shall work as a tracking and coordination body, identifying potential duplications. In fulfilling these tasks, the PSU shall coordinate with the PJCM central office in Kabul. The process for the insertion of new bilateral projects into the NJP is rather easy. Since activities are normally agreed upon between the donor and the justice institution concerned, the donor is supposed to communicate the establishment of the new project to the PSU, which in turn should forward the communication to the POC for review. The latter would then either identify potential duplications and thus advise the donor and the ICGJR on the matter, or instruct the PSU to insert the planned activity into the matrix contained in the NJP – Part Four. At the time of writing (October 2008), the PSU is still to be established. However, procedures for the appointment of staff were started.

The PSU works closely with the PUs, established within the Afghan justice institutions. PUs are only concerned with the implementation of the ARTF Justice Project. Each PU is led by the institution's head of administration, who is supported by an assistant and several staff members. The latter may include international consultants. PUs should facilitate the cooperation between justice institutions and the PSU, being the vehicle for the transfer of the know-how generated through the ARTF Justice Project from the PSU to the institutions. In particular, the PUs should assist the Afghan authorities in procurement and financial management procedures within the respective justice institutions.

The first part of the NJP draws an overall picture of the reconstruction activities within the Afghan justice sector. It also contains a rather detailed presentation of the Programme and a

⁵⁶⁷ *Ibid.*, p. 85, 87.

description of justice sector's funding mechanisms. In particular, the document stresses the PJCM role, especially with regard to the coordination of bilateral projects at provincial level, but excludes Traditional ADR from the current development activities⁵⁶⁸. The logical framework in Part Two subdivides each of the three NJSS macro-goals into two component. Such components are further broken down into specific objectives, which are in turn associated with a variety of key outputs. However, due to programmatic reasons⁵⁶⁹, the NJP log-frame does not entirely reflect that of NJSS. In order to show the required coordination between the two documents, the first part of the NJP reports the list of macro-goals and sub-programmes included in the NJSS with the corresponding row numbers of the NJP log-frame annotated in parentheses⁵⁷⁰. Conversely, Part Two still lacks the costs of single outcomes, and neither identifies the Government agencies tasked with leading implementation of each project, nor enlists international partners and related funding sources. Some key outcomes are articulated in the NAP matrix as 'policy actions'. For the latter, institutional responsibility and projected timeframes have been assigned. In line with the local ownership principle, Part Two further specifies that priority is to be given to the activities envisaged in the Provincial Development Plans and in the ARTF Justice Project⁵⁷¹.

The third part of the NJP consists of the ARTF Justice Project proposal, further agreed upon by the World Bank. Phase One of the Project officially started in early July 2008, with the establishment of the POC and the final agreement among the Supreme Court, the MoF, the

⁵⁶⁸ *Ibid.*, p. 18-19.

⁵⁶⁹ It is important to note that the NJSS and NJP have been drafted separately. In addition, due to delays in the official adoption of the NJSS, the NJP was eventually drawn up so as to be implemented even in the absence of a strategy of reference.

⁵⁷⁰ NJP, p. 35-40.

⁵⁷¹ The NJP clearly states that «in developing their own activities and making funding commitments, donors are requested to take these prioritised activities into account» (*ibid.*, p. 19).

MoJ, and the AGO on the Committee's presidency, which was granted to the MoJ. Phase One is aimed at implementing a set of quick-impact sub-projects, visible to the Afghan citizens, in preparation for the subsequent more robust and longer-term Phase Two. The ARTF Justice Project is articulated as a standard development project proposal to access World Bank funds. The Project's most relevant part is a log-frame containing specific activities to be financed through the ARTF, as well as related outputs, outcomes and costs⁵⁷². The Project also contains a detailed description of the reform activities to be undertaken. The total amount of the ARTF Justice Project – Phase One is US \$ 27.75 million. The Project has three components which are differently financed: *i*) enhancing the capacity of justice institutions; *ii*) empowering the people; and *iii*) strengthening implementation capacity⁵⁷³. Most of the funds (US \$ 16.9 million) will be absorbed by new judicial infrastructure. The funds will flow from the ARTF grant account to a designated account opened at the Afghanistan Central Bank. Such account will be operated by a Special Disbursement Unit (SDU) of the MoF – Treasury Department. Requests for payments from the designated account shall be made to the SDU by the PSU when needed. Requests may include direct payments to consultants, consulting firms or suppliers. The latter may be also paid directly through the ARTF grant account, following authorization by the SDU⁵⁷⁴. Procurement will be carried out in accordance with the World Bank's standard guidelines and procedures, which include open competitions and bids. Details of each contract are contained in a procurement plan agreed upon by the Afghan government and subject to revision at least once a year⁵⁷⁵.

Even though the NJP should have a strong multilateral orientation, its multilateral part, namely the ARTF Justice Project, pales

⁵⁷² *Ibid.*, p. 100.

⁵⁷³ Such components will receive US \$ 23.6, 2.4 and 1.75 million, respectively.

⁵⁷⁴ NJP, p. 110-111.

⁵⁷⁵ *Ibid.*, p. 115.

in comparison to the very long list of future bilateral projects included in NJP – Part Four. According to the latter, 221 new bilateral projects will be implemented in the next future. About 83 percent of these projects (183) will be carried out by the US⁵⁷⁶. This indisputably proves the US leadership in justice sector reform.

According to Daniele Canestri, former advisor to the Italian Development Cooperation Office in Kabul and specialist on justice system reform, the adoption of a multilateral approach in financing sector reconstruction will be of great help for donors. In his opinion, this approach will increase the financial resources allocated for the reform of justice, limit the waste of money (as funds will certainly be spent better than now), improve the division of roles between international and national stakeholders, and generally refocus the interventions of donors. He notes that the NJP itself may be considered as a «difficult compromise», being the result of numerous, and frequently opposite, instances. In this respect, the fact that the document still lacks sector priorities and costs in the second part, would be mainly due to the ‘environmental factor’ – that is the possibility that the situation may rapidly evolve as a consequence of the shaky control of the territory by the Afghan government – which would prevent a serious and accurate description of needs at any level⁵⁷⁷.

7.4 Reform Activities

7.4.1 Counter-Narcotics Law

⁵⁷⁶ JSSP will carry out 30 projects, ARoLP 148 projects (138 at sub-national level), and CSSP 5 projects. Other donors will include Norway (9 projects), Italy (8 projects), the UK (6 projects), UNODC (6 projects), Germany (5 projects), the EC (2 projects), UNDP (1 project), and UNAMA (1 project).

⁵⁷⁷ Interview with Daniele Canestri, Pisa, 5 November 2008.

An important change in the organization of courts during this period was the creation of the counter-narcotics primary and appellate courts in Kabul, having jurisdiction across the whole country. Under the February 2006 Law on Counter-Narcotics⁵⁷⁸, such tribunals have jurisdiction over all cases which concern possession of a sufficiently large quantity of narcotics (i.e., more than 2 kg of hard drugs or 10 kg of opium). The law also provides for the creation of a *Saranwali* special branch, located in Kabul, in charge of prosecuting drug and drug-related offences. The law establishes a complex handover proceeding by which, following the arrest, the accused is transferred from a province to Kabul for questioning and interrogation. The further creation of a dedicated special police unit (Counter-Narcotics Police of Afghanistan – CNPA), directly answerable to the Kabul headquarters, which can also perform undercover and covert actions/ appears to be an attempt to centralize the investigations, placing them under the central government’s political umbrella.

Previously, in May 2005, a Criminal Justice Task Force (CJTF) had been established with the objective of prosecuting drug-related crimes across the country. Set up in cooperation with the UK (which is the Afghan government’s key-partner on the issue), the US and UNODC, the task force should facilitate the training of investigators, prosecutors and judges, as well as modernize and strengthen anti-narcotics laws. Police officers, prosecutors and judges work all together in a self-contained court (Counter-Narcotics Tribunal – CNT – which includes primary and appellate courts) and prison in Kabul, called the Counter-Narcotics Justice Center (CNJC)⁵⁷⁹. As of June 2008, the CJTF has 150 staff members (including 35 CNPA officers, 28 prosecutors, 14 judges, and 43 clerks), working together with mentors and trainers

⁵⁷⁸ Counter-Narcotics Law, Official Gazette No. 875, 4 February 2006, http://www.cjtf.gov.af/Documents%20of%20CJTF/CN%20Law/drug_law.pdf.

⁵⁷⁹ Sedra, *Security Sector Reform*, p. 99.

mostly provided by the US and the UK⁵⁸⁰. Police officers refer cases to prosecutors who have 30 days to charge a suspect before the counter-narcotics primary court⁵⁸¹. Reportedly, between May 2005 and June 2008, the CJTF investigated and prosecuted 1,486 cases (995 cases occurred in Kabul, and 491 in the provinces), resulting in the conviction of 587 defendants, the acquittal of 181, and the referral to treatment centre of 46 persons. During the same period, the CJTF also reviewed 890 cases from other Afghan courts, resulting in the conviction of another 968 individuals. Since May 2005, CJTF investigations have led to 1,555 convictions⁵⁸².

Like the interim criminal procedure code, the establishment of the CNT can be seen as a way of strengthening the authority of central government over the provinces. However, the external support given to the centre may be counterproductive in that these legal practices may be discredited as Western impositions or, otherwise, if central government leaders abuse their control (particularly over drug policing) to undermine political and business rivals in the provinces this may discredit international legal assistance. A new anti-drug law, drafted by the Ministry of Counter-Narcotics, is due to be approved by the National Assembly within 1387 (March 2008-March 2009).

⁵⁸⁰ Advanced training for CJTF officers was also provided by ISISC with the support of UK and UNODC (ISISC, *The Provincial Justice Initiative in Afghanistan: Progress Report, December 2004 – July 2006* (Siracusa, IT: ISISC, 2006), p. 4, <http://www.isisc.org/public/PJI%20Progress%20Report.pdf>).

⁵⁸¹ UK Government, *The Criminal Justice Task Force – Lessons Learned*, Paper presented at the Conference on the Rule of Law in Afghanistan, Rome, 3 July 2007, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/1035039D-EBB5-421A-9790-78B8CABE7B0F/0/CJTfDiscussionPaper.pdf>.

⁵⁸² CJTF, *CJTF Latest Achievements: Second Quarter (April-June 2008)* (Kabul: CJTF Communications Department, 2008), <http://www.cjtf.gov.af/Documents%20of%20CJTF/News/CJTF%20Quarterly%20Achievements%20April08%20-Eng.pdf>.

7.4.2 Training and Capacity Building

Notwithstanding the change at the strategic level towards a multilateral approach in the reform of justice, since 2005 most of aid has continued to pass through bilateral projects. Training and capacity building activities represent a clear example of such tendency. We may consider a few examples taken from the projects financed by Italy. In July 2005 IDLO began the implementation of a project⁵⁸³, entirely financed by the Italian government, including training and assistance to the staff of the Kabul Faculty of Law, training of 350 judges and 350 prosecutors, development of *curricula* for the upcoming National Legal Training Centre (NLTC), and assistance/training to the MoJ in legislative drafting. Initially, the training component for judges was supposed to involve 170 new judges for stage training, and an additional 180 senior level judges for specialised training. The latter included a three month training on criminal law, commercial law, civil law and either labour or international criminal law. The training component for prosecutors would have included, 120 junior prosecutors and 230 senior-level prosecutors for specialised training (including financial crime and anti-terrorism)⁵⁸⁴. In 2006, the specialized training courses were taught by international legal advisors only. However, local personnel was gradually involved in the training activities, as in 2007 Afghan trainers gave 50 percent of classes. In 2006, Afghan trainers taught 40 percent of lessons held for the MoJ staff and 60 percent in 2007. Notably, in 2008 the basic training course for the MoJ officers was completely held by Afghan personnel⁵⁸⁵.

On the whole, according to IDLO, the 2006 stage was completed by 173 judges, while 188 judges completed specialized training. Of the planned 350 prosecutors, only 330 (half of whom coming from the

⁵⁸³ Project: 'Enhancing the Capacity of Legal Professionals'. The project cost € 5 million and was implemented up until February 2007 (Reed et al., *IDLO Italian-Funded Projects*, p. 23).

⁵⁸⁴ See Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.).

⁵⁸⁵ Reed et al., *IDLO Italian-Funded Projects*, p. 32-33.

provinces) were effectively trained due to the decision taken by AGO in 2006 to abort IDLO training in favour of training by the US State Department-funded Justice Sector Support Program (JSSP)⁵⁸⁶. The project also included the drafting of a 'prosecutor's handbook', intended to be a first point of reference on matters relating to criminal procedure law and practical skills. However, its development resulted «in abbreviated outputs in the shape of a Prosecutor's manual and an archive in early 2007 rather than as planned in May of 2006. A planned resource center was not completed»⁵⁸⁷. Neither the capacity building activities in the faculties of law and *sharia* were fulfilled. Instead, IDLO trained 90 law students in commercial and penal law. The training in legislative drafting started in April 2006 and included 155 MoJ officials from the *Hoqooq* and *Taqnin* departments. The assistance to the NLTC was never provided⁵⁸⁸ due to the withdrawal of the Supreme Court and the AGO from the Center itself in early 2008.

A second IDLO training project, also financed by Italy, was implemented from March 2007 to August 2008, although an extension has recently been granted. It included the training of 127 judges and a stage for additional 210 judicial candidates⁵⁸⁹. Under this programme, a donation of 200 books was made to the Faculty of Law in Kabul while the faculty of Sharia received a new library, along with 600 new volumes. With the funds received, IDLO also provided assistance to the Legal Aid Organization of Afghanistan (LAOA) for the training of Afghan lawyers⁵⁹⁰. This project was further merged by IDLO with

⁵⁸⁶ *Ibid.*, p. 29.

⁵⁸⁷ *Ibid.*, p. 30.

⁵⁸⁸ However, IDLO continues to assist the NLTC through the secondment of two advisors to the NLTC Interim Board and to the Interim Director, respectively.

⁵⁸⁹ Project 'Increasing Afghanistan's Capacity for Sustainable Legal Reform' (IACSLR). The project's budget is € 6 million (Reed et al., *IDLO Italian-Funded Projects*, p. 23 and 29).

⁵⁹⁰ According to IDLO, as of August 2008 the LAOA had already trained over 100 public defenders (Reed et al., *IDLO Italian-Funded Projects*, p. 31). In 2007

another project financed by the Canadian International Development Agency (CIDA)⁵⁹¹. The latter project was to provide specialised training for 250 judges and 75 senior prosecutors⁵⁹². However, in the end, the specialized training reached approximately 237 judges. Additional courses in commercial law, civil law and computer research were organized for 155 MoJ staff (including the *Hoqooq* and *Taqnin* Departments) and for 106 National Assembly staff members⁵⁹³.

In September 2005, the PJI second phase started in the provinces of *Herat*, *Badakshan* and *Nangarhar*. In February-March 2006 the training activities were extended to the provinces of *Wardak* and *Baghlan*, under the PJI-Phase 3. A fourth phase was implemented in March-September 2007 in *Parwan*, *Jowzjan* and *Ghazni*⁵⁹⁴. In order to complement the PJI, Italy and the European Commission co-financed a project run by

the LAOA was also financed bilaterally by Italy to review criminal cases involving minors detained in Kabul. The cost of the project was € 35,000 (Cooperazione Italiana allo Sviluppo, *Le attività bilaterali* (cit.)).

⁵⁹¹ Project ‘Strengthening the Rule of Law in Afghanistan’. The project’s initial cost was US \$ 6.5 million. However, in July 2008 it was granted an additional US \$ 100,000 cost extension (Reed et al., *IDLO Italian-Funded Projects*, p. 38).

⁵⁹² According to Charles Jakosa, former IDLO Chief of Party in Afghanistan, the project included: *i*) the training of 250 judges and 75 prosecutors; *ii*) a ‘training of trainers’ programme for 18 senior judges; *iii*) a moot court exercise at Kabul appeals court; *iv*) a 12-month defence attorney training course for 68 law graduates and a 2 full-semester courses in lawyering skills for university students; *v*) further defence attorney training courses for 19 lawyers from the Supreme Court and Legal Aid Office; and *vi*) practical lawyering skills training for 20 professors from Kabul University (Afgha.com, *Interview – Charles Jakosa: A justice system is a reflection of a culture* (Kabul: Afgha.com, 9 July 2007), <http://www.afgha.com/?q=node/3495>).

⁵⁹³ Reed et al., *IDLO Italian-Funded Projects*, p. 31.

⁵⁹⁴ 30 percent of posts in ISISC courses were reserved to women. Italy financed the first three phases of the PJI with US \$ 183,000. Additional US \$ 150,000 were provided for the remaining three provinces (see Cooperazione Italiana allo Sviluppo, *Le attività bilaterali* (cit.)).

UNDP, entitled 'Access to Justice at the District Level' (AJDL)⁵⁹⁵. The project was directed to Afghan rural communities which lack formal judicial structures, in order to educate the population about new legal reforms. Considered as a programme of 'judicial literacy'⁵⁹⁶, it was aimed at teaching the rural population on how to have practical access to justice. Currently this informal approach is being also successfully implemented in other countries, such as India, where state apparatus scarcely reaches small villages located in the countryside⁵⁹⁷. «Rather than dismantle customary structures, the programme should empower villagers to defend their rights within existing local structures»⁵⁹⁸. According to this project, knowledge and respect for human rights within these communities could be attained using 'informal' persuasion methods⁵⁹⁹, as well as more direct methods, for example, teaching the same principles in local schools during classes⁶⁰⁰. By means of this informal approach, the project was also intended to reform the

⁵⁹⁵ Project: 'Access to Justice at the District Level', developed in November 2005 and financed in 2006. The cost of the project is € 6 million, with a € 5 million contribution from Rome over 30 months (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)). See in detail http://www.undp.org.af/WhoWeAre/UNDPinAfghanistan/Projects/dcse/prj_ajdl.htm.

⁵⁹⁶ Karen Jorgensen, former UNDP Country Director, quoted in IRIN, *Afghanistan: Efforts to improve access to justice in rural areas* (Kabul: IRIN, 15 February 2005), <http://www.irinnews.org/report.aspx?reportid=28219>.

⁵⁹⁷ See gen. on the matter M. Galanter and J.K. Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India', 55(4) *Hastings Law Journal* 2004, 789-835; R. Moog, 'The Study of Law and India's Society: The Galanter Factor', 71(2) *Law and Contemporary Problems* 2008, 129-138.

⁵⁹⁸ Senier, *Rebuilding the Judicial Sector*, p. 8.

⁵⁹⁹ According to initial intentions of the organizers, such informal methods would include radio programmes, romantic novels, soap operas, theatrical performances by companies of strolling actors and wall pictures.

⁶⁰⁰ Like teachings in elementary school or during seminars held by local *mullahs*, focused on children and women's rights according to the Koran.

informal judicial activities, exercised by *jirgas/shuras*, within a legal framework respectful of both human rights and village institutions. The AJDL was supposed to run for 30 months and cover 60 districts. However, contrary to initial intents, the project started only in late 2006 and mostly concerned ‘ordinary’ training activities and restoration of judicial infrastructure⁶⁰¹. The initial training activities were carried out by ISISC – as UNDP sub-contractor – in the provinces of *Balkh* and *Herat*. Other human rights and legal awareness activities are now carried out by a number of Afghan NGOs. Reportedly, further initiatives will be implemented in *Baghlan*, *Jawzjan*, *Kunduz*, *Samangan*, *Badakshan*, *Takhar* and *Nangarhar*⁶⁰². Delays and lack of results are probably due to the shaky security situation and dearth of skilled personnel to implement the activities on field. However, the project’s substantial failure may be also ascribed to the competition with a similar project run by USAID-ARoLP. Remaining funds (about US \$ 2-3 million) will be probably channeled into a new ‘Joint Access to Justice at the District Level Project’, to be run jointly by UNDP, UNAMA, UNODC, UNIFEM, and UNICEF⁶⁰³.

Training projects have often involved the military, especially in the provinces. An example is the *Wardak* Provincial Justice Initiative, which was established in early 2006 under the auspices of the Combined Forces Command Afghanistan (CFC-A) with the support of JSSP, and chaired by the local governor. JSSP in collaboration with the Provincial Reconstruction Teams (PRTs), also organized Provincial Justice Conferences (PJC) in various provinces. The PJC were initially held in *Jalalabad*, *Ghazni*, *Parwan*, *Logar* and *Bamiyan* and were attended

⁶⁰¹ See Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.).

⁶⁰² For an updated report of AJDL activities see UNDP Afghanistan, *Access to Justice at the District Level (November 2005 – December 2008)*, Quarterly Project Report: 1 April – 30 June 2008, <http://www.undp.org.af/WhoWeAre/UNDPinAfghanistan/Projects/2ndQ08Reports/2008-08-05%20-%20Second%20Quarter%202008%20Progress%20Report%20-%20AJDL.pdf>.

⁶⁰³ See the project’s proposal at <http://sdnhq.undp.org/opas/en/proposals/suitable/1526>.

by senior officials from the MoJ, MoI, AGO, the Supreme Court and representatives from the international community⁶⁰⁴. In addition, a number of PRTs are conducting ad hoc human rights and justice initiatives. For example, reportedly the German-led PRT in *Kunduz*, during 2008 should provide training to about 220 Afghan judges, prosecutors and attorneys on basic law principles and family law. The project will be implemented in conjunction with the Max Planck Institute for Comparative Public Law and International Law, based in Heidelberg⁶⁰⁵.

7.4.3 The NLTC and other Judicial Infrastructure

The reconstruction activities undertaken during this second phase of justice reform have naturally included the construction or the restoration of judicial buildings and offices. Judicial and correctional facilities often require additional supplies of equipment, especially in the provinces and districts. Again, interventions have been exclusively bilateral. Italy alone financed the construction of the NLTC⁶⁰⁶, choosing UNOPS as implementing partner, which in turn contracted out the building works to an Afghan contractor. The NLTC was supposed to «set standards for legal training in Afghanistan and provide access to legal careers across government institutions [...] such as the Supreme Court, the Afghan Ministry of Justice, the Office of the Attorney

⁶⁰⁴ UNAMA, *Afghan Justice Sector Overview* (April 2007), p. 5.

⁶⁰⁵ IOM Afghanistan, 'Supporting the Rule of Law', 2(1) *IOM Newsletter* (September) 2008, 3, http://www.unama-afg.org/news/_publications/08sep-IOM-newsletter.pdf.

⁶⁰⁶ Project: 'National Legal Training Center', activities implemented from December 2005 to May 2007. The project cost to Italy around € 1 million (Cooperazione Italiana allo Sviluppo, *Le attività multilaterali* (cit.)).

General and the Ministry of Higher Education»⁶⁰⁷. USAID was also involved in the project in a minor part, by providing new furniture and other equipment. NLTC building works were completed in late 2006 but the construction was officially handed over to the Afghan government only in May 2007. A month later, the NLTC was promoted as an independent governmental institution by a presidential decree. In the first months of 2008, a governing charter, a strategic plan and a code of conduct were drafted, with input from US and Italian officials. The governing charter was then approved by the NLTC interim board – including, *inter alia*, the Chancellor of Kabul University and representatives of the Supreme Court, AGO and MoJ – and was sent to the MoJ for presentation to the National Assembly.

However, notwithstanding the initial participation to the NLTC project of all the Afghan justice institutions, in early 2008 the Supreme Court started boycotting the Center's activities, expressing determination in having its own training center⁶⁰⁸. The Court was followed by the Attorney General, who made similar claims. The Supreme Court and the AGO withdrew their support to the first NLTC training course, initiated in June 2008⁶⁰⁹, stating that they would not accept graduates from that study programme as judges and prosecutors. As a result the course was closed down and students

⁶⁰⁷ Press briefing by UN spokesperson Adrian Edwards and by UN agencies in Afghanistan (Kabul: UN News Centre, 6 March 2006), <http://www.un.org/apps/news/infocusnews.asp?NewsID=1036&slID=1>.

⁶⁰⁸ The Supreme Court's intent of having its own training centre, distinct from the NLTC, was initially made clear at the Afghanistan Rule of Law Coordination Meeting, held in Dubai on 4-5 December 2006 (summary of conclusions available at <http://www.rolafghanistan.esteri.it>), and reaffirmed in its 5-year strategy presented at the Rome Conference on the Rule of Law in Afghanistan (*Strategy of the Supreme Court, with Focus on Prioritizations*, Kabul, March 2007, p. 9, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/491571E5-4D82-461A-9F0F-FD4C0DAEADA1/0/SupremeCourtStrategy.pdf>).

⁶⁰⁹ A 36-week judicial 'stage' course had previously taken place in the NLTC, starting from 1 April 2007.

carried out a public demonstration in front of the building⁶¹⁰. Curiously, the failure in the organization of courses did not prevent USAID from financing the opening of the new NLTC library, which was handed over to the Afghan authorities in August 2008.

Up until mid-2007, UNODC had opened a few ‘Justice Support Centers’ (JSCs), in order to supplement the PJI. Three JSCs were inaugurated in *Paktia (Gardez)*, *Mazar-e-Sharif* and *Jalalabad* in October 2006, February 2007 and May 2007, respectively⁶¹¹. However, it is not clear, at the time of writing (October 2008), whether they are really operational. Reportedly, UNODC would have plans to establish JSCs in 11 other provinces⁶¹². New judicial infrastructure was also requested directly by the Afghan justice institutions to the donor community at the Rome Conference. As earlier mentioned each institution presented five quick implementation projects to be financed bilaterally by donors⁶¹³. Italy decided to fund an MoJ project and two AGO projects⁶¹⁴. Building works were assigned to the International Management Group

⁶¹⁰ Reed et al., *IDLO Italian-Funded Projects*, p. 31-32.

⁶¹¹ See UN News Centre, *UN anti-drug offices expands facilities to aid prosecution of Afghan traffickers*, 14 May 2007, <http://www.un.org/apps/news/story.asp?NewsID=22535&Cr=afghan&Cr1>.

⁶¹² Project: ‘Criminal Law and Criminal Justice Capacity Building’, No. AFG/R42, financed by Italy and Ireland. See UNODC, *Thematic Evaluation of the Technical Assistance*, p. 21.

⁶¹³ *Donor Implementation Plan for Adoption Jointly by Donors at the Rome Conference*, Paper presented at the Rome Conference on the Rule of Law in Afghanistan, Rome, 2 July 2007, Appendix 1, p. 7, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/193108D9-737E-467E-A7BF-D5E351D24740/0/RomeDIPwithApp1.pdf>.

⁶¹⁴ Italy decided to finance the MoJ Project No. 1: ‘Construction of offices for departments of Huquq and Government Cases’; and the AGO Project Nos. 1 and 2: ‘Infrastructure – for a fully functioning prosecution service’ and ‘Transportation – provincial and district access by prosecutors, and by victims/witnesses’.

(IMG), which is now entering into contract with local Afghan counterparts.

7.5 A 'New' Leadership: The Growing US and Military Involvement into Justice Sector Reform

The second phase of reconstruction activities is also characterized by the growing role of US civilian contractors and international military contingents in justice sector reform. On the one hand, this may be considered as an «inevitable development»⁶¹⁵ of the holistic approach we have analyzed in chapters three and four, under which military and civil reconstruction activities are supposed to move forward together. On the other hand, this increased US and military role may be considered as a direct consequence of the lack of leadership and financial/technical means of support in reconstruction shown by Italy and other donors. On the whole, one could affirm that approximately since mid-2005 the US has started planning to do things by itself, involving both its civil and military presence on the ground. This trend has even intensified in recent times. As previously referred, the US leadership had been present from the beginning of international intervention. However, between 2001-2005, it was the huge financial and technical assistance that granted the US a *de facto* leadership in the sector. The political control and the responsibility for coordinating activities within the justice sector officially remained in the hands of Italy, being the 'lead nation'. Conversely, starting from 2005, the general failure of all the 'leads' established at the Tokyo Conference pushed the US to assume a more incisive political role, which rapidly turned into broader economic and technical assistance in the reform of justice.

⁶¹⁵ See M.T. Doel, 'Military Assistance in Humanitarian Aid Operations: Impossible Paradox or Inevitable Development?', 140(5) *RUSI Journal* 1995, 26-38.

7.5.1 The US Civilian Assistance to the Rule of Law Sector

Currently, the US assistance to justice sector reform is provided by four US agencies: the US State Department – Bureau of International Narcotics and Law Enforcement Affairs (INL), USAID, the Department of Justice (DoJ), and the Department of Defense (DoD)⁶¹⁶. Such government agencies are committed to different areas of responsibility: USAID focuses on civil and commercial law, as well as judicial training; the DoJ specializes in counter-narcotics prosecutions; the DoD assists in police-prosecutor coordination; the INL focuses on criminal justice and corrections reform in the AGO and the MoJ. Agencies and their programmes are coordinated by the US Embassy in Kabul through a Special Committee on the Rule of Law, chaired by a Rule of Law Coordinator. The INL funds two major programmes, namely the JSSP and the Corrections System Support Program (CSSP). Both programmes are implemented by the Pacific Architects & Engineers and Homeland Security Corporation through its subcontractor, the National Center for State Courts. JSSP and CSSP have been set up since mid-2005 and early 2006, respectively⁶¹⁷.

⁶¹⁶ If not otherwise specified, organization and data are gathered from the US Government, *Report on Progress toward Security and Stability in Afghanistan* (Washington, D.C.: Report to Congress in accordance with the 2008 National Defense Authorization Act, June 2008), 34-38, http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf; US Department of State and the Broadcasting Board of Governors – Office of Inspector General, *Rule-of-Law Programs in Afghanistan* (Washington D.C.: Report of Inspection No. ISP-I-08-09, January 2008), 4-5, 23-24, 43, <http://oig.state.gov/documents/organization/106946.pdf>; D.T. Johnson, *Oversight of U.S. Efforts to Train and Equip Police and Enhance the Justice System in Afghanistan* (Washington D.C.: Statement before the Subcommittee on National Security and Foreign Affairs of the House Oversight and Government Reform Committee, 18 June 2008), <http://www.state.gov/p/inl/rls/rm/106015.htm>.

⁶¹⁷ CSSP was officially split off from JSSP in late 2005.

JSSP involves 30 US prosecutors, judges, defence attorneys, and criminal justice experts, as well as 35 Afghan legal advisors. The Programme has permanent teams based in Kabul, *Herat*, *Balkh*, *Kunduz*, and *Nangarhar* provinces, focused on criminal justice reform. Together with DoJ prosecutors, JSSP also conducts police-prosecutor training and mentoring, working closely with the Focused District Development (FDD)⁶¹⁸ initiative – run by the US military command – in a number of districts. Reportedly, to date, JSSP has trained more than 1,000 Afghan lawyers. The JSSP staff in Kabul is divided into three sections. The first two provide training and mentoring, as well as act as advisors to the AGO and the MoJ, respectively⁶¹⁹. While the third JSSP section concerns access to justice. It includes mentoring and capacity building activities for private legal defence organizations, legal education and training, as well as the organization of provincial justice conferences. A further component (Regional Police Prosecution Training Section) is responsible for regional police-prosecutor training.

The CSSP is composed of about 30 US advisors on prison law and administration, who work in Kabul, *Herat*, *Balkh*, *Nangarhar* and *Paktia* provinces. CSSP provides assistance on four distinct areas: training, capacity-building, prison infrastructure development, and the

⁶¹⁸ The FDD is a police training programme established in October 2007 by the MoI in cooperation with the US Combined Security Transition Command-Afghanistan. The programme is supposed to tackle inadequate training, poor equipment and corruption affecting the Afghan police. 1,500 US trainers (800 militaries and 700 DynCorps contractors) are involved in the training activities. Under the FDD initiative, police officers are sent from the districts to the respective provincial capital cities for an 8-week course. Then they redeploy in the districts of origin. Six cycles of FDD are planned for completion in 2008. They will cover 52 districts. According to initial forecasts, four years will be required to spread the programme across all the 365 districts of Afghanistan. Since May 2008, JSSP has begun offering 4-week courses to prosecutors in the provinces as a part of the FDD initiative, practically merging two training activities. Joint courses aim at establishing law enforcement and criminal justice linkages at district level.

⁶¹⁹ The first section consists of 16 US and Afghan advisors, while the second section is composed of 3 US and 11 Afghan advisors.

operation and maintenance of the CNJC in Kabul (including both the CNT and the CJTF). With regard to training activities, to date CSSP has trained more than 1,400 corrections officers in the provinces through both a basic 8-week course and a ‘train the trainers’ course. In addition, the CSSP capacity-building component advises the MoJ Central Prison Directorate (CPD) on prison policies and management, as well as on organizational reforms.

USAID, through the ARoLP⁶²⁰ assists both the MoJ and the Supreme Court, thus covering the remaining Afghan justice institutions and judicial activities. The project also supports the faculties of law and *sharia* in five provincial universities. ARoLP is divided into seven components: court administration; legal and judicial training; commercial dispute resolution; legal education; legislative process reform; women’s rights under Islamic law; and access to justice and informal justice sector. In 2004-2007 ARoLP focused on two major sub-programmes. The first constructed 40 courthouses in 17 provinces across the country, with a cost of approximately US \$ 12.4 million. The second programme allocated US \$ 33.5 million for legal and judicial training, developing media and publications for professional use and general public education⁶²¹. Training courses were organized for both candidates to the post of judge and sitting judges. They included a 36-week stage for incoming judicial candidates, a 4-week training for sitting judges, and a ‘training of trainers’ programme to establish a pool of trainers within the Supreme Court. According to USAID, by June 2008 ARoLP had trained over 70 percent of Afghan judges and by the

⁶²⁰ Checchi and Company Consulting Inc. is the implementing contractor for the Afghanistan Rule of Law Project.

⁶²¹ These activities included, *inter alia*: the codification of core Afghan laws dating from 1964 in both *Dari* and *Pashto* (further collected in 17 books); the publication of the Afghan Official Gazette in both electronic and print versions; the production of TV and radio programmes on citizen’s rights, with particular emphasis on women’s rights; and the publication of comic books for the Afghan rural population. This sub-programme has practically overlapped and eventually replaced the ‘Access to Justice at the District Level’ project.

end of 2008 it will have trained the entire Bench, which would consist of 1280 judges⁶²². These figures prove that there are often duplications in training activities, as many other donors are involved in organizing similar courses for judges. In addition, AROLP supported the Supreme Court in creating and adopting a code of judicial ethics, which was further disseminated through the training courses. The USAID-funded project has also financed the Supreme Court's inspection tours and conferences in provincial courts, which started in 2007, as well as a court administration system (Afghan Court Administration System – ACAS), aimed at implementing a standardized nation-wide court filing system⁶²³. AROLP will expire at the end of 2008. It will be replaced by a Justice Sector Development Program (JSD), which will have more or less the same tasks and targets⁶²⁴. Ultimately, JSSP, CSSP and AROLP advisors also participate in and often lead the various working groups

⁶²² USAID Afghanistan, *Justice Sector Development Program (JSD)* (Kabul: Solicitation No. 306-08-024, 26 June 2008), p. 9, https://www.fbo.gov/download/c59/c599fda28d49cf912080a39ce6d94561/FINAL_RFP_ISSUED_June_26_2008.doc.

⁶²³ The ACAS was officially approved by the Supreme Court in September 2007, at the end of an 18-month evaluation phase. The system's roll-out began in November 2007 and its dissemination across the country is expected to be completed by the end of fiscal year 2008. Training is usually provided through a 4-day course, divided into both theoretical and practical phases, lasting 2 days each. The practical phase consists of taking participants (judges and courts' administrative staff) to a court in order to show them how to practically implement the procedures learnt during classes. At the end of each course, participants go back to work in the courts of origin, followed by an AROLP assessment mission. In principle, sessions should take place in the districts concerned, but they are often organized in the main provincial cities, due to security reasons. Travel and accommodation expenses are paid by AROLP. ACAS comprises the supply of filing cabinets, lockers, folders and forms for any kind of judicial/administrative act, including criminal records. Participants are also trained in very basic operations such as opening and searching files, storing them into the lockers and sending them to higher courts.

⁶²⁴ USAID Afghanistan, *Justice Sector Development Program (JSD)*, p. 12.

established within CG No. 2, whose meetings often take place within their compounds in Kabul.

As regards the DoJ, the Department has been providing assistance to the Afghan justice through the DoJ's Senior Federal Prosecutor Program since 2005. The latter is composed of up to four legal advisors and the same number of criminal investigators seconded to the CJTF and the CNT. DoJ advisors, *inter alia*: drafted the counter-narcotics law and the presidential decree establishing the CNT, refined the military court legislation and the military penal and procedural codes; and drafted counter-terrorism and extradition laws. The latter were further reviewed by the *Taqnin* and are now under review by the Criminal Law Committee.

7.5.2 The Costs of US Civilian Assistance

The US contribution to justice sector reform has grown gradually over the years. In 2002-2007, INL and USAID spent US \$ 110.4 million on rule of law programmes (US \$ 64 and 46.4 million, respectively). In the fiscal year 2007, the United States spent US \$ 67.35 million (US \$ 55 million through the INL programmes and US \$ 12.35 million in USAID funding). In order to evaluate these figures, one should compare them with the total amount of contributions/pledges provided by other donors (Italy included), which was US \$ 164.8 million at end of 2007 (US \$ 81.8 million before the Rome Conference and US \$ 83 million pledged at the same event – not considering the US contribution). Therefore, by the end of 2007, justice sector reform in Afghanistan had received a total of US \$ 275.2 (110.4 + 164.8) million. This data reveals that the vast majority of funding has been provided by the US. Recently, US efforts in justice sector reform have even increased. In the fiscal year 2008, the INL budget reached US \$ 68 million, while USAID received US \$ 4 million. A further US \$ 20 million were granted by the Congress as emergency supplemental funds. This caused the US annual contribution to leaven up to US \$ 92 million, which is far more than that allocated by Italy to the justice sector since 2002. Once again this level of funding makes the US the biggest donor in the Afghan justice system, even though the US affirms it will not be able to cover the

sector's future needs, estimated to be US \$ 600 million over the next five years, on its own. In addition, notwithstanding the huge US involvement, data proves that funds allocated for justice sector reform represent only a small fraction (0.48 percent) of the US assistance to Afghanistan, which by the end of 2007 was estimated to be over US \$ 22.8 billion⁶²⁵. This reveals the poor attention paid to justice system reform by the US, if compared to other sectors. In fact, these figures do not include corrections, police and counter-narcotics justice, which received more funding than justice. However, data does not take into account the money spent by the DoD in RoL programmes, as this is included in the military budget⁶²⁶.

7.5.3 The Military Involvement into Justice System Reform

Addressing the interplay between reconstruction and military activities in Afghanistan is beyond the objective of this study. Besides, that of military involvement in humanitarian activities is now described by

⁶²⁵ On the whole, since 2001, international donors have pledged about US \$ 32.7 billion in the reconstruction of Afghanistan (M. Lee, 'US hopes to pledge more for Afghans', *USA Today*, 8 April 2008, http://www.usatoday.com/news/washington/2008-04-08-3963072919_x.htm).

⁶²⁶ By the end of 2007, INL alone had spent US \$ 48 million on corrections programmes and US \$ 10 million on counter-narcotics justice programmes. For the fiscal year 2008, counter-narcotics activities are funded by the US with around US \$ 500 million. As concerns police reform, before the Rome Conference, international donors had contributed US \$ 218 million for dedicated programmes. Currently the US DoD provides INL with US \$ 300 to 400 million per year for police training. On the whole, the US spent US \$ 2.5 billion on the police in fiscal year 2007 and will spend over US \$ 800 million in 2008 (J. Straziuso, 'US in new push to bolster Afghan police', *ABC News*, 15 February 2008, <http://abcnews.go.com/International/wireStory?id=4295509>).

scholars as a «long-running, and generally inconclusive debate»⁶²⁷. However, it may be said that in Afghanistan the connection between civil assistance and war-effort mostly stems from the conflict situation and the holistic approach to reconstruction adopted since the beginning of the international intervention. Indeed, in Afghanistan, that of keeping the reconstruction distinct from military activities is a pure theoretical question, of no real scientific value. On the contrary, willing or not, the ‘humanitarian circus’⁶²⁸ in Kabul does openly (but indirectly) sustain military operations. Basically, external actors are actively engaged in a state-building mission by assisting the government in place to extend its powers and authority throughout the country, while the Taliban and other armed groups are attempting to reduce the same powers and authority by force. In this respect, justice has been held since the beginning of the international intervention as one of the five Security Sector Reform’s (SSR) pillars in Afghanistan⁶²⁹. This is in line with the current conception of SSR at international level, which tends to include large parts of or the entire judicial sector⁶³⁰. However, this

⁶²⁷ See M.C. Pugh, ‘Military Intervention and Humanitarian Action: Trends and Issues’, 22(4) *Disasters* 1998, 339-351, at 339; For a study on the relationship between military activities and ‘humanitarian action’ in peace support operations see M.C. Pugh, ‘The Challenge of Civil-Military Relations in International Peace Operations’, 25(4) *Disasters* 2001, 345-357.

⁶²⁸ The concept of humanitarian circus was initially used by David Rieff in order to portray the situation of humanitarian assistance in Kosovo during the first year of international intervention. See D. Rieff, ‘Kosovo’s Humanitarian Circus’, 17(3) *World Policy Journal* 2000, 25-32.

⁶²⁹ The other four pillars are basically the ‘leads’ established at the 2002 Tokyo Conference, namely military reform, police reform, counter-narcotics, and DDR. See Sedra, *Security Sector Reform*, p. 96-102. See also gen. C. Hodes and M. Sedra, *The Search for Security in Post-Taliban Afghanistan* (Abingdon: Routledge, Adelphi Paper No. 391, 2007), 51-93 (‘Chapter Five: Security-Sector Reform’).

⁶³⁰ M. Brzoska, *Development Donors and the Concept of Security Sector Reform* (Geneva: DCAF Occasional Paper No. 4, November 2003), 23, http://www.dcaf.ch/docs/occasional_4.pdf. See also gen. J. Chanaa,

practically entails the 'securitisation' of justice, which ends up being seen as a mere tool to coerce the opponents of state-building process.

The US military command in Afghanistan became more active in the rule of law area in early 2006, addressing the issue as a high priority. Before, coordination with other US or international players was fairly poor. Reportedly, there were no contacts between US military lawyers and IJPO officials in Kabul, notwithstanding attempts made by the former to establish formal and informal links⁶³¹. During the Summer of 2006, for the first time since the beginning of the intervention, a Judge Advocate General's Corps (JAG) team drafted a five-year strategic plan for the implementation of a rule of law development programme. The plan was created on behalf of the Office of the US Rule of Law Coordinator. The master document included a vision, key participants, opportunities, threats, and a number of key initiatives. More importantly, it described the desired end-state and the financial resources required to reform the Afghan justice system⁶³². From that moment onwards the US started having its own strategy for justice reform, involving the totality of its civilian and military apparatus on the ground. In this context, since 2006 the DoD has increased its activities in providing assistance to the justice sector. Such assistance now concerns two major areas: improving linkages between justice and police sectors, and implementing rule of law initiatives in Eastern Afghanistan through JAG teams. The former area of assistance is provided by the Combined Security Transition Command-

Security Sector Reform: Issues, Challenges and Prospects (Oxford: Oxford University Press, Adelphi Paper No. 344, 2002).

⁶³¹ A US Major who was participating in a legal training mission in Kabul at that time declared: «After days of effort to effect such coordination, we were only able to secure the name and number of an Italian lawyer who left Kabul more than six months ago» (S.M. Watts, C.E. Martin, 'Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform', *Army Lawyer*, May 2006, 1-11, at 10).

⁶³² V. Tasikas, 'Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm', *Army Lawyer*, July 2007, 45-60, at 54.

Afghanistan (CSTC-A)⁶³³ – one of the two US operational command in Afghanistan, based in Kabul. In particular, CSTC-A advises the MoI Legal Advisor's Office on law enforcement legislation and procedures. The second US operational command in Afghanistan, namely the Combined Joint Task Force 101 (CJTF-101, based at the *Bagram* Air Base) is tasked with implementing projects of legal training, distribution of legal texts, and infrastructure support at provincial and district level in Eastern Afghanistan. Both commands work in coordination with the Rule of Law Coordinator at the US Embassy.

The US military involvement in justice reform includes a full range of activities. For example, CSTC-A assisted in developing the new military criminal and military criminal procedure codes⁶³⁴, as well as in drafting and implementing internal police disciplinary policy and regulations. Other activities consisted in drafting decrees, laws, and regulations regarding border control and criminal procedure. Judge advocates have further mentored Afghan officials and court-martial defence attorneys on several legal issues concerning military, international, environmental, fiscal, and personnel law. Judge advocates also meet on a regular basis with governors, judges, prosecutors, police and prison officers in the provinces to assess their concerns and priorities in the reform of justice. JAGs participate to provincial justice conferences and make assessments of the condition of judicial infrastructure and courts' functioning. In case of need, the US commander on field may use quick-disbursing funds (taken by the

⁶³³ CSTC-A is a US military command specifically created to «program and implement structural, organizational, institutional and management reforms of the Afghanistan National Security Forces in order to develop a stable Afghanistan, strengthen the rule of law, and deter and defeat terrorism within its borders» (CSTC-A Mission, <http://www.cstc-a.com/Mission.html>). Under CSTC-A's operational control is Task Force Phoenix, composed of more than 6,000 units, which is responsible for training, mentoring and advising the Afghan army and the police.

⁶³⁴ Military Penal Code and Military Criminal Procedure Code, Official Gazette No. 876, 9 February 2006, available at the MoJ website, <http://www.moj.gov.af/?lang=en&p=e14>.

Commander's Emergency Response Program – CERP) to rehabilitate judicial infrastructure and facilities, buy vehicles, finance defence counsel services, and launch public awareness campaigns. Any initiative and information is coordinated with the US Embassy and PRTs officials⁶³⁵. That of justice has become a priority for the US military command. Reportedly, during the Summer of 2006, 15 out of the 18 JAGs stationed in Kabul were conducting rule of law activities in one form or another at least 50 percent of the time. That is, over 80 percent of the US military lawyers in Kabul were fully engaged in justice sector reform⁶³⁶.

The US command is not the sole military body involved in justice system reform in Afghanistan. As previously reported, ISAF-led⁶³⁷ PRTs are rather active in supporting training courses for legal and judicial professionals as well as in restoring and providing new judicial and correctional facilities in the provinces. For example, in January 2008 the Italian PRT handed over to the MoJ 20 new houses for prison officers, built within the premises of the Herat juvenile correctional centre⁶³⁸. Again, building works for a new court in the district of *Shirin Tagab* (*Faryab* province) recently started in October 2008. The project is co-funded by Latvia and the EU, but implemented in cooperation with the Latvian PRT. Two additional court buildings will be further erected in the remaining two administrative districts of *Faryab*, namely *Qaysar* and *Gurziwan*. In line with the 'self-contained' PRT operational doctrine, the project also includes the training of some 60 judges and

⁶³⁵ Tasikas, *Developing the Rule of Law*, p. 54-55.

⁶³⁶ *Ibid.*, p. 55-56.

⁶³⁷ The International Security Assistance Force (ISAF), is the NATO-led security and development mission in Afghanistan. ISAF was initially set up on 20 December 2001 by UNSC Res. 1386 (2001). Its establishment is also envisaged by the Bonn Agreement. As of October 2008 its troops number around 50,700.

⁶³⁸ News Network International, *Italian PRT aids Herat juvenile correctional centre*, 15 January 2008, <http://www.nni-news.com.pk/lastNode.php?transfer=yes&secure=yes&pointer=20775>.

prosecutors, in order to improve the capacity of legal professionals in the districts concerned⁶³⁹. If legal training and rebuilding judicial facilities are the PRTs' most common activities in justice sector reform, their widespread organization has been often used to portray the status of justice in the provinces and districts. For instance, in February 2008, ISAF instructed the regional commands and PRTs to conduct a survey of judicial infrastructure, equipment, and other capacity, in order to identify current lacks and needs. The survey was closely coordinated with the donor community, and, most importantly, with the World Bank, which used the information gathered for the NJP initial financing⁶⁴⁰.

7.6 Assessment: A Mixed Ownership Regime

As earlier mentioned, this second phase of reconstruction had the aim of finally putting the Afghan ownership of justice reform into practice. In view of that, the international authorities were to leave the restoration of the sector to be, at least formally, driven by the Afghan government. However, far from the 'ownership' aims declared in official statements, national institutions have remained strongly dependent on external contributions. In fact, unsurprisingly, according to UNAMA among the various consultative groups chaired by national

⁶³⁹ Pajhwok Report, *Construction work of Faryab court building started*, 5 October 2008, <http://www.pajhwok.com/viewstory.asp?lng=eng&id=63078>.

⁶⁴⁰ US Government, *Report on Progress toward Security*, p. 34. In addition, recently, all reconstruction and development projects carried out in Afghanistan since 2002 have been inserted into database, developed and managed by ISAF, called Afghanistan Country Stability Picture. The database contains an estimated 70,000 activity records, provided from more than 170 sources. The value of projects included into the database amounts to US \$ 12 billion. ISAF Public Affairs Office, *New system tracks Afghanistan reconstruction, development projects* (Kabul: ISAF Press Release No. 2008-065, 10 February 2008), <http://www.nato.int/isaf/docu/pressreleases/2008/02-february/pr080210-065.html>.

ministries, those which have received significant external support in policy-building and capacity-planning have been the «most effective in fulfilling their aims»⁶⁴¹. This clearly raises the question of whether national officials in these ministries are really in a position to autonomously decide about the goals concerned, as well as questions the extent of the role played by international consultants and personnel inside these institutions.

Although this process should rationally lead to a wider integration of all reconstruction activities within the justice sector, this target appears to be still missing. Generally, recent researches based on empirical findings support the idea that development aid is often marked by scarce coordination among donors⁶⁴². In Afghanistan, this seems particularly true, as recently observed by the ICG⁶⁴³. According to Zalmay Khalilzad, US representative to the UN, 'As things stand, more than 30 national embassies and bilateral development agencies, several United Nations agencies, four development banks and international financial institutions, and about 2,000 nongovernmental organizations and contractors are involved in rebuilding in [the country]'⁶⁴⁴. Coordinating this plethora of international actors (often pursuing different and competing interests) with national agencies, aiming at securing the local ownership of reforms, is naturally an uneasy job. With the recent adoption of the UN Security Council

⁶⁴¹ UNAMA, *Afghan Justice Sector Overview* (Kabul: UNAMA-RoL Unit, June 2006), p. 2, on file with the IJPO.

⁶⁴² R. Thiele, P. Nunnenkamp, and A. Dreher, 'Do Donors Target Aid in Line with the Millennium Development Goals? A Sector Perspective of Aid Allocation', 143 *Review of World Economics* 2007, 596-630, at 614. See also gen. R. Mascarenhas and T. Sandler, 'Do Donors Cooperatively Fund Foreign Aid?', 1 *Review of International Organizations* 2006, 337-357.

⁶⁴³ International Crisis Group, *Afghanistan: The Need for International Resolve*, p. 12.

⁶⁴⁴ Z. Khalilzad, 'Afghanistan's New Deal', *New York Times*, 20 March 2008, <http://www.nytimes.com/2008/03/20/opinion/20khalilzad.html?scp=6&sq=>st=nyt>.

resolution No. 1806, an expanded coordinating role has been conferred to UNAMA, notwithstanding the current scarcity of personnel and capacities, especially within its Rule of Law Unit. This principle was further remarked at the Paris Conference of July 2008⁶⁴⁵. Undeniably, the lack of coordination does not spare the justice sector, as was extensively reported during the Rome Conference⁶⁴⁶. However, apart from that, other factors indicate that the Afghan ownership in justice reform is yet to be met and that we are probably experimenting a mixed regime, in which external players still influence *de facto* the decision-making process.

Examples of this trend can be found at both the policy-making and the operational level. Basically, however, the local ownership of reforms is seriously put at risk first of all by the country's economic and financial dependence on external aid, as well as by the way funds are disbursed. International assistance represents around 90 percent of all public expenditure, while some two-thirds of aid bypasses the Afghan government, being spent bilaterally by donors⁶⁴⁷. As for the reform of justice, apparently, this trend will not cease in the future. This may be proven by a comparison between the limited funds that will be channelled multilaterally (i.e., through the ARTF Justice Project, which will initially cost only US \$ 27.75 million) and the incredible number of projects to be implemented bilaterally in the near future, as reported in the NJP – Part Four. The dependency is even amplified by the donors'

⁶⁴⁵ Declaration of the International Conference in Support of Afghanistan, Paris, 12 June 2008, <http://www.diplomatie.gouv.fr/en/IMG/pdf/english.pdf>.

⁶⁴⁶ M.C. Bassiouni and D. Rothenberg, *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, Paper presented at the Conference on the Rule of Law in Afghanistan, Rome, 2 July 2007, p. 10, <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gliuffici/>

⁶⁴⁷ See M. Waldman, *Falling Short: Aid effectiveness in Afghanistan* (Kabul: ACBAR, March 2008), [http://www.acbar.org/ACBAR%20Publications/ACBAR%20Aid%20Effectiveness%20\(25%20Mar%202008\).pdf](http://www.acbar.org/ACBAR%20Publications/ACBAR%20Aid%20Effectiveness%20(25%20Mar%202008).pdf).

practice of disbursing less money than initially pledged. For instance, at the Rome Conference donors agreed to offer US \$ 360 million for justice reform. However, countries included in their pledges, money that had been previously promised but not disbursed yet. As a consequence, the total amount of contributions was broadly over quoted, resulting in only \$ 98 million of 'fresh cash'⁶⁴⁸.

At the strategic level, the application of the local ownership principle in reshaping the new sector's policy-making structure has been, at best, partial. With regard to the NJP, the document was initially drafted by a dedicated working group, whose participants were almost completely international, except for a representative of the ANDS Secretariat. While the first part of the NJP was entirely drafted by the dedicated working team, the second one was finalized with major contributions from a representative of a foreign Embassy. The third part was instead drawn up by the World Bank, and then amended after requests made by donors. The fourth part was prepared by UNAMA, with relevant inputs coming from contributing states. UNAMA also set up the matrix of current reconstruction activities, contained in the first annex to the document. Conversely, the sole Afghan stakeholder involved in the drafting process, i.e., the ANDS Secretariat, only prepared the second annex to the document, including priorities identified through consultations at provincial level.

The lack of inputs by local actors in the drafting process may be due to a number of reasons. They may probably include the limited capacity of local personnel to contribute to such a complex document, which requires specific skills, and also the determination of international actors to complete the draft NJP as quickly as possible. However, this can also stem from the poor interest of the Afghan authorities themselves. Indeed, so far the latter have appeared reluctant to be absorbed in difficult tasks like that of preparing a complicated

⁶⁴⁸ Canada alone pledged US \$ 30 million. Other commitments included the United States (US \$ 15 million), and Italy (US \$ 13.6 million). In fact the NJP reports new funding pledges for only US \$ 60 million (p. 13) – which is approximately the sum of such commitments.

development aid framework for the sector, and more inclined to use their powers after the completion of the initial drafting process. At that stage, they can successfully bargain their 'institutional weight' with that of other external actors, in order to obtain a major role within the designed policy-making structure. The lengthy adoption of the NJP is a clear example of this way of acting.

The NJSS approval process may be regarded as another example of such a trend. The document's framework was initially conceived during the Summer of 2007 by a UNDP officer seconded to the ANDS Secretariat. The draft paper was then completely reviewed in September 2007 by a dedicated working group (whose members were, once again, all but one international) and sent to both ANDS Secretariat and donors. The latter made various comments which were further included in the draft by the same working group. At that point the document was translated in *Dari* (by JSSP and another international organization) and re-submitted to the ANDS Secretariat in order to be circulated among the Supreme Court, the AGO and the MoJ. Following on from that, a number of discussion tables among international and national stakeholders took place at the ANDS Secretariat. In the end, other modifications were included in the document, as required by Afghan justice institutions. The final draft was then sent again to the ANDS Secretariat, which made a few formal amendments and finally published it in a restricted area of its website, in order to circulate it before its official adoption.

At the operational level the 'mixed ownership regime' of reforms seems even more apparent. As reported above, membership and powers of TWGs, sub-WGs and committees established within the RoL WG are based on terms of reference agreed by the MoJ. This would formally preserve the authority of state institutions, though it remains to be seen how effectively such authority is exercised. Among the TWGs, those within the Law Reform TWG are probably the *fora* in which the local ownership principle is better implemented. Although their meetings are normally held at international offices and the Government's chairmanship is not always granted (e.g. the Criminal Law Committee is chaired jointly by UNODC and JSSP), the weight of Afghan members differs from group to group. Generally, their influence varies with the ability of international experts to involve the local counterparts in the works. The final aim should be that of creating

a common will towards the adoption of laws and regulations which comply with international norms and standards but that also respect local legal traditions. This is possible only if Afghan members understand their significance, and above all, their usefulness. As previously seen, in order to make this happen, international representatives should concentrate on the effective 'demand for justice' of local actors – more than on their political priorities – while drafting or amending laws and regulations.

Conversely, it may be noted that TWGs are strictly consultative bodies. The last decision over the adoption of laws or policies remains in the hands of Afghan institutions, and sometimes, as in the case of some articles contained in the forthcoming Police Law, local authorities are unwilling to accept amendments suggested by international experts⁶⁴⁹. Obviously, all this negotiation process delays the approval of new norms. Nevertheless, it is essential in order to create the preconditions for such norms to be effectively abided by people, once they come into force. However, this open procedure does not prevent external actors from putting some pressure on the adoption of specific laws, by requesting amendments to the annual legislative plan or rather by organizing a seminar abroad (held in Siracusa – Italy – at the end of April 2008) in order to attempt inserting provisions taken from the UN-backed Model Criminal Procedure Code to the upcoming new Afghan criminal procedure code.

Besides, *de facto* influence of international actors over justice sector reform may be powerful at any rate. It can take the form of legal advisors or 'mentors' seconded to justice institutions, as done by the EU/EC missions and by several US contractors, as well as recently advocated by UNAMA. International consultants cover positions at all levels, including personal advisors to the top-level authorities in the justice sector. Sometimes, influence is exercised by the creation of

⁶⁴⁹ The most controversial issue is the time-limit for pre-charge detention (police arrest), which Afghan authorities want to extend up to 10 days, as it was provided in the old 1979 'Law on the Discovery and Investigation of Crimes'.

privileged relationships between such authorities and international representatives, as was the case, for example, with the business lunches organized on a regular basis between representatives of two international agencies and the former Attorney General until his sacking in July 2008. Occasionally, international actors operate as guarantors, by playing the role of a confidence-building promoter among Afghan institutions. The mixed Ministry of Interior – Attorney General’s Office Commission (MoI-AGO Commission), born in October 2007 to facilitate the establishment of good relationships between the two institutions, is being held under the auspices of representatives of the US (through its contractor JSSP), Germany, Italy (both through their development cooperation agencies) and the EU Police Mission.

On the whole, contrary to appearances, the mixed regime which characterizes the decision-making process within justice sector reform in Afghanistan may be considered as an evolution. It is far from the ‘bilateralization of aid assistance’ registered at the beginning of the international intervention and it has the merit of being open to a wider number of stakeholders. In addition, it grants a major role for the Afghan government authorities. How genuinely the system is oriented towards the achievement of the full Afghan ownership will be revealed when the real intentions of donors will be unveiled. This will happen when they will be asked to support principally pooled financing mechanisms for the justice area, and to reduce bilateral projects, as also requested by the Special Representative of the UN Secretary General, Kay Eide⁶⁵⁰. Indeed, the path from the ‘lead nation approach’ to the local ownership of reforms may be described with the loosening of political interests by single contributing nations and the birth of a real common political end-state, being that of truly establishing a functioning *sovereign* nation. In this respect, the growing lack of confidence among all the stakeholders, as testified e.g. by the huge

⁶⁵⁰ Quoted in J. Hemming, ‘U.N. says donors should back Afghan aid plan’, *International Herald Tribune*, 22 May 2008, <http://www.iht.com/articles/reuters/2008/05/22/asia/OUKWD-UK-AFGHAN-AID.php>.

number of US bilateral projects listed into the NJP, is the most serious danger that threatens the success of future reforms.

8 Conclusion

It's not just the lack of security that poses a problem but the challenge of figuring out what actually works on the ground⁶⁵¹

I can't say where all the money is going!⁶⁵²

In **Chapter One** and **Two** I have offered some brief opening remarks about the dissertation and introduced the contents of the subsequent chapters. Furthermore, I have discussed some methodological aspects of this thesis, in an attempt to specify the reasons that led me to choose the reform of the Afghan justice system as the topic of my Ph.D. research. The title of this thesis is the combination of two Latin sayings: 'the weak (minor) capitulates before the strong (major)' and 'where there is society, there is law'. '*Ubi Maior, Ibi Ius*' basically sounds like 'only the mighty make the law'. This sentence evokes the fundamental and still unresolved issue which stands at the basis of the general theory of law, namely the conception of law in the struggle between its sociological and autocratic origin. In state-building interventions, when the reconstruction process also deals with justice system's restoration,

⁶⁵¹ Stephen Wallace, vice-president of the CIDA Afghanistan Task Force, quoted in S. Levitz, 'Canada learning hard lessons in aid to Afghanistan: senior aid official', *Canadian Press*, 3 March 2008, <http://www.630ched.com/News/National/article.aspx?id=3382>.

⁶⁵² Ele Pawelski, former Chief of Party for the IDLO-CIDA project, commenting the legal training activities financed by CIDA and implemented by IDLO (quoted in S. Levitz, 'Detainees captured by Canadians see better prisons, but may never see justice', *Canadian Press*, 2 March 2008, <http://www.630ched.com/News/World/article.aspx?id=3125>).

this dualistic conception resurfaces and requires state-builders to refer to it when establishing a model of conduct for legal and judicial reforms. In this respect, justice system reform in Afghanistan clearly shows that a mere top-down, externally-directed transfer of legal knowledge is doomed to fail.

While specifying the motives for this research, I have affirmed that the latter issue is one of the main points of interest of this thesis. Other reasons include, *inter alia*: the major change in the concept of humanitarian action which took place during the state-building intervention in Afghanistan, the profound ideological basis of such intervention, the magnitude of the commitment undertaken by the international community, and the challenge of transplanting Western-oriented legal and administrative models into an Islamic, war-torn, atomized society – traditionally refractory to any political and institutional change. I have chosen to investigate the reform of justice because of my educational background and because law is typically a product of local society. Law characterizes the society which it applies to, and vice versa. Modifying the Afghan law and court system and making it acceptable for the local population means, to some extent, inducing profound changes in the Afghan society. *Rectius*, the acceptance of a large-scale justice reform entails that society *is already* changed. This is the reason why success in justice system reform in Afghanistan may be also ‘a matter of approach’.

In **Chapter Three**, I have attempted to illustrate the major changes that occurred after the September 11 attacks in IFIs development aid policies. To this aim, I have drawn a broad picture of strategies and frameworks used at international level to support the development of countries recovering from conflict. I have also explained the rising of the ‘local ownership’ principle in the dedicated literature and how such theory is put into practice through the ‘consultative group formula’.

First, I have briefly traced the evolution of the approach to institutional changes in war-torn countries since the nineties. In particular, I have focused on the a vast consensus, which emerged among key international actors in the wake of 9/11, around the concept of ‘aid-induced pacification’. According to the latter, stabilization may only be achieved by an effective development aid. I have further argued that the growing concerns over the failure of the state-building

intervention in Afghanistan are now leading to a change of approach, whose outcome is still open to debate. Subsequently, I have described policies and guidelines issued by international financial and development institutions for countries emerging from conflict. This preliminary study has been indispensable for the subsequent analysis of the Afghan justice system development, since the policy-making framework which governs institutional reforms in Afghanistan is set up according to those policies and guidelines. However, I have also underlined that this pattern of combining traditional humanitarian assistance and IFIs development policies relies on the expected continuum between emergency and development, which is often missed in state-building operations. In another paragraph, I have highlighted the importance of respecting the local ownership of reconstruction activities, even though this principle is frequently invoked more in word than in deed, as a kind of saving clause which donors may appeal to in case of failure. I have then considered the application of the local ownership principle through the establishment of a policy-making structure composed of 'consultative groups', participated jointly by national and international stakeholders. This decision model is provided in IFIs manuals and guidelines.

In **Chapter Four**, I have given a brief overview of state-building theories and methods, as applied to justice system reform in post-conflict scenarios. In the first two paragraphs I have considered the need for balance between imposed and consensual solutions. In addition, I have remarked that the domestic political order should be settled before providing to legal or judicial reforms. In the third section I have illustrated the reasons for choosing a model of reform based on local consensus and how to successfully rely on it. This entails considering the real 'demand for justice'. I have then added a few notes on the attempts made to establish a 'transitional justice' phase in Afghanistan. Ultimately, I have analyzed some common characteristics of state-building operations, in which international authorities play a role in the reform of local systems of justice.

More in detail, I have specified that justice system reforms in post-conflict state-building interventions may take place under a variety of implementing strategies, influenced either by a 'dirigiste' (i.e., neo-colonialist) or a consent-based approach. I have stressed that

the success of reforms depend in turn on the consensus received by the local population. As concerns justice reform, this means attempting to respond to the 'demand for justice' of the Afghan people. This also implies drawing-up a 'social compact' between national and international stakeholders, including the 'legal empowerment' of a growing part of the population. Such an inclusive strategy could lead to postponing the full application of the rule of law principles, in case of need. In this respect, I have argued that, in order to generate a relatively strong popular demand for legal and judicial services, justice system reform has to adapt to the local conditions or contain principles already familiar to the local population. On the contrary, if new laws and institutions were merely imposed, the initial demand for their use would probably be weak, conditioning the success of reforms. Local 'demand for justice' may imply adopting transitional justice mechanisms. In this regard, I have first briefly explored the issue of transitional justice in countries recovering from conflict and then extended the analysis to Afghanistan. I have then concluded that this phase has not been established yet in Afghanistan, notwithstanding the adoption of a dedicated 'action plan', which was launched in 2006 by the Afghan government, but never truly implemented. This is mostly due to the fact that prosecution and vetting procedures could possibly involve former Northern Alliance commanders, putting at risk the balance between political factions which sustains the existing political order. This is the main reason why transitional justice vests a limited significance within the whole justice system reform. With regard to the features that are common to the majority of post-conflict state-building operations dealing with justice system reform, I have listed a number of characteristics and made a comparison with the current situation in Afghanistan. Common features include:

- (i) high level of destruction of infrastructure and judicial records;
- (ii) strong interference of local executive authorities in the administration of justice;
- (iii) law in force not consistent with human rights law and/or its validity contested by the population;
- (iv) the existence of a parallel/unofficial justice system;
- (v) limited human and material resources.

In **Chapter Five**, I have described the development of the Afghan justice system before the 2001 military intervention. In the first paragraph I have briefly examined the most relevant principles of Islamic law, which are of interest for this study. In the subsequent sections I have focused on the influence of Islamic law over the Afghan justice system in the 'pre-American era', starting from the reforms undertaken in the twenties. The analysis has comprised the study of the legal and judicial reforms carried out during the Taliban regime. In a short introductory section I have emphasized the influence of *sharia* and the *pashtunwali* (the code of conduct of *Pashtun* tribes) over the 'formal' justice system. Traditionally, statutory law is expected to be in harmony with *sharia* and to supplement it, while both are supposed to overlay tribal codes or customs. The confrontation between formal and informal justice systems mirrors the historical clash between urban elites and the rural population and elite. Understanding this conflicting relationship between centre and periphery is fundamental in the implementation of current reforms. On the other hand, Islamic law has always strongly influenced the Afghan justice system. Islamic jurisprudence and principles have constantly represented a law source in many areas of law, such as criminal, family and contract law. In addition, they have been often granted constitutional value in the nine constitutional charters adopted (or even just drafted) during the 70 years going from 1923 to 1992.

In the subsequent paragraphs I have illustrated the evolution of the Afghan court and legal system from the sixties to the beginning of the state-building intervention in late 2001. This study shows that the new organization of courts adopted after the US-led invasion and the subdivision of roles and powers within the justice system, resemble those set up during the past forty years. Jurisdiction and authority of the three 'justice institutions', namely the Supreme Court, the Attorney General's Office and the Ministry of Justice, on the whole, have remained unchanged. The history of the Afghan justice system shows that, notwithstanding the launch of several law reforms in the sixties and seventies, and the adoption of the main substantive and procedural codes, laws have never been easily accessible. As a result, many judges and prosecutors only had a basic knowledge of their contents, or otherwise were often reluctant to apply them. The first compilation of all the Afghan laws and regulations passed since 1963 was only drawn

up in 2002 by IDLO. I have further pointed out that the justice system has never been seen as fair and impartial by the local population, who have always perceived it as a tool for the 'centre', to impose its authority over the most volatile provinces. This perception was even amplified during the communist regime, fuelling the rebellion. In view of that, I have concluded that in 2001 the international community was not required to restore the justice system in place, but to build it up for the first time.

In **Chapter Six**, I have analysed the Afghan justice system currently in force. I have shown how the latter has been slightly modified following the institutional reforms – culminated with the new 2004 Constitution – the reorganization of the judicial administration, and the enactment of new basic substantive and procedural laws. In order to highlight the evolution that occurred in the reconstruction activities since 2001, justice system reform has been divided in two phases. The first phase is described in the sixth chapter. It goes from the beginning of the international intervention to the opening of the London Conference on Afghanistan, held in January 2006. This phase of reforms was implemented under the so-called 'lead nation approach', under which five G8 nations assumed the role of leading security sector reform, each one within a single sub-sector of responsibility. In this respect, I have addressed the role of Italy, being the 'lead nation' in the reform of justice. In a further paragraph I have examined the development of training and capacity-building activities, as well as the reconstruction of the crumbling judicial infrastructure. In this chapter I have also analyzed the main issues raised by the adoption of the 2004 Constitution and the establishment of a new court system. The latter has been assessed in the last paragraph, which reports the number of judges, prosecutors, defence attorneys and functioning courts, as well as data on the qualification of judicial and administrative personnel. The picture emerging from available data is not encouraging.

Specifically, I have emphasized the compromise made in the initiatives undertaken to spread the rule of law through the country. Furthermore, I have considered the most visible externally-generated inputs introduced into the domestic legal system (namely a number of new laws and codes), and discussed some key points that emerged during the analysis. It should be observed that the Afghan legal system

still admits norms derived from Islamic jurisprudence which can be easily considered in breach of a number of human rights conventions and the 2004 Afghan Constitution. This clear contradiction is the result of two complementary efforts: strengthening domestic institutional capacity through the introduction of legal norms respectful of human rights, and the need to restore legitimacy to the central authorities by respecting Afghan rural and Islamic traditions and conventions. Therefore, relevant Afghan and international actors have agreed to postpone the most incisive reforms in order to maintain the existing balance of powers between political and judicial elites. Indeed, the Constitution itself encompasses some articles that apparently contradict each other when they refer to the coexistence of Islamic and human rights law.

Chapter Six is also the first chapter which is principally analytical rather than descriptive. Indeed, it ends with a preliminary assessment of justice reform in Afghanistan during the first phase of reconstruction. This preliminary evaluation precedes the comments raised in the subsequent chapter and in the general conclusions. In the sixth chapter I have argued that a number of problems have inevitably undermined the success of reform projects undertaken under this donor-recipient bilateral scheme. On the whole, this 'lead nation approach' has generated a donor-oriented system, with broad bilateralization of planning and programming. It has been characterized by the absence of a unique development concept, lack of coordination, and disparity in the level of committed resources. Indeed, during this initial phase of reconstruction activities, the lack of a clear national plan or even a background policy among the different international players is rather evident. On the other hand, the absence of systematic coordination among donors has led to establishment of a plethora of overlapping and sometimes ill-assorted projects, each advancing independently. In addition, I have pointed out that the limited impact on the ground of these reform projects has not only stemmed from the lack of coordination among donors. The problem is more profound and probably concerns the lack of a credible political leadership among external actors. In this regard, I have highlighted that donors have missed their initial target, being that of implementing justice reform by influencing the political will of Afghan authorities through direct financial and technical support. In fact, domestic

institutional and policy changes, as well as improvements in the technical capacity of local authorities, have been extremely limited. As a consequence, I have argued that the substantial failure of assistance provided under the 'lead nation' approach is probably due to the limited powers, the financial capacities and the expertise of the selected 'lead nation'. However, I have also wondered whether Italy has ever really exercised this leadership over the sector, given the vast amount of technical and financial aid provided by the US during the same period.

In **Chapter Seven**, I have discussed the second phase of justice sector reform, going from the London Conference to date. This phase has been characterized by a change of course in the overall approach to reconstruction activities. The new development aid strategy has included a wider participation of the Afghan authorities to the reform process, especially on the decisional plane. In this respect, I have described the implementation of the local ownership principle at both the operational and the strategic level. I have also attempted to give a practitioner's view of the ongoing activities, on the basis of my service for the Italian Ministry of Foreign Affairs in Rome and Kabul. I have shown that, basically, the local ownership principle has been put in practice by reshaping comprehensively the whole decisional framework which regulates the reform process. In particular, aid architecture has been aligned with the templates included in policies and guidelines set by major international financial institutions for countries emerging from conflicts. In addition, Afghan authorities have been granted the presidency of all the consultative bodies established to support the Executive in formulating sector policies. Eventually, this local ownership consolidating process has led to the adoption of a sector development strategy (National Justice Sector Strategy) by the Afghan government, to be implemented through a National Justice Programme. The NJP is based on two major funding options, being a pooled financing mechanism, namely the ARTF Justice Project, and the 'classic' bilateral assistance, experimented so far. The ARTF Justice Project is run jointly by Afghan justice institutions funded through the Afghanistan Reconstruction Trust Fund, which is in turn participated by a number of contributing countries and administered by the World Bank. I have underlined that the ARTF Justice Project may be considered as the product of real change of approach towards the

Afghan ownership of justice system reform. However, the use of multilateral funding mechanisms, managed by local authorities, is only at the beginning and the difference with the total amount of financial and technical assistance provided bilaterally is still profound.

On the other hand, the study of this second phase of reform activities is not limited to the main policy-making bodies and their powers, but extends to several other issues. The latter include the end of the political process initiated at the Bonn Conference in 2001 and the status of the Afghan justice system, which is assessed by presenting new and updated data. In the seventh chapter I have also addressed the most recent reconstruction programmes, focusing on the growing US and military role in justice sector reform. I have explained that the US contribution to the reform of justice in Afghanistan in terms of both technical and financial assistance is unreachable by any other donor. Indeed, since 2006, the US political and financial leadership within justice sector reform has been rather evident, as shown by the available data. I have highlighted that the US assistance to justice sector has concerned the totality of the US civilian and military apparatus on the ground. Inspired directly by the US, is the establishment of a counter-narcotics special jurisdiction in Kabul, which comprises special courts, prosecutor's office and police. I have pointed out that this represents the most relevant change in the organization of justice that has occurred since 2005. Other paragraphs concern the establishment of new training programmes and the construction of new judicial infrastructure. The latter includes the National Legal Training Centre, which is supposed to serve as a joint training centre for all the three justice institutions. While tracing the short history of the NLTC, I have reported the difficulties faced by the Centre – with the Supreme Court and the AGO trying to obtain their own training centres – and the teaching activities which are now in a deadlock.

In the conclusive paragraph, I have argued that the invasive participation of international actors within justice sector reform, at both the decisional and operational level, practically impedes the implementation of the local ownership principle, which basically remains only on paper. I have concluded that at present the system is characterized by a 'mixed ownership' regime, split between international and national stakeholders. Such fragmented regime is mostly generated by the inability of international actors to involve the

local counterparts into a mutually-shared process of reforms. Other reasons may include the lack of an authentic common vision among donors over the final end-state of justice reform, the confusion of roles between international and local players, the gap of capacity and expertise in the Afghan justice administration and the consequent mutual lack of trust between donors and local authorities, the necessity of international actors to achieve quick results from their ‘investments’ within the justice sector, and, last but not least, the overall top-down approach to the development of justice system, which donors have never truly abandoned.

A few additional comments may be raised from the study as **general conclusions**.

First, justice sector reform in Afghanistan is *de facto* still influenced by external players, who generate strong inefficiencies in the decision-making process. Notwithstanding donors officially declare their willingness to provide assistance through a true multilateral programme (i.e., the ARTF Justice Project), they still channel their financial and technical aid almost entirely through bilateral projects, putting the Afghan ownership of reforms at risk. The lack of local ownership in turn has jeopardized the success of reforms. Bilateral, neo-colonialist, top-down assistance in the reform of justice may succeed only when the recipient state is small enough for the financial capacity of the donor, willing enough to receive assistance (for example in the case the recipient state is defeated and order on the ground is effectively imposed *manu militari*), and the lack of capacity and technical expertise among local authorities is quickly filled. Conversely, multilateral programmes, implemented through pooled financing mechanisms have the merit of *truly* attempting to improve local technical and institutional capacities. First, they are run by the government of the recipient state, which thus becomes accountable to both donors and citizens. Secondly, state sovereignty is effectively respected and even reinforced, as it should be during a *real* state-building process. On the contrary, bilateral assistance only strengthen dependency from foreign aid and does not really stimulate the improvement of capacity and expertise among local authorities. The practice of state-building operations proves that bilateral assistance is mostly ineffective and often ends up in a waste of money. In

Afghanistan, this 'project-centred approach', employed by many international actors, has promoted quick results at the costs of sustainability and international standards. Unsurprisingly, this approach has also generated a severe lack of accountability among aid organizations on the way they provide financial and technical assistance to the Afghan institutions.

Indeed, the scarce reaction by donors to the failures that occurred so far in the justice sector reform raises doubts on whether aid programmes and projects implemented to date are *truly* aimed at improving the Afghan justice sector or are instead intended to achieve results at another level. In fact, aid could primarily serve the political (and economic) interests of donors, rather than the development of the Afghan justice system. For a donor country, internally, assistance consists in disbursing a large amount of money to several governmental and non-governmental organizations to implement aid projects abroad. Such organizations are almost always based in the donor country which finances the projects. Let's consider, for example, the legal training activities in Afghanistan. The US has involved several American contractors whose personnel is mostly composed of ex-militaries or ex-government officials. Italy has financed IDLO and ISISC, both located in Italy, and UNODC, which is led by an Italian executive director. Germany has funded the Max Planck Institute, based in Heidelberg. Besides, the cost of training activities is usually quite high, resulting in good business for the organizers. IDLO, for instance, received the staggering figure of US \$ 20.34 million (US \$ 14 and 6.34 million from Italy⁶⁵³ and CIDA, respectively) to implement training activities. High costs are frequently ascribed to the lack of security and the poor living conditions for expatriates, which would make the salaries for consultants and managers leaven. In general, in

⁶⁵³ Reed et al., *IDLO Italian-Funded Projects*, p. 38. This means that IDLO to date has received about 20 percent of the entire Italian aid to the Afghan justice reform (which is around US \$ 57 million until the beginning of 2007 plus US \$ 13 pledged at the Rome Conference in 2007). The IDLO evaluation report itself admits that «there is a widespread perception that IDLO's costs are high when compared to organizations with similar mandates» (*ibid.*).

Afghanistan, the transaction costs of international assistance seem very high. They are reportedly 40 per cent, while for example in Burkina Faso they are around 10 per cent⁶⁵⁴. More in detail, data gathered from reliable sources⁶⁵⁵ confirm that the cost of foreign personnel working for consulting firms and contractors ranges from US \$ 250,000 to US \$ 500,000 a year, that is, from 200 to 400 times the average annual salary of an Afghan civil servant. These figures are rather high even if compared with the cost of international personnel deployed in other state-building missions and engaged in justice reform⁶⁵⁶. The cost of mentors, advisors, consultants and trainers (namely, the 'technical assistance') absorbs about 25 percent of all aid to Afghanistan. In addition, more than 60 percent of such 'technical assistance' is not coordinated with the Afghan government, being practically imposed from the outside. Unsurprisingly, reports confirm that «much of such assistance has been wasteful, donor-driven and of limited impact»⁶⁵⁷. The ANDS itself has been sarcastically called «the world's most

⁶⁵⁴ A. Donini, 'Local Perceptions of Assistance to Afghanistan', 14(1) *International Peacekeeping* 2007, 158-172, at 165. However, it is worth saying that 'transaction costs' is a quite generic formula, mostly including administrative costs (like working time of administrative staff), other indirect costs (like disbursement delays and lack of state ownership), and opportunity costs (trading off resources consumed in the transaction with alternative applications). Aid transactions costs are normally shared by donors and the recipient country. They practically measure the difficulty in establishing and implementing development aid programmes.

⁶⁵⁵ If not otherwise specified, information and data mentioned in this chapter are gathered from Waldman, *Falling Short* (cit.), and from ActionAid Afghanistan and ELBAG, *Gaps in Aid Accountability: A Study of NSP Finances* (Kabul: ActionAid Afghanistan, 2007), <http://www.actionaid.org/assets/pdf/FEB%20ELBAG%20report.pdf>.

⁶⁵⁶ According to data provided by the RAND Corporation, the costs per person per year were approximately US \$ 154,195 for Congo, US \$ 292,285 for Haiti, US \$ 163,486 for Liberia, and US \$ 122,680 for Sierra Leone, with an average cost of US \$ 183,162 (Dobbins et al., *The Beginner's Guide to Nation-Building*, p. 105).

⁶⁵⁷ Waldman, *Falling Short*, p. 2.

expensive poverty reduction strategy», as its drafting process cost at least US \$ 15 million⁶⁵⁸.

As concerns the number of advisors to be seconded within the local justice administration during a state-building intervention, the RAND Corporation recommends deploying one advisor for every 10 judges, one for every 30 prosecutors, and one for every prison⁶⁵⁹. Although in Afghanistan the number of advisors in the justice sector is probably much higher, by using these parameters, the annual cost of foreign mentors would be approximately US \$ 56 million at best⁶⁶⁰. Naturally this figure does not take into account the dozens of foreign mentors seconded to the three justice institutions' central headquarters⁶⁶¹, nor the local consultants hired by international organizations and contractors. Indeed, thanks to the high salaries, international agencies/contractors often employ the best local legal advisors. However, this tends to undermine the technical capacity of the Afghan justice institutions⁶⁶².

⁶⁵⁸ J. Boone, 'Afghan failure to meet IMF target casts doubt on debt relief', *Financial Times*, 2 April 2008, http://www.ft.com/cms/s/0/94314c9c-0059-11dd-825a-000077b07658.html?nclink_check=1.

⁶⁵⁹ Dobbins et al., *The Beginner's Guide to Nation-Building*, p. 102.

⁶⁶⁰ Following official data, we have estimated approximately 1100 judges, 2000 prosecutors, one prison in each province (34 provinces), 10 mentors in the *Pul-e-Charkhi* prison complex. The annual cost of each advisor has been kept at minimum (US \$ 250.000 per year, as earlier reported).

⁶⁶¹ Just to have an idea of the number of advisors working in the Afghan central state institutions, one may consider that reportedly, as of late 2004, 224 international consultants (including expatriate Afghans hired on international contracts) were working within the Ministry of Finance, contracted by USAID under a US \$ 95.8 million contract (see A. Suhrke, *The Limits of Statebuilding: The Role of International Assistance in Afghanistan* (San Diego: International Studies Association Annual Meeting, 21-24 March 2006), 20-21, <http://www.svet.lu.se/conference/papers/suhrke.pdf>).

⁶⁶² This problem is common to every state-building operation. It may be considered as a direct consequence of the economic impact of these missions

The importance of considering the ‘internal factor’ is amplified by the large portion of aid which remains in the hands of implementing agencies and the small part that effectively reaches the ultimate Afghan subcontractor and/or the local population⁶⁶³. This practice has been labelled the ‘salami slicing’ of international aid⁶⁶⁴, whereby multiple cuts of any disbursement are grabbed by foreign agencies and managers, rather than delivered to local stakeholders. In Afghanistan, over three fourths of assistance bypasses the national budget, being spent directly by donors without any reporting to the Afghan government⁶⁶⁵. Indeed, only one-third of donor analytical or assessment work over reconstruction projects is conducted jointly with the Afghan government⁶⁶⁶. Donors provide 72 percent of the core budget and about 90 percent of all the public expenditure. Even when donors decide to channel aid funds through multilateral programmes – whose financing is accounted into the national development budget, and thus managed by the Afghan authorities – the money pledged is never entirely

on the local economy. See on the point M. Carnahan, S. Gilmore, and W. Durch, ‘New Data on the Economic Impact of UN Peacekeeping’, 14(3) *International Peacekeeping* 2007, 384-402, at 394.

⁶⁶³ A 2005 report by ActionAid confirms that for example, the bulk of funds for development aid spent by France (89 percent) and the US (86 percent) is ‘phantom aid’, returning to the donor in form of corporate profits and consultant salaries (see ActionAid International, *Real Aid: An Agenda For Making Aid Work* (Johannesburg: ActionAid, 1 June 2005), 30, http://www.actionaid.org/docs/real_aid.pdf). See also on Afghanistan: B. Upadhyay, ‘US aid “failing to reach target”’, *BBC News*, 16 May 2008, http://news.bbc.co.uk/2/hi/south_asia/7405434.stm.

⁶⁶⁴ See R. Weitz, ‘Afghanistan: Rethinking Reconstruction’, *Eurasia*, 23 September 2008, <http://www.eurasianet.org/departments/insight/articles/eav092308.shtml>

⁶⁶⁵ Whilst some donor agencies, such as the UK Department for International Development (DIFD), channel up to 80 percent of funds through the Afghan national budget, USAID spends the core of its funds in external budget.

⁶⁶⁶ Reportedly, among the most virtuous donors are Canada and the WB, which, for example, in 2005 conducted over 60 percent of analytical work jointly with the Afghan government.

disbursed⁶⁶⁷. Up until March 2008, of the US \$ 25 billion of aid pledged by donors, only 15 billion had been effectively spent (60 percent)⁶⁶⁸. In addition, at least 40 percent of funds have returned to donor countries in corporate profits and consultant salaries. However, contractors and sub-contractors' corporate profits may absorb up to the half of the contract value. Moreover, some big contracts in Afghanistan include up to five layers of international or Afghan subcontractors, each of which usually has a 10-20 percent of profit margin on its contract, although, in some cases, the profit margin may reach 50 percent of the contract. In addition, occasionally costs may be inflated by the contractor/implementing agency⁶⁶⁹. As we have earlier mentioned, this practice of contracting out works and services is rather common, for instance, in the construction of judicial infrastructure or in organizing legal training activities. Efficiency is reportedly hampered by the scarce transparency in procurement and tendering processes and by donor bureaucracy. Ultimately, the necessity to achieve quick and visible results has led to a 'centralization' of aid, which has mostly focused on Kabul and other major urban centres. The capital city has also received 70 percent of the national operation and maintenance budget.

⁶⁶⁷ The ActionAid Report takes as an example the National Solidarity Programme (NSP), financed through the ARTF similarly to the ARTF Justice Project. According to ActionAid, «a total of US \$ 111 million was pledged by seven donors for NSP for the [2007] to the ARTF. Out of the US \$ 111 million pledged, the donors had paid-in only US \$ 10.64 million (9.6 % of total pledge) as of July 22, 2007».

⁶⁶⁸ According to ACBAR, with regard to the money pledged for 2002-2008, the Asian Development Bank and India have disbursed only a third of their commitments, the US only half, the WB just over half, while the EC and Germany less than two thirds.

⁶⁶⁹ For example, personnel belonging to a US contractor in Afghanistan have been recently charged with conspiracy, major fraud and wire fraud by the DoJ, for having obtained reimbursement by USAID for inflated expenses (DoJ, *Four Individuals and Subcontracting Company Charged with Contract Fraud Related to the War in Afghanistan and Rebuilding Efforts*, Press Release No. 08-893, 3 October 2008, <http://www.usdoj.gov:80/opa/pr/2008/October/08-crm-893.html>).

On the external plane, financial and technical assistance always has a political return. 'Investing' in the aid market in Afghanistan can generate good dividends on the international stage and increase the influence of donor countries in conditioning local politics. This is possible only if assistance is provided in external budget through bilateral projects; only if technical and financial *dependency* of the recipient country continues. This is to say that, since the recipient country's internal political order is conditioned by external aid, the more the political situation is unstable or led by factions which may possibly oppose donors' interests, the more international actors will avoid providing money to the core budget and will strictly use bilateral assistance programmes.

This may explain why it has been decided to establish a coordination mechanism of bilateral projects at provincial level – i.e., the PJCM – run by international agencies (UNAMA and UNDP) only, and out of the Afghan government's control. In addition, the comparison between the PJCM costs and limited coordinating functions cast doubt on the real efficiency of such initiative⁶⁷⁰. According to Daniele Canestri, the PJCM is essentially a «self-referential mechanism». In his view, the PJCM self-referential character is systemic, stemming from UNAMA itself. Indeed, he acutely observes that UNAMA is a mission mandated to simply coordinate the interventions of donors at central level. In this perspective, the PJCM is nothing but 'a small UNAMA' at provincial level. Therefore, just as UNAMA owns neither the power, nor the mandate, to effectively improve the conditions of state institutions at central level, the PJCM effectiveness at provincial level will probably be limited. In addition, remarkably, the PJCM will not operate as a concrete assessment mechanism. It will only present reports on the status of justice infrastructure and services in the provinces and districts without

⁶⁷⁰ The estimated annual cost of the PJCM is between US \$ 3,464,640 and US \$ 4,544,640 (UNAMA, *Proposed Provincial Justice Coordination Mechanism for Afghanistan*, Paper presented at the Conference on the Rule of Law in Afghanistan, Rome, 2 July 2007, p. 8, <http://www.rolafghanistan.esteri.it>).

contributing to a realistic analysis of the situation and to an authentic improvement of justice services at local level⁶⁷¹.

The need to obtain good ‘political dividends’ as quickly as possible leads to promote high visibility programmes and to immediately display their good results, without looking at the effectiveness and sustainability of the programmes themselves. This ends up generating a profound and diffused lack of accountability at all levels. With regard to justice system reform, this would explain why donors, in affirming the success of their assistance, often only refer to the number of judicial and prison facilities constructed, or the number of judges trained, rather than making a more in depth evaluation of results. Independent evaluations of assistance programmes are in fact quite rare and generally money are simply given by donors to the implementing agencies without providing any further effective oversight. A few evaluations are conducted by the implementing agencies themselves through ‘independent evaluation units’⁶⁷². However, this process is similar to an internal audit and unsurprisingly, it leads to evaluations which are often very positive. In the case difficulties arise, failures may be easily blamed on other relevant actors, or even on the local authorities/population, by invoking the local ownership principle as a saving clause.

On the contrary, when the evaluation is conducted by the donor (as it should regularly be) and accountability mechanisms are more clear and transparent, results are often quite different. For example, a recent in-depth review of CIDA-funded projects in Afghanistan, made by the same Canadian agency, revealed that a number of activities (approximately 50 percent of projects) have led to unsatisfactory outcomes⁶⁷³. Among the projects which generated poor results, a legal

⁶⁷¹ Interview with Daniele Canestri, Pisa, 5 November 2008.

⁶⁷² See, for instance, the evaluation of development projects financed by Italy and implemented by IDLO and UNODC. (Reed et al., *IDLO Italian-Funded Projects* (cit.); UNODC, *Thematic Evaluation of the Technical Assistance* (cit.)).

⁶⁷³ Data provided by Nipa Banerjee, former CIDA Head of Office for Afghanistan, quoted in S. Levitz (Canadian Press), ‘Cup half full, half empty

training programme, implemented by IDLO, entitled ‘Strengthening Rule of Law in Afghanistan’ stands out⁶⁷⁴. The latter mirrors a similar project of legal training financed by Italy, which used the same assets, personnel and methodologies as the ‘Canadian’ one. In fact, the two projects have been recently merged by IDLO. However, unlike the IDLO-CIDA project, the evaluation of the Italian project is rather positive⁶⁷⁵, possibly because the assessment work has been carried out by IDLO itself, through an independent evaluation team, and not by the donor.

Apart from the ‘bilateralization of aid’ and the real intentions of donors, the poor success registered so far in the reform of justice in Afghanistan may also be ascribed to other factors such as the lack of organizational capacity and legal experience among Afghan officials, widespread corruption⁶⁷⁶, poor security conditions and the dearth of skilled international consultants to carry out aid programmes. With regard to the latter issue, provisional results of a study being carried

in Canada’s development work for Afghanistan’, *Afghanistan Times*, 3 February 2008, p. 2-3.

⁶⁷⁴ Lack of results had been also mentioned in a previous CIDA evaluation report: see CIDA, *Review of the Afghanistan Program* (Ottawa: CIDA Evaluation Division, May 2007), 34, [http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Afghanistan/\\$file/RapportAfghanistanSept07-E.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/Afghanistan/$file/RapportAfghanistanSept07-E.pdf). According to the Canadian Press, an IDLO internal survey found that, at the end of the training activities, judges would not be able to apply the procedural norms learnt during classes, including the basic right of access to a defence counsel for the defendant (Levitz, *Detainees captured by Canadians*).

⁶⁷⁵ Reed et al., *IDLO Italian-Funded Projects*, p. 28. However, both the evaluations made by IDLO and CIDA, refer to budgetary inefficiencies and scarce long-term impact of the legal training projects (see *ibid.*, p. 39 and 47; CIDA, *Review of the Afghanistan Program*, p. 34-36).

⁶⁷⁶ For example, the Supreme Court has recently ordered the dismissal and arrest of 40 judges on charges of embezzlement and corruption (See Ariana TV, ‘Afghan Supreme Court sacks 40 judges on bribery charges’, 2 July 2008, in *BBC Monitoring – Afghanistan*, 4 July 2008).

out by Prof. Cynthia Alkon, of the Appalachian School of Law (Virginia), reveal that foreign experts working in Afghanistan within justice development programmes generally have good professional experience in rule of law development, but virtually none of them has received any specific training on Afghanistan before being deployed on field. In addition, apparently, only one of the consultants surveyed is able to speak any of the local languages⁶⁷⁷.

The security issue is naturally another conditioning factor. Development programmes implemented outside the main urban centres are almost all due to fail. A large number of districts are simply not accessible, because they are out of the Government's control and in the hands of armed groups which may possibly belong to the Taliban. It is important to note that the deterioration of security not only affects international staff, but also has repercussions on local judicial personnel and thus on the functioning of justice at all levels. Indeed, several murders and kidnappings of judges have occurred in the last months, in some cases paralyzing the respective courts⁶⁷⁸. In general, it is the institutional system itself to be still fairly weak. The continuous search for a stable political order ends up conditioning the establishment of the rule of law. For example, in July 2008 the former Attorney General Sabet was immediately dismissed by the President Karzai, after he publicly announced his candidature to the next presidential elections⁶⁷⁹. Provisionally, a good result would be that of concentrating justice system reform in the major cities and supporting traditional ADR in the villages, as suggested by the World Bank in a

⁶⁷⁷ Personal correspondence with Prof. Cynthia Alkon, 20 October 2008.

⁶⁷⁸ See e.g., Afghan Islamic Press, 'Gunmen kidnap three judges in Afghan east', 16 July 2008, in *BBC Monitoring – Afghanistan*, 17 July 2008; Pajhwok, 'Kidnappers of Afghan judges demand ransom', 29 July 2008, in *BBC Monitoring – Afghanistan*, 30 July 2008; Pajhwok, 'Afghan counter-narcotics judge shot dead', and 'UK envoy condemns murder of Afghan counter-narcotics judge', 4 September 2008, in *BBC Monitoring – Afghanistan*, 5 September 2008.

⁶⁷⁹ BBC News, *Afghan attorney general is sacked*, 16 July 2008, http://news.bbc.co.uk/1/hi/world/south_asia/7509463.stm.

recent report⁶⁸⁰. Unfortunately, traditional ADR are not taken into account in the NJP, even if realistically their role within justice system reform will remain central in the next years. Besides, a good deal of realism is fundamental for the success of justice sector reform in Afghanistan, as recently underlined by both the IMF and the International Development Association (IDA)⁶⁸¹.

Problems affecting sector development are also due to a fragmented decisional process, at all levels, that hampers the system's effectiveness. Negotiating in each and every working group or consultative body may take time, while the final outcome of discussions is in any case uncertain. However, involving both national and international stakeholders in a broad debate on the reforms to be undertaken is probably the only way to reach a mutually-shared reform policy, influenced, but not conditioned, by external inputs. Indeed, reforms always impose a balance between Western international legal norms, seen as crucial to building institutional capacity at both the national and provincial levels, and ensuring Afghan 'ownership' of the reconstruction process, through respect for local expectations in terms of the legitimization and operation of legal norms. In this regard, the complex balance of the 'light footprint' approach to international institutional assistance to post-conflict state-building makes it particularly important for international actors to develop a coherent and common reform strategy for the justice system.

⁶⁸⁰ According to the World Bank: «Both judicial reform and infrastructure creation should focus on the major cities because that is where the formal justice system is most used and most needed. [This report recommends] [f]ocus[ing] judicial reform on provincial rather than district courts [and ...] [s]upporting non-state dispute resolution. Traditional conflict resolution mechanisms [...] may be all that is available for many years» (World Bank, *Afghanistan – Building an Effective State: Priorities for Public Administration Reform* (Washington, D.C.: World Bank, 10 June 2008), 82, <http://www.worldbank.org>.

⁶⁸¹ IMF and IDA, *Joint Staff Advisory Note on the Poverty Reduction Strategy Paper* (Washington D.C.: IMF Country Report No. 08/193, June 2008), 10, <http://www.imf.org/external/pubs/ft/scr/2008/cr08193.pdf>.

In principle, such a common approach should be genuinely oriented towards strengthening the sector development, and it should overshadow the interests of single donors. On the contrary, regrettably, the large number of bilateral projects to be implemented in future years, as testified by the NJP-Part Four, still highlights a rather patchy development policy for the sector. Success could be possible only by reducing the bilateral activities and concentrating efforts on real multilateral programmes, such as the ARTF Justice Project. Probably, short-term results will not be rousing, but still in the medium-term, a multilateral approach will produce more robust and stable effects, helping the new justice system to take root in the Afghan society and to stimulate the internal 'demand for justice'. In the end, there is nothing to loose in attempting to use real multilateral aid mechanisms, since the opposite approach, namely the bilateral one, has clearly failed.

Spreading the new legal and judicial system throughout the country will require a long-term commitment by international donors. Success will mainly depend upon the political situation and the end of war. This research confirms that justice system reform in Afghanistan may succeed only if development programmes are implemented through a real multilateral approach, involving domestic authorities and other relevant local stakeholders⁶⁸². I therefore **recommend**:

⁶⁸² According to Daniele Canestri, future developments will be linked to: improving the trustworthiness and capacity of the Afghan justice institutions; opening the higher education system to foreign instances (e.g., by inviting visiting professors or expatriate Afghan legal scholars to hold courses in local universities); conducting an in-depth survey of the Afghan justice system, as those surveys currently available would be not completely reliable; extending effectively the government control throughout the country; improving the conditions of judicial facilities, as they represent the tangible presence of the state on the ground; and increasing the number of legal professionals. Mr. Canestri is relatively optimistic about the future. He notes that at the end of the NJP in 2013, the general situation of the Afghan justice sector will probably be improved, as the system will be composed of more and better-educated legal professionals, and judicial infrastructure will be in a better condition, meeting the targets included into the ARTF Justice Project. In addition, he also observes that the military role in justice sector

- i)* concentrating financial contributions through pooled financing mechanisms such as the ARTF Justice Project;
- ii)* drastically reducing the number of bilateral activities;
- iii)* expanding and improving the monitoring and evaluation activities by donors on implementing agencies and their subcontractors in bilateral projects;
- iv)* reducing the number of international personnel; the remaining personnel should be mainly used for monitoring and evaluation activities in multilateral programmes rather than as implementers;
- v)* employing much more skilled and experienced international personnel, also providing them with specific pre-deployment training;
- vi)* drastically reducing the legal training activities undertaken on bilateral basis and focusing on improving the capacity of the local higher education system;
- vii)* promoting legal awareness activities at district level;
- viii)* involving traditional ADR in development policies as a part of justice sector reform; this would practically entail adopting specific policies on the matter – as provided in the NJSS – and implementing them through the second and third phase of the NJP;
- ix)* and, finally, stopping the implementation of a reform which seems mostly concerned with the short-term interests of donors rather than aimed at shaping a modern and effective justice system.

reform will probably increase, as a result of the holistic approach to reconstruction activities. However, such activities will escape the government control as they will not be included into the NJP (Interview with Daniele Canestri, Pisa, 5 November 2008).

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