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State-building, lawmaking, and criminal justice in Afghanistan: a case study of the prison system's legal mandate, and the rehabilitation programmes in Pul-e-charkhi prison

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State-building, Lawmaking, and Criminal Justice in Afghanistan

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the rehabilitation programmes in Pul-e-charkhi prison*

State-building, Lawmaking, and Criminal Justice in Afghanistan

A case study of the prison system's legal mandate, and the rehabilitation programmes in Pul-e-charkhi prison

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Accepted Terms and Abbreviations

AGO	Attorney General's Office
AIBA	Afghan Independent Bar Association
AIHRC	Afghan Independent Human Rights Commission
ANA	Afghan National Army
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
ANSF	Afghan National Security Forces
ARTF	Afghanistan Reconstruction Trust Fund
CLJ	Constitutional Loya Jirga
CLRWG	Criminal Law Reform Working Group
CSSP	Correction System Support Program
ELJ	Emergency Loya Jirga
GDPDC	General Directorate of Prisons and Detention Centres
GIRoA	Government of the Islamic Republic of Afghanistan
GMAF	Geneva Mutual Accountability Framework
ICRC	International Committee of the Red Cross
IEC	Independent Electoral Commission
IJPO	Italian Justice Project Office
INDS	Interim National Development Strategy
INL	Bureau of International Narcotics and Law Enforcement Affairs
JCMB	Joint Coordination and Monitoring Board
JRC	Judicial Reform Commission
JSCWG	Justice Sector Consultative Working Group
JSSP	Justice Sector Support Program
MoE	Ministry of Education
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
NJSP	National Justice Sector Program
NJSS	National Justice Sector Strategy
NPP	National Priority Plans
NSIA	National Statistic and Information Authority
NTCPP	National Training Centre for Prison Police
PDCSC	Prisons and Detention Centres Supreme Council
PDP	People's Democratic Party
PRR	Priority Restructuring Reform
PWG	Prison Working Group
SIGAR	Special Inspector General for Afghanistan Reconstruction
TMAF	Tokyo Mutual Accountability Framework

TVT	Technical and Vocational Training Directorate
UNAMA	United Nation’s Assistance Mission for Afghanistan
UNDP	United Nation’s Development Program
UNODC	United Nation’s Office for Drugs and Crime

1.1 INTRODUCTION

This study is about the evolution and implementation of the prison system's legal mandate (notably rehabilitation of prisoners) in the context of an overall state-building endeavour, from 2001 – the time when international intervention and reform began – to 2020.¹ The study also examines the broader historical, social, and political context of state-building, law-making, and criminal justice reform before 2001. In order to allow for a practical and deeper understanding of the effects of the pre-2001 history and the post-2001 reform within one criminal justice institution with a specific legal mandate, it assesses Pul-e-charkhi, the largest and most modern prison in Afghanistan, along with its rehabilitation programmes.

To that end, instead of one conventional story to tell, this dissertation has three storylines which connect my academic interests and work experience.² As an administrator, I am interested in the overall state-building

1 I was planning to finish this study by 2020, which would have been an ideal deadline for completing my PhD. However, that year coincided with significant changes in the political and military landscape of Afghanistan, ultimately resulting in the return of the Taliban in 2021 (see 2.8). I therefore needed to extend my project's timeline, to ensure that I was both utilising the research data and keeping the work interesting and relevant. In addition, I decided to maintain the specified end date and add an epilogue to the dissertation, which discusses the changed context and its implications for this study.

2 I have been a faculty member of the Kabul Law School since 2001. In this capacity, I used to give lectures on theoretical criminology to undergraduate students. I also performed administrative duties at the Office of Administrative Affairs and the Council of Ministers' Secretariat (namely, the Cabinet Secretariat and the Executive Office of the President of the Islamic Republic of Afghanistan), from 2008-2014. I worked firstly as the Director of the Monitoring and Evaluation department, then as the Deputy Director-General of the Office of the President and Deputy Secretary of Cabinet. In addition to the high-level management of several projects, I was involved in the process of making the Afghan Constitution in 2004, and almost all the Loya Jirgas (Grand Assemblies) held in Afghanistan after 2004, including the CLJ of 2004. During the period 2017-2020 I served as Commissioner for the Administrative Reform and Civil Service Commission, and Director General of the Civil Service Appointments Board. The latter was a position at the core of the Afghan civil service administration and its reform processes. In my last appointment, I served as the focal point for the International Criminal Court and the 'Situation of Afghanistan', negotiating a historic process to put positive complementarity into practice; this project did not reach its final stages, due to the fall of the Afghan government on August 15th 2021. The experience I gained in these roles gave me a unique insight into how things worked in Afghanistan. As such, I have included some of my personal experiences (where appropriate), to add an insider's perspective to certain stories.

process, including the bureaucracy and administration of reform. As a lawyer, I am interested in lawmaking, legislative processes, and legal reform. Lastly, as a criminologist, I am interested in criminal justice institutions like prisons, as well as the rehabilitation of prisoners. I believe that the nexus of and parallels between the three storylines are not only compelling, but also multifaceted, when they are explored together (in this research project).

To ensure a proper interface between the three storylines, each of which has its own academic literature, it is necessary to go far beyond the familiar dualistic notion of '*law in books and law in action*'. In the following sub-sections I therefore briefly outline the key concepts in relation to each of the storylines, and describe their relevance to the overall research problem discussed further below.

1.1.1 State-building

'State-building' is increasingly embedded as a concept in multi-disciplinary academic literature, including the fields of social science, international relations, economics, anthropology, security, and development. A considerable amount of scholarly work has been devoted to topics such as the formation of the state, and the principles and approaches adopted to ensure that the legitimate use of force remains a key characteristic of 'the state' (Girth and Mills, 1946; Tilly and Ardant, 1975; Marquette and Beswick, 2011).³

Recently there has been a tendency to limit discussions to the most problematic situations. Therefore, contemporary literature on state-building is preoccupied with concepts such as modernisation, political development, institutionalisation, intervention, as well as post-conflict and fragile state issues. Thus, many authors use the term state-building to refer to interventionist strategies aiming to restore and rebuild institutions and infrastructure: e.g. the state bureaucracies (including the legislative and judicial branches) that communicate with and help each other to reach the ultimate goal of building the state.

In this context, state-building generally involves formulating policies, developing laws, rebuilding institutions, and training people. This not only calls for a sustainable approach to state development; it also requires that all the tasks and effort geared towards state-building are aligned with certain domestic and international norms and values. As such, interventions geared towards state-building (no matter how domestic or internationally-led they may be) require a clear and calculated blueprint to help maintain not only a healthy process, but also a meaningful institutional relationship between all relevant components of state-building endeavours.

3 Also see (Scott, 2007).

Some scholars refer to three overarching perspectives, a combination of which is used as a blueprint for international intervention in many areas of state-building. The perspectives are generally termed as modernisation, rational choice institutionalism, and institutional capacity (Goodhand and Sedra, 2015). In addition, certain normative assumptions tend to influence state-building efforts, particularly with regard to the security sector, the rule of law, the allocation of aid, and the roles of domestic and international actors.

Almost all scholars strongly emphasise the promotion of security and the rule of law as the top priorities for state-building; that was also at the core of post-2001 international intervention in Afghanistan. However, there is no specific consensus on how other areas, events, and priorities of state-building should be sequenced. Authors have suggested a variety of different frameworks of action for international intervention. Ghani and Lockhart (2009) suggest a 'Multifunctional View of the State', via a framework of ten functions for international intervention (2009, pp. 124-168).⁴

Other authors suggest broader and more comprehensive frameworks, by drawing attention to the normative status of different institutions and the roles they play in the process of state-building. Stromseth et al. (2006), for instance, look into the nuanced particularities of state-building and suggest a synergistic approach to leading state-building intervention. The approach originates from academic and political discussions about international intervention in post-conflict settings. As a normative theory, it sets out a few broad principles that the authors call the "blueprints for post-conflict governance". It considers reform to be an interconnected set of activities that must grow in synergy, suggesting that it must be ends-based and strategic, adaptive and dynamic, and systemic. The theory therefore provides a three-point agenda, implying that foreseeably successful reform must adopt a process involving the three elements, as follows:

4 Their proposed framework of ten functions includes: the rule of law; monopoly over the legitimate use of force; administrative control that operates within clearly defined and predictable guidelines; public finances; health and education services; infrastructure; citizens' rights; market creation and industrial policy; management of public assets; and public borrowing. According to them, external actors should prioritise state-building efforts in that sequence, focussing on state capacity instead of other objectives, and not allowing projects to be driven primarily by donors.

I have chosen to reference Ghani and Lockhart not only for their academic relevance, but also for practical considerations. The former served as president of Afghanistan from 2014 to 2021. In spite of being entrusted with full political and administrative authority, he failed not only to implement his own recommendations but also to maintain the status quo that he inherited from the previous administration. Ghani's failure may be attributed to several factors including his personal qualities, but at the same time it tells us a lot about the complexity of state-building endeavours in Afghanistan.

1. The ends-based and strategic approach necessitates a “holistic process”, because effective reform is complex and prone to internal contradictions. As a result, it is necessary to see the bigger picture, rather than focussing solely on changing laws and institutions. Likewise, many overlapping topics (such as culture and education) must be considered, as these can either contribute to or challenge the success of reform.
2. The adaptive and dynamic approach requires building on existing foundations. It necessitates a desire to recognise that the perceptions and needs of ordinary people are important, and that the wholesale transplantation or importation of laws may clash with existing legal foundations and the public’s perception of the legal system in its entirety. A dynamic approach recognises that reform is a continuous and long-term process; therefore, it must be designed to accommodate new developments arising from contextual changes. In other words, it must be able to mitigate the challenges typically associated with the evolution of local circumstances.
3. A systemic approach implies that reform necessitates a detailed and thorough understanding of how institutions function as a system, their key elements, and how they relate to other institutions. Thus, reform processes should not focus simply on reforming laws. Instead, they should also consider improving the target institutions and adjusting other components, with the ultimate goal of building a law-abiding society (Stromseth et al., 2006, p. 13).

The synergistic approach implies that an effective rule of law reform involves many complexities and contradictions. For example, “attempting to build up judicial or police institutions without reforms in governance that create checks and balances may result in lopsided institutions in which one branch is dominant, willful, or oppressive” (Stromseth et al., 2006, p. 310). However, it is also important to highlight that achieving a synergistic pathway to state-building is particularly challenging in places like Afghanistan, with its checkered history and inconsistent development patterns.

1.1.2 Lawmaking

As laws are normally at the core of a state’s authority, governance, and the social contract between itself and its citizens, any form of state-building also involves lawmaking. In this context lawmaking is an objective process; through careful regulation of its domain, it aims to enhance the integrity of both state and society. In recent decades, legal reform (or ‘rule of law promotion’) has also become a core activity in international intervention (see 1.1.1 above). In the specific case of Afghanistan, lawmaking has been a huge undertaking throughout its history, and even more so in the post-2001 era.

Perspectives on lawmaking with a particular focus on developing countries, especially Afghanistan, are of paramount importance to this dis-

sertation, since it examines how lawmaking is organised, as well as how it is practised in the field of criminal justice. A spectrum of theories may be employed to make sense of lawmaking and reforms implemented in Afghanistan.⁵ However, the following theories seem to have more explanatory power, for the purpose of this study: legal transplant (Watson, 1993); programmatic lawmaking (Allott, 1980); the bureau-political theory (Allison, 1971; Tanner, 1995, 1999); and finally, Seidman's model for understanding and improving legal systems in developing countries (Makgetla and Seidman, 1987; Seidman and Seidman, 1994).

Throughout most of Afghanistan's legal history, and particularly during the post-2001 law reform period, the foremost approach to lawmaking has been legal transplantation (see Chapters 2 and 4 below). In this regard, Watson's theory of *legal transplants* (1993) has gained widespread recognition amongst scholars of comparative legal history. The theory suggests that there is no logical relationship between different societies and the legal systems they adopt as sets of rules with which to govern themselves. It argues that transplantation of law is the most straightforward, efficient, and comprehensive method of lawmaking. According to the theory, transplantation is particularly recommended for developing countries, as they can arguably transplant an entire legal system.

However, the theory also cautions the drafter to consider factors such as accessibility, habit, and fashion, when selecting a point of derivation, because when legal content is borrowed from a system, it is best to continue borrowing from that system in order to maintain the consistency and integrity of laws being made by the borrower. There is also a significant role for international assistance in legal education and training. Legal education can serve as a bridge between conceptual matters and the practical application of ideas transplanted to the borrower's society.⁶

Allott (1980) offers another useful tool for understanding lawmaking in the context of Afghanistan, particularly for the post-2001 situation and the phenomenon that is termed 'laws as projects' (see Chapters 3 and 4

5 In their study on the use of legislative theories to enhance law and development projects, Otto et al. (2008) distinguish between three broad features of legislative theories (e.g. those addressing lawmaking processes, those addressing the social effects of laws, and those addressing internationally oriented law reform). The authors argue that every theory has its limitations, as each is focussed on specific aspects and actors of lawmaking within only one of the three features. Further, lawmaking is intrinsically a complicated endeavor, made even more complex by the social, traditional, political, economic, and (several) other factors at play in developing and transitional contexts (Otto, Stoter and Arnscheidt, 2008, p. 57).

6 Although this study does not cover legal education, it is important to note that it has been one of the key challenges for post-2001 reform. In addition to its quality and content, legal education presents a challenge in terms of its scope, and in terms of the tension between the positive law system taught by faculties of law and the Sharia-based system taught by faculties of Islamic studies and Sharia (Weinbaum, 1980; Eddy, 2009; Choudhury, 2014).

below). The central premise of Allott's theory is that impatient political elites, unaware of the deeper layers of social reality, seek to transform societies through legislation guided by certain informing principles, such as unification, modernisation, regression, liberalisation, secularisation, and mobilisation.

The outcomes of such law-making processes are thus generally inclined towards ambitious elite agendas. Laws are used 'as programs', with the aim of achieving social change in a direction that is defined without the consent and participation of the general public. Allott asserts that the history of law and development is replete with "dismal failures" due to such lawmaking processes, which often lead to civil unrest, opposition, and political stagnation (Allott, 1980, pp. 174-202). While Allott's theory focusses on individuals and certain groups of actors who have the power to influence lawmaking, other theories pay special attention to institutions.

For example, organisational politics theory (Allison, 1971; Tanner, 1995, 1999) looks at the institutional dynamics of lawmaking, and argues that lawmaking involves a struggle within and between government institutions and other actors. As a result, laws are generally a product of unpredictable and capricious administrative competition. According to the theory, individual state institutions have specific objectives and interests within the goals of the state as a whole. As such, whenever a new regulatory issue arises, it leads to a struggle between agencies with somewhat shared concerns and responsibilities.

This struggle is partly due to the fact that agencies with discrete interests attempt to define, diagnose, and resolve issues within their sphere of authority, which directly affects the law. The organisational politics theory is particularly relevant to the Post-Bonn process and particularly to the later stages of post-2001 international intervention in Afghanistan (see 3.3 below). While the theories briefly discussed above can explain different aspects of lawmaking after 2001, I believe a country specific and problem oriented approach could have served as the best guiding framework, and that it could still be used as the overarching guide for lawmaking in post-2021 Afghanistan.

The institutional legislative theory developed by Bob and Ann Seidman fits best here, as one of the few comprehensive theories on lawmaking in developing countries (Arnscheidt, Rooij and Otto, 2008, p. 12). The Seidmans' model for understanding and improving legal systems in developing countries (Makgetla and Seidman, 1987; Seidman and Seidman, 1994) and their manual for drafters working in developing countries (Seidman, Seidman and Abeyesekere, 2001) have generated the most debate within the literature on lawmaking. According to the Seidmans, society specific and problem oriented lawmaking may facilitate democratic transformation and social change. Thus, behaviours (e.g. the behaviours of drafting personnel, the subject, and the other actors) are at the heart of all legal problems. It is only by understanding these behaviours that one can effectively address legislative problems and the social change expected to arise from them.

However, the Seidmans also argue that change processes will fail if all aspects of problematic behaviour are not fully recognised, existing legislation is not considered in its entirety, and a precise process for formulating and evaluating new laws is not put in place (Arnscheidt, Rooij and Otto, 2008, p. 57). They propose a methodology for analysing problematic behaviour, resolving the problems of existing laws, and evaluating new laws, which is known as the institutional legislative theory and methodology, and is outlined in a four-step roadmap. The methodology recommends that the process of drafting a law should begin with a description of the social problem, which must include what and whose behaviours constitute problems the law is intended to address.

The next step should be an in-depth study, conducted to explain behaviours in a multi-layered manner and taking into account different categories, the perspectives of those who will benefit from the legislation, and the perspectives of those who will implement it. Next, the writing process should start, taking into account all the results obtained during the second step (e.g. the study). Finally, as an integral part of the initial design, a monitoring and evaluation system should be set in motion, to identify and solve any problems that could arise during the implementation process (Arnscheidt, Rooij and Otto, 2008, p. 95; Seidman and Seidman, 2009, pp. 453-4).

It is important to note that the Seidmans methodology has been criticised for being overly optimistic, particularly regarding the role of research and legal draftsmanship.⁷ However, I believe that the debate about whether or not research can answer complex technical questions associated with social behaviour and practical solutions is somewhat polarised and inconsistent, and that it does not undermine the relevance of the Seidmans' methodology in the case of Afghanistan. For example, the study of several Afghan laws demonstrates that legislation involving research and consultation tends to be more in tune with social realities in Afghanistan (see Chapter 4 below).

On the subject of the complexity of the process, however, I agree with assertions that considering lawmaking as an entirely technical process, free

7 Some critics maintain that the theory does not aim to explain how lawmaking in developing countries actually happens. They argue that the theory provides for the ideal scenario but does not take into consideration problems with lawmaking in developing countries, such as a lack of resources, time, and legal and political accountability. Finally, "the theory comes with naïve and positivist assumptions because it adopts a scientific approach to problem solving. The theory believes that scientific research can fill the knowledge gaps and can provide the correct answer about the problem through research. The theory ignores the limits and the methodological constraints under which research is conducted". In a very similar context, research processes can also relate to issues raised in the wider methodological literature: about how research is political, how it can be constrained by wider forces, and how it may only reveal parts of the story whilst leaving the bigger picture undocumented (Almeida, 2022, p. 123- cited from Rooij, 2006: 29 and Tamanaha 1999: 152).

from political and interest group interference, is a myth. Certain circumstances, such as the Taliban regime, will likely pose even more difficulties, because several layers of religious, traditional, and ethnic filters might be added to the review and drafting processes.

One final consideration with regard to lawmaking, as suggested by society specific and problem oriented models, is that lawmaking is not only relevant to state legitimacy; it also has strong potential to facilitate democratic social change. These aspects of lawmaking are of primary concern in the criminal justice systems (see 1.1.3 below). The social change aspect is of particular interest with regard to the prison system and the rehabilitation programmes which are of specific interest in the case study carried out for this work.

1.1.3 Criminal justice

Criminal justice, as an abstract concept, refers to a broad set of laws, policies, processes, procedures, and institutions that are set in motion before, during, and after the commission of a crime (Terrill, 2016). In this respect, anything directly involved in apprehending, prosecuting, defending, sentencing, and punishing those suspected or convicted of (a) criminal offence(s) are part of the criminal justice system. The primary and official institutions of the criminal justice system, however, include the police, prosecution, defence lawyers, courts, and prisons.

With respect to the relationship between state-building and criminal justice, it is important to note that state-building is clearly not just about building or consolidating state institutions and coordinating political processes. It also involves the creation of a commitment or social contract between the state and its citizens, which means formulating and enforcing a set of rules and norms that govern the society. A robust criminal justice system serves as an anchor for the state-society relationship and a means of enforcing the social contract, making it a vital component of state-building (Foucault, 1977).

In relation to the function of prison institutions within the criminal justice system and an important part of the state-building process, it is necessary to look into broader sentencing approaches first, including the 'consequentialist' and 'non-consequentialist' approaches, which tend to justify the act of punishment.⁸ The latter holds that criminal justice systems

8 The origin of this debate relates to the philosophy of punishment and, more specifically, to moral theories of punishment, which serve not only as a basis for justifying, rationalising, and legitimising punishments, but also as benchmarks for evaluating the degree to which a criminal justice system aligns its practices with its objectives (McPherson, 1967; Holth, 2005; Duff, 2016; Terrill, 2016). These theories are beyond the scope of this work, although my references to the relevant literature could be used to obtain further details about them.

possess a responsibility to demonstrate collective social disapproval of crime through retribution, and that punishment is the means to achieve that retribution and consequently achieve justice. However, the former maintains that punishment can only be justified in light of its benefits to offenders and society; for instance, via the rehabilitation or incapacitation of offenders (Duff and Garland, 1994, pp. 1-43).

Whilst prison institutions generally lean towards a consequentialist approach, they can also embrace parts of a non-consequentialist role, depending on the type and modality of the state. In the specific case of Afghanistan, sentencing aims “to regulate general principles of crime and punishment, to ensure the application of the constitution and other laws, to enforce criminal justice and public order, to safeguard the independence and sovereignty of the country, to fight and prevent crime, to discipline and rehabilitate, to ensure respect for human rights and personal freedom, to protect private and intellectual property, to promote accountability, and to compensate victims of crime” (Ministry of Justice, 2017b, Art 3).⁹

Amongst the various elements of sentencing objectives, those intending “to discipline and rehabilitate” and “to fight and prevent crime” relate more directly to the consequentialist function of prison institutions. However, those intending “to enforce criminal justice and public order” and “to compensate victims of crime” pertain to the non-consequentialist function of prison institutions (e.g. retribution). Whilst prison institutions function within the broader criminal justice system and as an important element of the state-building process, they also carry a complex legal mandate that emerged over time and against the backdrop of the three storylines discussed above.

1.1.4 The institution-building explanatory framework

In order to facilitate a deeper understanding of the three storylines in the context of prisons, I have presented a case study at the end of this dissertation which focusses on the rehabilitation component of prison system operation in Pul-e-charkhi (see 1.2 and 1.5 below). For the case study I use the institution-building framework, initially developed by Milton J. Esman (1972) and elaborated further by dozens of scholars, summarised by Blase (1973; 1984). The model assesses and explains government agencies’ performance, as described further below (see Chapter 6, 7, and 8). It has been used extensively to study local government institutions, agriculture, health, and education, in developing countries, including Afghanistan (Otto, 1993;

9 A similar objective is reflected in most of the criminal justice legislation, including the Criminal Procedure Code 2014, the Penal Code of 2017, and the Prisons and Detention Centers Laws of 2005, 2012, and 2020.

Giustozzi, 2004, 2013; Woods and Yousif, 2021). As far as I am aware, the model has never been applied to the study of prison institutions, and this is probably the first time it has been used in the context of prison studies.

In an attempt to operationalise the model for this study, I realised that a modified version of the model used to study the development of administration in Egypt, proposed by Otto (1993), had already dealt with some of the operationalisation issues, lending me a version of the model that was closer to what is needed. In Otto's version of the institution-building model, the main idea is that an institution must fulfil a given task, the quality and the process of which depends on a number of intimately relevant factors.

Those factors include: 1) institutional factors (i.e. internal structure, resources, and leadership); 2) target group factors (i.e. interest, access, reach, and enforcement); and, 3) contextual factors (i.e. geographical, historical, political, legal, socio-cultural, economic, and technological). Then there are institutions, with their own infrastructures, personnel, and resources. Finally, there are processes, which turn tasks into results, feeding into the overall programme and (ultimately) the policy goal concerned. This process of interaction between the institution and its tasks is normally affected by several contextual factors from within and outside of the implementing institution.

In this analysis I use all of the above three sets of factors (i.e. institutional, target group, and contextual), as well as their subordinate properties, although a slight readjustment has been necessary. The readjustment involves replacing 'task' with 'programme'. A task would only refer to a specific assignment that can be divided into sub-tasks of a similar nature; the term cannot be used to describe different types of assignments. I therefore propose using 'programme', as it can embrace the entire prison mission, including several tasks like rehabilitation and incapacitation (see 5.5 below). As institutions may be more effective in certain areas than in others, the proposed adjustment would allow for the inclusion of numerous tasks within one programme category, which would constitute the overall policy goal of the prison system. In this sense, programme conveys "actions related to the performance of functions and services" (Esman, 1972, p. 23).

1.2 RATIONALE – PUL-E-CHARKHI AND REHABILITATION

In light of the background provided above, it was imperative to choose a prison as the unit of analysis and, more specifically, to examine one or more of the programmes within that unit. I selected Pul-e-charkhi and its rehabilitation programme as an example of prison-based intervention in the prison system of Afghanistan. I chose Pul-e-charkhi because it has deep roots in the traditions and history of the Afghan criminal justice system. It therefore has more potential to support a comprehensive account of the practice of imprisonment than any other prison in the country. It is also the largest and most advanced prison in Afghanistan, housing a variety of prisoners from

different social, political, economic, and criminal backgrounds, including many who were initially detained at Bagram Detention Centre.¹⁰

Furthermore, Pul-e-charkhi comes the closest to meeting internationally accepted prison management standards in Afghanistan, although it remains unexplored and under studied. The prison occupies an area of about 225.6 hectares of land, surrounded by a massive wall, with a big steel door (referred to as the 'Black Door') that is the only entrance to the facility. Life in Pul-e-charkhi starts the moment a convict passes through this door. Thus, the Black Door has a powerful connotation for those in captivity, and in their minds it has completely replaced the name Pul-e-charkhi (see 8.2 and 8.3 below). All prisoners, without exception, remember entering Pul-e-charkhi through this door, and this establishes a link with the pains of imprisonment discussed in the work of (Sykes, 1958).¹¹

To this end, another important aspect of this dissertation is that it opens the Black Door to its readers, trying to explain (as much as possible) the prison dynamics and discuss the factors which have helped shape the prison system of Afghanistan in its current (as of 2020) form and structure.

Illustration 1: The Black Door



Photo from public domain (accessed, January 2019)

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- 10 Bagram Detention Center (also known as Parwan Detention Center) used to operate within one of the biggest United States military bases in Afghanistan, known as Bagram Airbase. Over 3,000 inmates were held at the center, many of whom had been arrested on the battlefield or accused of helping anti-government militants (see 3.4 below).
- 11 According to Sykes (1958), the five major pains of imprisonment are triggered by five types of deprivation, including the deprivation of liberty, the deprivation of goods and services, the deprivation of heterosexual relationships, the deprivation of autonomy, and the deprivation of security.

Regarding my choice to analyse rehabilitation within the prison system of Afghanistan, it is necessary first to look at the broader understanding of the term, followed by an explanation of how it fits into this study. Dictionary definitions of 'rehabilitation' may be helpful in understanding it as an abstract concept. According to the Oxford dictionary, rehabilitation means "restoration to a higher moral state". Merriam-Webster dictionary defines rehabilitation as "the action, process, or result of rehabilitating or of being rehabilitated". Accordingly, rehabilitation in the context of prisons involves "the process of restoring someone (such as a criminal) to a useful and constructive place in society".

In essence, rehabilitation encompasses a wide range of concepts related to an improvement in status for objects or human beings. From an etymological perspective, the word rehabilitate is derived from the Medieval Latin 'rehabilitatus' the past participle of 'rehabilitare'. It means, "restoration or the noun of action from the past participle stem of rehabilitare, from [the prefix] 're' meaning again and [the infinitive] 'habitare' meaning to make fit. Its specific use in cases of criminals, addicts, etc. is to restore one's reputation or character in the eyes of others" (Online Etymology Dictionary, 2017).

In the field of penology and criminology 'rehabilitation' refers to a process that is intended to help an individual attain a certain level of improvement. The improvement in question must be considered 'normal', 'healthy' or 'better than before', within a particular value system. Therefore, both the nature of rehabilitation and the process through which rehabilitation is achieved are important factors for its success. Some argue that "rehabilitation according to modern standards can be defined tentatively and broadly as the right to an opportunity to return to (or remain in) the society with an improved chance of being a useful citizen and staying out of prison; the term may also be used to denote the action of state or private institutions in extending this opportunity" (Rotman, 1990, p. 3). Thus, rehabilitation is not limited to restoration to a preexisting condition of adequacy. It can entail the achievement of completely new social or psychological development, or the acquisition of new skills.

Additionally, terms such as "reform, regeneration, correction as well as more modern expressions such as reentry, social reintegration, reeducation, and socialization have all been used to refer to the rehabilitative ideas" (Rotman, 1990, p. 3). However, for the purpose of this work, rehabilitation refers to *the process of leading an offender to a normal life through progression towards a gradual reduction in their criminal inclinations*. Looking at rehabilitation as a prison-based programme allows us to question not only prison-based intervention, but also the spirit of criminal justice, lawmaking, and the overall process of state-building specifically from the following two viewpoints.

First, rehabilitation has featured as a somewhat lofty goal of imprisonment throughout the post-2001 state-building process and the significant overhaul of criminal justice laws in Afghanistan. For example, the Prisons and Detention Centres Laws 2005, 2007, and 2020; the Criminal Procedure Codes 2004, 2008, and 2014; and the Penal Code 2017 all underwent substan-

tial changes during the post-2001 international intervention, state-building, and legal reform process. All the above aimed to integrate advanced criminal justice concepts, such as rehabilitation, conditional release, and alternatives to imprisonment; the reformed laws indeed contain numerous examples of each (see 4.3.3, 4.3.4, and 4.3.5 below).

In general, the reformed criminal justice legislation sets specific goals for prisons, and promises to reform prisoners and decrease recidivism. According to the Prisons and Detention Centres Law (2020), Article 2.4: “the law aims at preparing and correcting prisoners, to abide by the law, to adjust to social and moral standards of living, to participate in beneficial social work, and to prevent recidivism.” The legislation also serves as a baseline for the inclusion of some international standards, including (amongst others) the UN Minimum Standard Rules for Treatment of Prisoners 1955; the International Convention on Civil and Political Rights 1966; and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”) 1984.

However, interestingly, the prison population has grown rapidly since these major reforms were implemented. For example, the prison population of Afghanistan was about 6,000 in 2006, up from 600 in 2001 (UNODC, 2007, p. 5). In 2007, the numbers stood at 12,400 (Johannes van den Brand and Roagna, 2010, p. 54).¹² According to the World Prison Brief, the prison population reached 12,500 in 2008 and 18,283 in 2010. From that point onwards the numbers increased steadily every year, reaching 24,600 in 2012, 26,590 in 2014, and 30,000 in 2017 (World Prison Brief, 2021).¹³ As of 2018 there was a total of 31,130 prisoners across the country, increasing to 31,066 in 2019, and to 36,216 in 2020 (NSIA, 2018, p. 87, 2019, p. 114, 2020, p. 116).¹⁴

12 This period coincided with a number of developments in the process of state-building, including: the first elected presidency; the first National Assembly; changes to the police structure; and shifts in prison system administration between the MoJ and MoI. As the data suggest, there appears to be a correlation between all of these factors and the rate of incarceration, probably resulting from active policing as well as more laws.

13 During my initial fieldwork 2016/2017, I observed daily counts of prisoners at the General Directorate of Prisons and Detention Centers and compiled some statistics. At that time, there were approximately 29,504 inmates, including 10,441 remanded prisoners across the country.

14 It should be noted that the actual population census for Afghanistan dates from 1971, and that there has not been a full population count since then. As a result, the rate of imprisonment reflects estimates that have been recalculated every year by the NSIA, based on the 1971 population census.

As the statistics suggest, the prison population has risen steadily – and tripled in size – since 2001.¹⁵ The elevated national security concerns discussed in (Clear and Austin, 2009; UNAMA, 2019; UNAMA and OHCHR, 2021) provide a possible explanation for this increase. However, an (in)effective prison system might be another plausible explanation, which could be deeply rooted in the history of state-building, and the development of criminal justice institutions and legal reforms, including the post-2001 international interventions.

Second, rehabilitation is widely recognised as a significant part of criminal justice systems, worldwide. Some studies suggest that implementing rehabilitation programmes could result in tangible outcomes (Rotman, 1990; Losel, 1995; Gendreau, 1996; Listwan *et al.*, 2013; Fazel and Wolf, 2015; Johnston, 2016). There are some instances, although these are isolated and country-specific, which suggest that prison-based interventions could result in ideologist hardliners undergoing reform, if appropriate methods are applied and highly skilled professionals, such as Judge Hamood Al-Hitar, are available to administer the methods (see 5.2 below).

It is also important to note that rehabilitation involves different models, and at least four such models dominated prison interventions during the 19th and 20th centuries, including the penitentiary system, therapeutic communities, social learning, and the rights model (Palmer, 1975; Martinson, Palmer and Adams, 1976; Andrews *et al.*, 1990; Wilson, Gallagher and MacKenzie, 2000; Coyle, 2002, 2004; Clear, 2007; Andrews, Bonta and Wormith, 2011). These models, all establish corresponding functions in prison systems, known as ‘prison-based treatment’ or ‘intervention programmes’, which include individual and group activities, ranging from simple tactical functions to complex professional and correctional intervention programmes that are designed and implemented by specialists.

Employing any of these models is (at best) challenging and requires significant financial, infrastructural, and professional resources. Indeed, many countries have implemented various rehabilitation programmes and services that aim to address the underlying causes of criminal behaviour. However, as discussed in this work (see 5.2 below), academics and practitioners) identified several challenges and criticisms of prison-based rehabilitation (Nur and Nguyen, 2022; Van der Meulen and Omstead, 2021;

15 International trends indicate that many other countries are also experiencing an ever increasing prison population, so Afghanistan is not the only example of this. Nevertheless, a comparison of its data with other Asian countries shows that Afghanistan falls into the category of ‘nations with a medium incarceration rate’. According to the World Prison Population Index, Afghanistan ranks 54 amongst 223 countries worldwide, or 19 amongst 31 Asian countries, with a prison population rate of 74 prisoners per 100,000 inhabitants. Likewise, based on World Prison Brief statistics, Afghanistan ranks amongst the top 100 countries with the largest prison population worldwide (World Prison Brief, 2021). Also see the **Prison Studies Database** <https://www.prisonstudies.org/highest-to-lowest/prison-population-total> (Last accessed in December 2021).

Sachitra and Wijewardhana, 2020; Fergus McNeill and Hannah Graham, 2019; Austin, J, 2017; Boone and van Swaaningen 2013; B. S. Brown et al, 2004; and David Farabee, 2005) that one could summarise in the following order:

Lack of effectiveness: some critics argue that prison-based rehabilitation programs are not effective in reducing recidivism rates. They suggest that the high rates of reoffending are evidence that rehabilitation programs are not working.

Limited funding: another criticism of prison-based rehabilitation is that the programs are often underfunded, which can limit the scope and quality of services provided to offenders. This can result in long waiting lists for programs and inadequate support for those who do participate.

Lack of support: many offenders face significant challenges when they are released from prison, such as finding housing, employment, and reconnecting with their families. Some critics argue that prison-based rehabilitation programs do not do enough to address these challenges, which can increase the risk of reoffending.

Inadequate staffing: some critics argue that prison-based rehabilitation programs are understaffed, which can lead to a lack of attention and support for offenders who are trying to change their behavior.

Emphasis on punishment: many critics argue that prison-based rehabilitation programs are too focused on punishment, rather than rehabilitation and reintegration into society. This can create an environment in which offenders feel stigmatised and marginalised, which can make it harder for them to successfully re-enter society.

Lack of tailored approaches: critics also argue that many prison-based rehabilitation programs take a one-size-fits-all approach, which can be ineffective for some offenders. They suggest that more tailored approaches, based on individual needs and circumstances, may be more effective in reducing recidivism.

Overall, it is important for policymakers and practitioners to address these criticisms in order to improve the effectiveness of prison institutions and better support offenders as they try to reintegrate into society. To that end, one becomes curious to know which ones of these sophisticated normative and theoretical suggestions for prison-based rehabilitation are being applied in the case of Afghanistan, how they are selected, and how and to what extent they are working.

1.3 RESEARCH QUESTIONS AND WORKING DEFINITIONS

The three storylines outlined above, and the developments and challenges of the prison system and criminal justice laws discussed below (see 1.5 below), have led me to formulate the research problem or fundamental question of this dissertation, as follows:

How has the legal mandate of the Afghan prison institutions developed in the context of state-building efforts before and after the 2001 international interventions and their repercussions on law-making and criminal justice; and, how and to what extent has the mandate been implemented in the country's largest prison, Pul-e-charkhi, with special reference to rehabilitation?

Whilst this work focusses on law, it views law in the context of and in relation to developments in other relevant fields; and it views the prison institutions as the target of law reform. The dissertation therefore addresses its thematic research areas through these specific questions:

1. How have subsequent regime changes and political ruptures before and after 2001 influenced state-building, lawmaking, and criminal justice, and especially the prison system?
2. To what extent and how has the post-2001 international intervention influenced legislative processes and products, with special reference to criminal justice legislation including the legal mandate of prison institutions?
3. What does rehabilitation as an objective of imprisonment mean, in the Afghan prison system, and how has it been regulated and programmed?
4. To what extent and how did Pul-e-charkhi implement its legal mandate in 2017-2020, and how does it compare with a provincial prison elsewhere in Afghanistan?

A few terms used in the research problem are of a complex nature, so some working definitions are necessary, as follows:

State-building efforts is used to describe all orchestrated attempts, whether physical, financial, or programmatic, to establish or strengthen state institutions.

International intervention is used to describe the interactions and processes directed toward social and political engineering, mainly due to the Bonn Agreement (2001), and any subsequent development programmes that are influenced by the international community and donors.

Legal mandate is used to describe a command or authorisation to act in a particular way on a public issue; in this case, all the key powers and obligations entrusted to the prison administration. The term covers two specific mandates of the prison system in particular: its mandate to limit the freedom of its target population; and, its mandate to rehabilitate its prisoners.

Implementation is used to describe the multiple levels of variables and actions which contribute to the realisation of a mandate assigned by law.

Rehabilitation is used to describe the process of leading an offender towards a normal life, by achieving a gradual reduction in their criminal inclinations.

Prison system is used to describe prison institutions as a whole, whereas individual prisons are always referred to as 'a prison' or 'a prison institution'.

1.4 RESEARCH METHODOLOGY AND LIMITATIONS

The methodological inspiration for this research comes from interdisciplinary socio-legal research, and a mix of qualitative and quantitative methods, including a case study. This combination assists in understanding the research problem in different ways. First, the study investigates the emergence of the Afghan prison system's legal mandate, in the context of state-building efforts before 2001. Here, the socio-legal approach helps to explore (in a structured way) how the laws and regulations governing the prison system have been made in the past, how different social and historical factors have influenced them, how they have been applied, and how they have changed over time. The result of this exploration is vital to understanding how reform actors have perceived and influenced criminal justice regulation and institutions after the 2001 legal reform (see 4.4 below).

Second, the study focusses on how the post-2001 reforms influenced the emergence of the prison system's legal mandate and its implementation in Pul-e-charkhi. In-depth accounts of the relationship between domestic actors and donor-led reform interventions, and understanding prisoners' and prison staff perspectives on imprisonment, as well as the prison programmes and challenges they are facing, form the primary objectives of this study. I mainly use a qualitative semi-structured interview technique, rather than a direct survey method. In addition to providing me with the opportunity to ask follow-up questions and extract comprehensive accounts from respondents, the method provides me with the opportunity to show how lawmakers' assumptions and expectations compare with actual practice.

It is important to note that my research reflects my dual roles as academic researcher and senior government official who has been partly involved in lawmaking, reform, and criminal justice (see footnote 2 above). Having worked at various levels within the government and in the legal sector results in some pros and cons for this research. As for its advantages, I have developed a thorough understanding of both working processes and the various actors involved in all forms of state-building, lawmaking, and criminal justice. This thorough understanding proved beneficial throughout my research, including the data collection processes and analyses of the data.

Due to my work connections I also had access to a wide range of information and contact with a variety of stakeholders, which would have been difficult for an outside researcher to establish. I would like to provide an example of how my connections helped me to penetrate certain bureaucratic barriers. As a general rule, Afghan authorities do not permit easy access to institutions under their control, especially in the military environment, and right of entry is further restricted in prison environments. The Prisons and Detention Centres Law restricts outsider access to prisons, serving as a systematic research barrier.

For instance, the law requires official authorisation from top level bureaucracy, and it is usually challenging to negotiate so high within the hierarchy.¹⁶ This becomes even more complicated when trying to understand prison institutions and their dynamics through the lens of scientific research, which necessitates multiple visits and access to different areas of the prison – in most cases, more than once. My government portfolio and connections, along with experience from Bagram Detention Centre and connections with Kabul Law School and Leiden Law School, proved helpful. It not only helped me secure entry to the prison, I could also set several individual meetings with people like the Chief Justice and other high-ranking officials, who were deeply engaged in post-2001 reform and could genuinely comment on multiple aspects of the reform process.

I believe that incorporating the term ‘rehabilitation’ was another essential element of gaining easy access to prisons and relevant actors. I used the term rehabilitation when introducing the research to prisoners, prison guards, prison management, and other criminal justice officials. As mentioned before, whilst it is usually challenging to access information and reveal untold stories from such highly protected institutions, people feel less threatened and vulnerable when talking about rehabilitation. This is because the presence of rehabilitation programmes (if any) highlights the cheerful side of an institution, making it seem a safer topic for discussion. In this way, the topic allowed smoother access to the institutions, data, and people needed for this research.

Moreover, many of the relevant actors knew my background personally, which encouraged free and open discussion, without any embarrassment, regarding what they knew about the reform and different stakeholders; it also helped to minimise any incentive the actors might have had to be untruthful in their responses. Similarly, for most other respondents, including prison management staff, this was an opportunity to state their concerns and frustrations about the prison system to someone who might help them find solutions that would be in the best interest of the prison population in general. Respondents also felt that they could openly and freely discuss and exchange views on various topics related to this research. This would certainly not have been the case for researchers unfamiliar with the system, because they would have been regarded as outsiders and key actors would have been hesitant in dealing with them. In other words, such researchers are unlikely to receive the kind of reception and open discussion afforded to me.

16 At the time of my fieldwork, the Ministry of Interior was at the forefront. Article 38 of the Prisons and Detention Centers Law (2007) specifies that, “except for prison authorities and staff, no one else is permitted to enter detention centers or prisons without the permission of the Ministry of Interior.”

In addition, my university connections and social status helped me penetrate the prison's socio-legal structure more deeply during my fieldwork and observation across the prison system, particularly in Pul-e-charkhi and Balkh prisons. My academic background played an even more significant role, in this regard. For example, knowing about my criminology background, the majority of the prison personnel openly encouraged me to come and observe their work, or talk to them more often. They tended to openly discuss the prison conditions and its programmes and asked genuine questions, to see if I could propose some workable arrangements they might adopt to develop a better prison programme. They also facilitated proper access to Pul-e-charkhi and other relevant institutions, usually restricted to media, civil society, human rights, and similar portfolios.

In spite of these advantages, my government portfolio and university position also created some challenges involving ethical issues and potential conflicts of interest. Certain actors' perceptions that I might learn about their mistakes were a major challenge, particularly within the Ministry of Justice (MoJ) and the National Prisons Administration. As a result, some potential respondents refused to cooperate, for fear of self-incrimination, or because they felt insecure. There were also instances where my personal experience, gained from attending cabinet meetings, was different to the accounts presented by drafters or other actors; in some cases, I knew the reality much deeper, and from a broader government-level viewpoint, and it was always difficult to resolve such tensions. I generally solved the tensions by triangulating the data and cross-checking with other relevant actors, as suggested in (Bryman, 2016).

As a matter of fact, being an outsider to a research context helps to promote a greater degree of objectivity, which may not be possible for researchers who are insiders. Therefore, to improve objectivity and deal with the challenges illustrated above, I adopted the following measures. First, I assured respondents that any sensitive information they shared would remain anonymous and confidential. Second, I obtained prior and informed consent from each respondent, whilst they were guaranteed the freedom to decline any questions they deemed uncomfortable. Third, I discussed the findings of the study with colleagues and researchers at Kabul Law School, for critique and feedback, and in order to deal with any ethical issues.

At this point I would like to introduce the data used in this study and explain the importance of a qualitative approach. As is argued in (Banakar and Travers, 2005), whilst socio-legal studies involve examining law, jurisprudence, and doctrine, they also include empirical research involving quantitative and qualitative methods. This research is based on literature, laws, regulations, case law, official reports, project documents, strategies, official statistics, and two sets of primary data.¹⁷

17 Additionally, I used a few batches of secondary sources from the GDPDC, the NSIA, the UNODC, the UNAMA, and the CSSP.

The first data set consists of 20 in-depth interviews with Afghan criminal justice professionals and experts, and 20 in-depth interviews with prison management staff. For the earlier category, respondents were pre-selected from scholars and officials involved in lawmaking processes, and in teaching and practising law within the criminal justice system. The interviews aimed to gauge the depth and quality of criminal justice actors' attachment to and comprehension of concepts such as rehabilitation, and to examine the dynamics behind the lawmaking process.

The in-depth interviews of prison management included staff at Pul-e-charkhi prison, Balkh prison, and the General Directorate of Prisons and Detention Centres (GDPDC), which used to serve as the National Prison Administration. The interviews were mainly geared towards a better understanding of the prison officials' views on prison policies as well as systemic and practical matters, such as prison management and rehabilitation programmes. These interviews also examined internal dynamics at Pul-e-charkhi and Balkh prisons, and how rehabilitation is interpreted in prison and at the higher levels of prison management.

The second data set consists of a semi-structured survey of 30 prisoners in Pul-e-charkhi prison and 60 prisoners in Balkh prison. The purpose of the survey was to understand the prison conditions, its programmes, and the level of satisfaction amongst prisoners. Initially, I intended to reach 60 prisoners in each prison, and due to the relatively small sample size, I did not employ a systematic randomisation procedure. Instead, I divided the sample size as evenly as possible amongst all types of prisoners to ensure that responses were diverse, with a mix of age categories, ethnicities, length of sentences, and types of crime.

In addition, I personally administered the survey at Pul-e-charkhi so that I could communicate with the prisoners not only to explain the survey questions, but also to ask additional questions, and to take notes. This method enabled me to gain insight into the motivations, attitudes, and beliefs of prisoners at a deeper level than simply answering survey questions. Thus, it provided me with an opportunity to reflect not only on the survey questions, but also on many qualitative aspects of the prisoners' views. Nevertheless, it also hindered my ability to reach the required number of 60 respondents, so instead I surveyed only 30 prisoners in Pul-e-charkhi.

Whilst I personally administered the survey at Pul-e-charkhi, the prison authorities at Balkh prison strictly asked me to let them handle my questionnaires and data collection directly. I suspected that they wanted to make sure the data comes from selected prisoners, but I did not have a choice to resist their request. So, I insisted on the necessity of selecting random prisoners to ensure unbiased data and to be given a chance to informally chat with several prisoners. Eventually, my conditions were accepted and we had an agreement leading to a data collection process that yielded 60 fully answered questionnaires in one evening. Additionally, I interacted informally with two cell leaders for approximately one hour. I also engaged

in informal discussions with two groups of prisoners consisting of 13 and 8 prisoners for approximately 90 minutes each.

Although with this sample size, one cannot claim full representativeness, due to the data collection technique used in Pul-e-charkhi and sheer number of responses received from both prisons, it quickly became clear that, generally, the data was sufficient and robust enough to draw meaningful conclusions for the purpose of this work. In some cases, however, the written responses also presented challenges due to lack of coherence and/or precision. For example, when I asked the prisoners of Pul-e-charkhi about the quality of food and hygiene, 77% reported that food and hygiene were 'satisfactory'. In reality, however, most prisoners did not consume the prison food, because it was not even close to what locals would consider satisfactory.

As a result of my follow up questions and qualitative investigation with prisoners of Pul-e-charkhi, several factors were identified, which directly contributed to the prisoners' unwillingness to complain about the food. Those included prisoners' concerns regarding their legal proceedings and paper work, which used to remain pending for a considerable period of time as well as an overwhelming sense of apprehension and fear of retaliation from prison guards. Similarly, in the case of Balkh prison, I noticed that the deputy manager of the prison, who had offered to help with the data collection, had encouraged and manipulated some prisoners to answer the questions as per his instructions. As a result, I had to discard (30) questionnaires that were answered almost similarly (several of them had similar penmanship) and all of them contained unrealistic or exaggerated answers.

With these challenges in mind, it is imperative to note that, while quantitative methods may be more reliable elsewhere, prisoners in Afghanistan have many reasons to avoid expressing their views openly in writing, or on record. Thus, as is argued in (Blair, Imai and Lyall, 2014), when trying to capture views through quantitative methods alone, the risk of misleading and unreliable data outcomes is high. To that end, despite the inclusion of some quantitative data in this study, I place greater emphasis on the qualitative aspects and the same follows in most of my analysis.

1.5 THE PRISONS

The information I obtained regarding the prison system and prison-based rehabilitation programmes is grounded in a study of six prisons, which provides an overview of the entire prison system in Afghanistan. I had informal discussions with key informants about prisons in Herat, Kandahar, Kunduz, and Jalalabad, and I visited two prisons in person, to review their programmes including Pul-e-charkhi and Balkh. The following two sub-sections deal with the social constructs and other characteristics of the prisons I visited in person.

1.5.1 Pul-e-charkhi prison

Pul-e-charkhi prison is Afghanistan's central prison, and it is located east of Kabul City.¹⁸ The prison consists of three major zones, including a residential area, an administrative area, and an industrial area. The residential area has 11 buildings, including a wheel and spoke structure at its heart, and it supports facilities around the area and within the prison perimeters (see figure 1).¹⁹ All the residential buildings have three to four floors, and on each floor there are two large extensions. The extensions are located directly opposite one another and are referred to as 'wings'. The wings are protected by cage-like internal structures with solid steel bars, commonly called 'rings'.

Illustration 2: Aerial view of Pul-e-charkhi prison and the surrounding area



Source Wikimedia Commons (Jerome Starkey)

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- 18 The prison lies between Arzanqimat and Pul-e-charkhi, two villages to the east of Kabul City. Arzanqimat is a residential area that is close to Pul-e-charkhi. It is reported that, at the time of the prison's construction, the entire area of Arzanqimat and Pul-e-charkhi were like a desert. There were no residential buildings or signs of life around the prison, except for a distant, less populated village towards Sheena (i.e. another residential area in the Bagrami district of Kabul City). However, at the time of writing, due to internal displacements because of long-lasting armed conflict, the area around the prison is now a populated residential district of Kabul City.
- 19 The capacity and dimensions of each building are as follows: Block One, with capacity for 446 prisoners, is dedicated to substance addicts and prisoners with mental health conditions. Block Two, with capacity for 1,763 prisoners, is used for detainees. Block Three, with capacity for 871 prisoners; Block Four, with capacity for 1,256 prisoners; Block Five, with capacity for 227 prisoners; Block Six, with capacity for 867 prisoners; and Block Seven, with capacity for 909 prisoners, are all used for other prisoners. Block Eight, with capacity for 785 prisoners, is used as a high-security section. Block Admin, with capacity for 76 prisoners, serves as the intake facility of the prison. Some blocks, such as Block 10, were vacant at the time of my fieldwork, because their rooms and wings needed major reconstruction.

In some buildings, the rings serve as prison cells; in others, they are divided into smaller units separated by drywall, and each unit has its own entrance. The prison also has other facilities, such as workshops, meeting and prayer rooms, a small library, an open sports facility, a clinic with a 20-bed inpatient ward, a dental unit, and a pharmacy.

The prison is home to perpetrators of serious crimes from across the country, as well as those whose families live in Kabul. Those in the first category are housed in Pul-e-charkhi, due to its status as the best maximum security prison.²⁰ According to official statistics obtained in 2017, the national prison population then stood at about 29,504 prisoners (10,441 on remand, and 19,063 prisoners). A total of 9,391 prisoners were housed at Pul-e-charkhi, representing 49% of all prisoners in the remaining 33 provinces of Afghanistan, combined.²¹

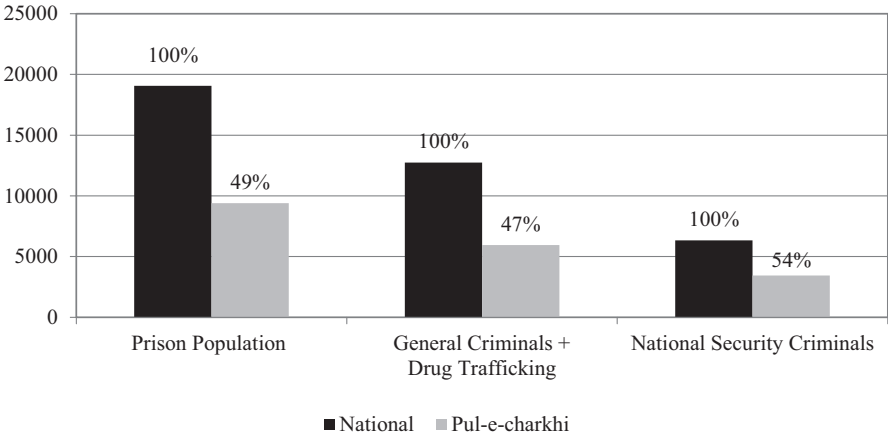
Whilst this shows significant disproportionality between Pul-e-charkhi and all the other Afghan prisons, specific categories of prisoners seem to have been following similar trends. For example, there are 3,441 national security prisoners in Pul-e-charkhi, constituting about 54% of the same category in all the other prisons at national level (i.e. 6,338 prisoners). National security prisoners even outweigh all the other categories of prisoner (i.e. general criminals, and drug trafficking criminals) within Pul-e-charkhi itself, because national security prisoners account for about 37% (or just over one-third) of the prison population.

In a sense, the density of the national security prisoners' category has a strong implication for rehabilitation programmes at Pul-e-charkhi. Since prisoners in this specific category share an insurgent background, they are less likely to qualify for the usual rehabilitation programmes that are aimed at street criminals with moral, financial, and psychological issues. Thus, perhaps more specific intervention programmes targeting counter insurgency and the issue of Islamic fundamentalism are necessary, alongside ordinary rehabilitation. In the absence of such additional/alternative programmes, Pul-e-charkhi would qualify as a prison facility where a significant number of prisoners are not eligible for active rehabilitation programmes.

20 The Prisons and Detention Centers Law 2007 stipulates that incarceration takes place at provincial facilities, in which the prisoners' families reside. This provision basically relates to the concept of resocialization, and easy access for each prisoner to his/her social base, see (Ministry of Justice, 2007, Art 20).

21 When I first visited Pul-e-charkhi in 2016, I gathered daily counts of prisoners, indicating that the prison housed approximately 13,000 prisoners.

Figure 1: Prisoner categories – Pul-e-charkhi v. the national level



1.5.2 Balkh prison

After completing the first leg of my fieldwork in Pul-e-charkhi, a question remained regarding whether other prisons had similar issues at play; I therefore added Balkh prison to my study. Another objective in adding Balkh was to describe, as much as possible, the experience of being imprisoned under poorer conditions than at Pul-e-charkhi. Balkh prison was the best choice for comparison, for the following three reasons. First, although the city of Balkh is the birthplace of ‘Zahak’ prison, Balkh prison itself is different to the horrific Zahak prison (see footnote 5, in 2.3 below).²² Second, the city of Balkh is located in Mazar-e-Sharif, a key province and economic hub for the northern part of the country, which shares borders with three Central Asian countries (i.e. Uzbekistan, Tajikistan, and Turkmenistan). Third, Balkh prison is the main prison in northern Afghanistan. Its age-old continuity, and its perseverance in producing similar results to Pul-e-charkhi make it an interesting case for comparison here.

Balkh prison is less well equipped than Pul-e-charkhi, and almost all its amenities are sub-standard. The prison does not have a dedicated building, and it operates within a compound belonging to the Traffic Police Department of Balkh Province.²³ The facility is a small structure of 35 rooms, each

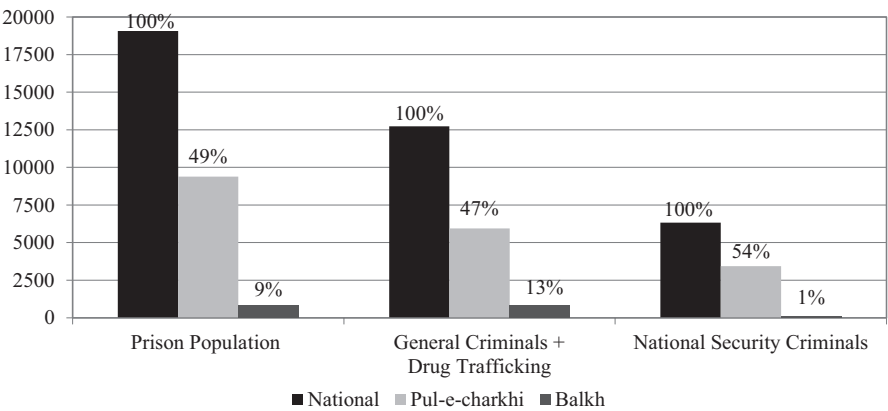
22 See also Azad and Kennedy (2018), which provides an overview of Balkh’s evolution during the pre-modern and early Islamic periods, using archaeological data and relevant research.

23 The Traffic Police Department and its compound are located at the heart of the city of Balkh, closely attached to a residential area in which shops and private houses share walls with parts of the prison. According to the prison authorities, there was a large dedicated area for the prison just outside the city, which was grabbed by land mafia and converted into an illegal township. For this reason, the prison was moved to a location that was not originally designed for incarceration purposes.

with an average dimension of about 6 x 4 metres and accommodating 25-30 prisoners. There are shared bathrooms at the far end of each corridor, which are insufficient for the number of prisoners using them.

At the time of conducting the fieldwork, Balkh prison had a daily head-count of 800 prisoners.²⁴ Balkh hosts about 6% of the overall national prison population. Similarly, within specific prisoner categories, the population of Balkh accounts for 4% of overall general criminals and less than 1% of overall national security prisoners. However, unlike Pul-e-charkhi, where a large group of prisoners have committed national security crimes, over 95% of Balkh's prisoners fall into the general criminals' category.

Figure 2: Balkh prison population v. Pul-e-charkhi and national level



Around 79% of the prisoners in Balkh are illiterate, including 388 prisoners (48%) who declared themselves illiterate at the time of their intake and registration. Just over 20% have been educated up to primary and secondary levels; a few prisoners received tertiary education as well. The majority of prisoners (427, which constitutes about 53% of the Balkh prison population) are aged 18-30. Whilst the 31-50 age group was still significant (295 prisoners, or about 37% of the total prison population) the remainder were 50 or older.

Looking at the length of imprisonment, more than half of the prison population (56%) belongs to the medium or long-term imprisonment group, which falls under the 5-15 years category and mainly relates to crimes such as murder, kidnapping, and armed robbery. Other visible crime categories include adultery (10%), drug trafficking (6%), forgery (3%), corruption (3%), and human trafficking (3%). Other crimes make up the remainder.

24 According to unpublished data produced by reliable sources (including the USAID-funded Correction Centre's Support Program), the population of Balkh prison increased by over 60% over a 5-year period – from 534 prisoners in December 2011, to 804 in July 2016.

1.6 DISSERTATION STRUCTURE

Whilst the current chapter deals with introductory and conceptual matters related to the study, Chapter 2 provides a concise historical background for the rest of the dissertation. Chapter 3 discusses the institutional context of the post-2001 legal reform, and Chapter 4 deals with a case study of major criminal justice laws affected by the reform. Chapter 5 discusses the prison system's legal mandate. Chapters 6 and 7 provide an overview of the prison system's realities, with a focus on the context for and institution of Pul-e-charkhi. Chapter 8 introduces the prisoners of Pul-e-charkhi, along with an assessment of its rehabilitation programmes. Chapter 9 summarises the main findings of the study. Finally, Chapter 10 outlines the post-2020 changes, as well as reflecting on what the system looks like under the Taliban regime.

All the chapters aim to contribute to explaining the three storylines, including the dynamics of state-building, lawmaking, and criminal justice, and the extent to which and how pre-2001 history and post-2001 reform processes have influenced criminal justice laws and prison institutions in Afghanistan. At the very least, I hope that this contribution helps to reduce the literature gap in the evolution of the prison system's legal mandate, and its implementation in the country's largest prison, Pul-e-charkhi.

2 State-building, lawmaking, and criminal justice before and after the 2001 international intervention

2.1 INTRODUCTION

While the main focus of this work is on post-2001 developments, it is self-evident that none of the three storylines I want to explore began in 2001. Therefore, this chapter provides a historical context for *how and to what extent Afghanistan's political ruptures and subsequent regimes, including post-2001, have influenced state-building, lawmaking, criminal justice, and especially prison institutions*. As the chapter looks into the main features of the three storylines within the historical context, it also tries to shed light on key actors and factors, both domestic and international, which are involved in the processes concerned.

2.2 A PERIODISATION OF THE PRE-2001 ERA, POLITICAL RUPTURE, AND SUBSEQUENT REGIMES

It is important to emphasise that conflicts and fragmentation have characterised state-building, law, and order throughout Afghanistan's checkered history. People in Afghanistan are accustomed to a deeply ingrained sense of insecurity and fear. Institutions of all kinds, including the criminal justice and prison institutions, lack a cohesive development pattern. Countless historical instances have occurred in which one institution has grown at the expense of others during one phase, only to suffer dramatic setbacks or undergo significant transformation in subsequent phases.¹

1 A review of the history suggests that state institutions tend to undergo extremely quick and fundamental changes, under the influence of social and political factors. For example, the development of a coherent system and consistency of operation in prison institutions did not follow a cohesive pattern; it kept changing with the political environment. In the system's early stages, prisons were used by autocratic rulers to maintain their coercive power over the people. Later, a westernised modality was adopted, followed by a Russian modality, and then a mix of European and American-oriented systems. It is important to note that each shift has been associated with broad changes across other criminal justice institutions, including the judiciary. Unlike the natural evolution of institutions, changes in this case were often sustained by substantial effort and resources, since institutions tended to revert to their initial state shortly after changes had been implemented. (Please refer to the epilogue, below, for a description of drastic changes in the prison system during the post-2020 period).

Various other factors also contribute to the fragility of state-building, law and order in Afghanistan, including its high levels of poverty and illiteracy, its complex and isolated geographical location, and its intricate conception of national values (resulting from its checkered history). There have always been strong regional and international dynamics in Afghanistan, which create conflicts of interest within the Afghan society, also resulting in political rupture, turmoil, and civil war. These factors affect different areas of life, in different ways, and at a different pace. It is difficult to comprehend the situation from a broader historical standpoint, because, in the words of established Afghan historian, Hassan Kakar (1995), Afghanistan's history has been "long and eventful", which has a dynamic socio-political momentum.²

For this reason, I propose a periodisation of the historical context, based on specific moments of change, which will not only help to focus attention on the most relevant facts but will also facilitate a reasonably accurate description and understanding of the context. I will split the history into two general phases: ancient history, covering the era before the war of independence in 1919; and contemporary history, covering 1919-2021. The division is for convenience only and does not claim to create new historical classifications.

The year 1919 represents a historic moment of change in many ways (including independence), which cannot be ignored when considering developments throughout Afghanistan's history. After this point there are over 100 years of state-building dynamics, including the rule of law, modernisation of state institutions, and general efforts towards development. The era also includes periods of instability, political rupture, and civil war. Therefore, I will divide the latter part of the country's history further, into six distinct phases. Considering the pre-1919 era to be one major period, there are in fact seven historical periods to explore in this chapter.

The first phase is from 1919 until 1932, and is a period of independence and fighting for modernisation. The second phase is from 1933 to 1973, the last decade of which is considered to be the golden age of state-building and development. The third phase, from 1974 until 1977, sees a coup d'état, leading to the emergence of the first republic and a period of political upheaval. The fourth phase, from 1978 until 1991, marks the start of political rupture, a revolution, and a bloody coup d'état, as well as an era of socialist legality.

2 The ebbs and flows of Afghan history are captured in several scholarly works, including (Ghobar, 1978; Kakar, 1995; Barfield, 2010; Ansary, 2012; Dalrymple, 2013; Lee, 2019). However, I have based my work on three of them. Amongst literature written in English, my most cited sources are Barfield (2010) and Ansary (2012); I sometimes refer to other sources as well. When it comes to local literature, I mostly cite Mir Gholam Mohammad Ghobar (1978). His book is called *Afghanistan in the Course of History, Volumes I & II*. (Both volumes are originally written in the Dari language. Volume II of the book, however, has also been translated into English by Hashmat K. Gobar, and was published under ISBN-13: 978-0970796400 in 2011).

The fifth phase, from 1992 to 2001, features further rupture which ushers in an era of Islamic revolution and civil war; an era of fundamentalism and terror follows, along with continuation of the civil war under the first Emirate of the Taliban. The fifth phase also embraces some major shifts in the international sphere, including the collapse of communism and end of the cold war. The final (sixth) phase, from 2001 to 2021, represents an era of international intervention and reform, as well as setbacks which ended with yet another catastrophic political rupture in 2020, leading to the Taliban taking over the country.

2.3 FIGHTS FOR IDENTITY, SELF-DEFENCE, AND STATEHOOD (THE REVOLVING DOOR OF HISTORY)

Contrary to common perceptions about Afghanistan, it is a mineral rich country, sitting at the meeting point between East and West: the crossroads of Central Asia and South Asia. The country has been an integral part of the ancient trade route known as the Silk Road, which ran from the Middle East to Asia and vice-versa, as well as being a passageway from Asia to the Indian subcontinent.³ This combination of hidden wealth and strategic location tended to make Afghanistan an attractive destination for warriors and conquerors from across the world.

To that end, numerous military campaigns have been fought in Afghanistan, from the Persians to the Macedonians and Greeks who came with Alexander, the Muslim Arabs who brought Islam, the Mongols who came with Genghis Khan on their way to Europe, to the British and Russians in the 18th and 19th centuries, and finally, a broader international coalition over the last two decades (i.e. 2001- 2021). Some of the above conquered and ruled the country for a period, but ultimately all faced defeat except for those who brought Islam that not only introduced religious conversion, but also established its own lasting institutions. These institutions provided a framework for spreading the Islamic faith and for providing justice to the newly converted population. Hence, it has been a significant turning point in the country's history bringing with it a new religion, culture, and political order shaping the country's future.

Today, Islam remains the dominant religion in Afghanistan, with the majority of its population following the Sunni school of thoughts. The advent of Islam, however, has been a complex and multi-layered process that took place over several centuries. The early history of Islam in Afghanistan is closely tied, to the Arab conquests of the 7th century when the Arab

3 Afghanistan has always been part of a transport route, due to its geographic location; it shares borders with Turkmenistan, Uzbekistan and Tajikistan, to the north; China, to the northeast; Pakistan, to the east and south; and Iran, to the west. For more information about the Silk Road and how it connected east and west, please see (Omran, 2010; Hiebert, 2016).

armies conquered, in 652 CE, Persia and the eastern province of Khorasan that included parts of today's Afghanistan. The Umayyad and Abbasid, two Islamic dynasties, which ruled over much of the region during 9th and 10th centuries, aided introduction of Islam in the region and played a key role in spreading the religion in Afghanistan.

Initially, the conquerors encountered resistance from the local population, who were predominantly Zoroastrian and Buddhist. However, over time, it began to spread and by the 11th century, Islam had become firmly established in the country and some of its provinces such as Balkh and Ghazni had become centers of Islamic scholarship and culture. The city of Ghazni, in particular, emerged as a major center of Islamic learning, and its ruler Mahmud of Ghazni is remembered for his patronage of the arts and sciences.

Coming back to the numerous military campaigns that have been fought in Afghanistan, in terms of state-building and development processes, they have left a legacy of destruction and disruption. War and self-defense was the country's *modus operandi* for a long period, including a big part of the 19th century. Ancient rulers could not devote sufficient time to building state institutions, putting laws together, and thinking about economic growth, whilst feeling the enemy at their back. Nevertheless, whilst setting up modern state institutions was not a priority for most rulers, some sources argue that (even in that peculiar context) a state structure and judicial system 'under traditional norms and Sharia rules' existed from as early as the post-Islamic conquest.⁴

Those glint of hope was never able to flourish, because the sequence of events kept attracting more and more invaders, some of which deliberately aimed to destroy states as part of their battlefield strategy. A famous example of the latter is the Mongolian ruler, Genghis, who invaded Afghanistan from 1219 to 1222. During this invasion, the Mongolian army massacred people, destroyed institutions, burnt infrastructure, and fiercely suppressed any attempts to restore government for years after the invasion was over. This led to a situation of statelessness and fragility for a long time, until Ahmad Sha Durrani established an independent kingdom in 1747 (Ghobar, 1978, p. 121; Dupree, 1980; Runion, 2007, pp. 44-49).

As a key figure in the Durrani dynasty, Ahmad Sha showed leadership by trying to establish elements of a viable state. He set up a relatively strong state, and soon started to expand his empire to other parts of Asia. He invaded India around eight times and made substantial territorial gains, which shows us the extent of his empire's might and demonstrates the fact that he did not rule by law. Yet, Ghobar (1978) contends that during the Durrani dynasty an early version of the judiciary evolved within the

4 The first signs of a legal system based on Sharia rules are recorded after the Islamic conquest, beginning with the rule of the Saffarid dynasty (861-1003). Later, the Ghaznavid dynasty (977-1163 CE) established a more formalised judicial hierarchy, in which Sharia, traditional norms, and royal decrees governed (Bosworth, 2010).

state structure (1978, pp. 355-359&594-595). In this period, a harsh form of criminal justice was re-established that was based on the Ghaznavid dynasty and its system of punishment (977-1163 CE), especially with regard to the prison system.⁵ There were some famously notorious prisons at the time, in Gardaiz, Mandaish, Jawzjan, Kashmir, Multan, and Ghazni. Wells, dungeons, and other means of isolation were also built on remote mountaintops (Ghobar, 1978, p. 121). According to the literature, the sole purpose of re-establishing a harsh criminal justice system during Ahmad Sha's reign was to control the people and suppress important anti-government figures, either by locking them up or executing them, as directed by the ruler (Kohzad, 2018).

Despite the strength of his empire, the king had to remain mindful of domestic actors, including tribal elders, clergymen, and other activists. In a way, the king owed his crown to the tribal elders, because he had been appointed by a gathering of influential elders; once the gathering had decided, Saber Sha (a respected Sufi) crowned him as king.⁶ This indicates how tribal elders, community leaders, and other religious figures were powerful and closely involved in the state affairs and politics of the era.

On the other hand, regional and international scenes were fraught with political and security-based tensions for most of the 19th century, and up until the turn of the 20th century, which directly threatened state-building, law, and order in Afghanistan. For instance, a political confrontation between the British and Russian empires over territories in Central and South Asia, known as 'the Great Game', coincided with this turbulent part of Afghanistan's state-building history. During most of this period, the British feared the expansion of Russian interests in the region, particularly in India and throughout Central Asia. Equally, the Russians feared the expansion of British interests in the region, leading to a profound sense of suspicion between the two superpowers.

5 Although (as I have argued elsewhere) prison institutions pre-date the Ghaznavid dynasty, they seem to have been the first to set up multiple prisons and use them in a relatively systematic way (Amin, 2017, pp. 243–282). For example, *The King's Epic (Shahnama)*, in Dari language) is an ancient book, written by the famous poet Ferdowsi between 977 and 1010 CE, and it describes a terrible custodial settlement in the ancient Balkh region in northern Afghanistan. Furthermore, Gobar (1978), Abultaqi (2013), and Beek (2004) cite the Zoroastrian sacred book *Avesta*, which refers to Zahak Jail, an unpleasant prison in the aforementioned geographical area, which was controlled by a cruel king called Zahak (1978, p. 37; 2004, p. 31; 2013, p. 116).

6 In 1747 a Loya Jirga was invited to discuss forming a state out of the ashes of Genghis Khan's long-running era of destruction. The Jirga was held in Sher-e-Shorkh (an area in Kandahar province), so it became known as the Sher-e-Shorkh Jirga. After nine days of discussion and debate between the elders, the Jirga decided that Ahmad Sha Durrani would be the new ruler. Saber Sha, a respected Sufi, crowned Durrani by placing a cluster of wheat on his turban. The new king left the Jirga wearing a gold-colored crown made out of a wheat cluster. To that end, clusters of wheat have long been a symbol of national government, in many forms, throughout Afghan history (Ghobar, 1978).

During the course of this period of suspicion, particularly when tensions were running high, the British Empire invaded Afghanistan three times, resulting in three 'Anglo-Afghan' wars. As each of these wars had a significant effect on Afghanistan's internal affairs, a brief description of the wars and their consequences follows. The descriptions highlight the importance of external actors and their impact on the country's international and regional relations, as well as its internal affairs, such as state-building, laws, and criminal justice.

The first Anglo-Afghan war occurred from 1838 to 1842, when the British army invaded Afghanistan. The British conquered the country in 1839, installing Sha Shuja, a pro-British king who ruled for a while. The invasion, which met with resistance from the outset and culminated in a serious uprising against their rule in 1841, led to the complete destruction of the British forces in 1842.⁷ The second Anglo-Afghan war occurred from 1878 to 1880, when the British invaded Afghanistan again, with the hope of excluding Russian influence. This war led to the Treaty of Gandamak (1879), by means of which Britain acquired part of the Afghan territory, including all the frontier border areas between Afghanistan and British India, as well as control over Afghanistan's foreign affairs.

In return, the British offered an annual subsidy, as well as vague assurances of assistance in case of foreign aggression. For this purpose, the British maintained a resident governor in Kabul, Louis Cavagnari, and the army left in May 1879. Only three months later, in September 1879, the Afghan resistance forces executed the British governor and massacred his companions in Kabul. In response, the British returned with more forces, and further campaigns were waged. The British re-captured Kabul, installing Abdulrahman as king, reaffirming the Treaty of Gandamak, and establishing Afghanistan as a buffer zone between the British and Russian empires, then left again.⁸

7 At the height of hostilities, the British decided to leave Afghanistan. They came under attack from Afghan tribesmen on their way out, leading to a bloody war and costly consequences for both sides. On the British side, an army of over 16,000 military personnel and their companions, were killed in action or died of exposure to the harsh weather. The army was led by Major-General Elphinstone, hence history refers to this war as the 'massacre of Elphinstone's army'. According to reports, William Brydon (a surgeon with the British army) was the only survivor left alive to relay information about the incident to British authorities. The cost was even greater on the Afghan side, despite its apparent military victory. The British army was outraged by the massacre, so Afghanistan later paid a high price in blood and tears, putting both its statehood and geographical boundaries in jeopardy.

8 There have been profound and lasting effects on the country, and it has since repeatedly been used as a theatre for proxy wars, including during the Cold War era and thereafter. Despite its recent progress, the country has not been able to escape these effects to this day, and current circumstances suggest that this pattern may continue for many decades to come.

The third Anglo-Afghan war was fought in 1919, after about 40 years of attachment to British subsidies resulting from the second Anglo-Afghan War and the Treaty of Gandamak. The war began with Amir Amanullah's attack on the frontier area that the British had separated from Afghanistan. As a result, Afghanistan entered into the treaty of Rawalpindi with British India and secured its independence. The British ceased to pay the Afghan subsidies and ended their claim to direct Afghan foreign policy. In addition, since the British had traditionally viewed Afghanistan as a buffer state, they imposed the Durand line as a dividing line between Afghanistan and British India, so that the country would remain a buffer state.

It is important to note that between the third and second Anglo-Afghan wars important developments occurred. In the aftermath of the second Anglo-Afghan war, in 1880, Amir Abdurrahman ascended the throne and began to move towards setting up a new state structure, including the legal system, new laws, and a judiciary. The Amir was famous for his pragmatic approach and intense efforts to centralise power, and he gradually asserted authority throughout the country (Pashtoon, 2017, p. 134). Any actions of the Amir in asserting control obviously came at the cost of limiting the reach of local power brokers. Although they were rudimentary and divided, the state structure and reforms implemented at the time continue to influence Afghanistan's state structure and judicial system today, hence it was a very important era for state-building, lawmaking, and criminal justice (Choudhury, 2014, p. 252; Kristina *et al.*, 2017, p. 25).

The sovereignty of the state was believed to be based on divine authority, and the Amir was believed to be its representative on Earth; hence, rebelling against him was a rejection of the divine. On the basis of this philosophy, the Amir consolidated state control over its territory and integrated a robust set of state institutions. The first official police force belonged to this period; reportedly a predatory force, it was used for activities such as tax collection, amongst other things (Pashtoon, 2017, p. 134). Likewise, other state institutions, such as the first robust court system and the first finance and taxation arrangement, also belong to this period. The Amir believed that he laid "the foundation stone of a constitutional government... though the machinery of a representative government had not taken any practical shape yet" (Kakar, 1979; Kristina *et al.*, 2017, p. 73).

On the lawmaking front, Abdulrahman was the first to institutionalise written laws. In his opinion, lawmaking was clearly connected with state-building. He asserted that, the state "exists to bear witness to God amid the darkness of this world, and the function of the government is to act as the executive of the law" (Kristina *et al.*, 2017, p. 75). Examples of lawmaking in this era include the introduction of Sharia and the Hanafi School of Islamic jurisprudence, as well as the creation of the first ever judges' manual (*Asas ul Quzat*), which was the first procedural law to standardise the court procedures of the time.

In the area of criminal justice, the Amir imposed an unprecedentedly harsh system of justice, including prisons, but made two innovations that were fundamentally important, including: the creation of a dual court system and the installation of boxes of justice. The system was composed of Sharia and state courts working in parallel, but with different jurisdictions. The Sharia court was responsible for adjudicating issues related to criminal law, family law, and personal law. The state court adjudicated disputes regarding trade, taxation, and crimes related to government employees. Courts were run by judges (*Qazi*), who also received advice from religious scholars (*Mufti*). The Hanafi School of Islamic jurisprudence and the judges' manual were the governing laws.

The 'justice box' (*Sandooq-e-Adalat*) was another initiative aimed not only at extending access to justice to remote areas, but also at ensuring the state monopoly of power, and at strengthening relations between the centre and periphery of the country. The initiative involved installing large mailboxes in public areas, so that citizens could enclose sealed letters informing the Amir directly of their disputes, and asking for his assistance in resolving them. The mailboxes were taken to Kabul, so that the king could personally open them and read the petitions. The petitioner would then receive a reply through the mail, or in certain cases the petitioner was invited to come to Kabul so that justice could be served in front of the Amir. As a result of this practice, the king was reinforced as the ultimate decision maker of all state affairs, including the judiciary (Martin, 1907).

Prison institutions were particularly harsh during this period. Several notorious prisons, such as the Arg prison, the Sheerpor prison, the Bala Hisar dungeon, and the Kotwali prison came into being under Abdulrahman. According to Martin (1907), in Abdulrahman's era the entire country was a large prison. He maintains that "prisons in Kabul are not buildings erected for the purpose, but any house belonging to the government, which is suitably situated, becomes a prison. The space at disposal in such houses is inadequate to the number of prisoners. ...the prisoners are herded together in a house that has perhaps been used for twenty or thirty years and never cleaned ... typhus and other diseases are common among prisoners. Typhus alone will very often sweep off seventy to eighty per cent of the men confined, and the wonder is that all do not die" (1907, p. 146).

After the death of Abdulrahman, in 1901, his son Habibullah inherited the throne and tried to reform the state, including elements of the harsh criminal justice system introduced by his father. However, he also decided to improve prison conditions and soften the severity of the criminal justice system. For example, after taking power in 1901, he ordered a review of all prisons and prisoners, and only about 120 prisoners were allowed to remain in prisons throughout the country; there was no legal basis for keeping

anyone else, so the king released them.⁹ In addition, the king took drastic measures to amend the dreadful practices of the past, close down some prisons, and discipline officials who had mishandled their responsibilities.

Habibullah was an open minded person, although not necessarily a liberal, he was in favour of reform and liberalisation. An important characteristic of Habibullah's time is that it provided a conducive environment for the formation and strengthening of the constitutionalist movement (*Junbish-e-mashrotyat*), influenced by similar movements in Iran, Turkey, and Egypt. As a matter of fact, during British rule (particularly between 1878 and 1880), there had been exiling and assassinations of noble and knowledgeable Afghans. Those who managed to escape, or were exiled as a result of the British takeover, continued to develop an ideological bond with political movements and influencers in Iran, Turkey, and Egypt. These bonds were the seeds of the constitutionalist movement which formed and grew under Habibullah.

However, the movement was fundamentally unhappy with certain elements within Habibullah's cabinet, as well as with his relationship with Britain; every now and then, the movement raised concerns. Although initially a civil movement, it was decided at some point that pistols were needed for its protection, and this was reported to the king as if some members of the movement intended to assassinate him. As a result, the king tracked down records of their meetings, determined who had weapons, then arrested and executed eight of the movement's members without trial, sending 35 others to prison (Ghobar, 1978, p. 717).

Due to incidents such as those described above, the emergence of a deep political split within the kingdom, and fear of powerful opposition, some notorious prisons were reopened. According to Ghobar (1978), this included Sara-e-Mutee prison in Shorbazar (near downtown Kabul), which was devoted to housing members of the constitutional monarchy movement. The authorities exploited this prison, and others, by using them to gradually eliminate their internal enemies. As a result, the old prison system of management and punishment reappeared.

9 King Habibullah went to the Central Kotwali (the office of the Central City Magistrate) personally and wrote an order in the official prison register in his own handwriting, so that officials could follow it exactly as he intended. This is a translation of the order from the original Dari text: "...effective from today, [November 9, 1912] the 29th of Zealqahda 1330, it is prohibited to take out prisoners' eyes. In lieu of the criminal being blinded he shall serve 12 years in prison. The criminal's ears may not be cut off; instead, six years of imprisonment will be imposed. It is now prohibited to cut off one (or both) hand(s) of a criminal. Ten years of imprisonment shall be imposed in place of cutting off hands. This shall apply only in instances that do not fall under Sharia. Where Sharia provisions apply, the regulation of age-by-age wounds by Qisas [i.e. equivalent to *lex talionis*] may proceed. I have written this order, and with Allah's help I will execute it as well" (Ghobar, 1978, p. 701; Abultaqi, 2013, p. 119).

This was the moment when the constitutionalist movement gained traction, growing into a specific force which pushed hard for modernisation, a constitutional monarchy, individuals' rights, women's rights, and reform. To put this into perspective, giving examples of the personalities active in this movement is helpful, and Mahmood Tarzi is one good example. Tarzi was an Afghan who grew up under the Ottoman empire, where he experienced the effects of reform and returned to Afghanistan in 1911. His daughter, Malika Suraya, married King Amanullah, forming a young couple who questioned a number of the old traditions, including *hijaab* and the education of girls.

In summary, it is important to note that the Islamic conquest played a significant role not just in shaping the country's religious and cultural landscape but also in shaping its laws and the overall system of governance. Yet its practical application has been influenced by a variety of factors, including the country's rugged geography, ethnic diversity, political upheavals, and the influence of neighboring countries. To that end, as in many Islamic countries including Egypt, Indonesia, and Iran, Afghanistan's legal system is characterised by a highly complex blend of legal pluralism, which is composed of three predominantly competing sources, including Sharia, statutory law, and customary law.¹⁰ However, in the area of prison law and criminal procedure law, which is central to this thesis, statutory law prevails. Therefore, this study bears no signs of the abovementioned legal pluralism.

However, a stable state structure did not exist in most parts of the era before 1919. In the rare cases when states did exist, they were rudimentary and divided. Thus, struggles for independence and statehood, as well as a strong state reliance on a mixture of traditional and Sharia law, were hallmarks of the time. In the latter stages, a centralised state structure evolved that ended the revolving door of history, and the influence of regional and international players. Nevertheless, two opposing ideologies and mindsets – of traditional power brokers and modernist reformers – emerged within the country, and began to push against each other. The two opposing ideologies targeted the modernisation of state institutions, laws, and the justice system as priority areas for change.

10 Each of the sources has a different degree of hierarchical power and binding nature across time and geography. For example, statutory laws come first in the court system, followed by the Islamic jurisprudence both of which are inspired by the broader notions of Sharia and sometimes by the customary norms. However, in reality, the customary norms seem to have a higher degree of applicability in rural areas, where a majority of the population lives (MoJ, 2005, p. 12; Center for Policy and Human Development, 2007; Akseer *et al.*, 2018, p. 121).

2.4 FIGHTS BETWEEN TRADITIONALISM AND MODERNITY

In August 1919, King Amanullah championed the war of independence, after which he initiated an ambitious policy of reform and further centralisation of the state authority.¹¹ The king embarked on modernisation of state institutions and significant social change, by introducing new laws, including the first constitution of Afghanistan, which was endorsed by the Loya Jirga of Jalalabad and promulgated in 1923. The 1923 constitution included a number of important features related to state-building, lawmaking, and criminal justice (Ghobar, 1978; Prashad, 2021).

Adoption of the first constitution not only marked the first systematic effort towards state-building, but also established a tradition of constitutional rules and informally obliged subsequent regimes legitimising their power through written constitutions. In fact, after Amanullah, no monarchy dared to rule without a constitution legitimising its authority. The constitution, however, did not provide for a legislature, instead vested all legislative authority in the king; the king was still free to pass laws, issue decrees, and enforce rules as he wished, which meant that power was still centralised to him. This was not appealing to tribal elders and notables, in particular, who had been used to having a great deal of discretion within society.

The spirit of modernisation also brought changes to other areas directly affecting religious leaders. For example, the 1923 constitution added a reference to the “general civil and criminal laws”, together with a reference to the “principles of Sharia”, and it provided that all criminal cases must be adjudicated according to the state and Sharia. Furthermore, the constitution initially restricted *tazeer* punishments to those “stipulated in criminal law”. Thus, in the area of criminal justice, the principle of *nullem crimen sine lege* emerged for the first time in the history of Afghanistan, taking away the discretionary power of the *Qazis* and *muftis*, who used to assign *tazeer* punishments.¹²

It is believed that this was a major reason for the resistance of traditional power brokers to the constitution and the king’s modernisation efforts. These dynamics were even involved in the development of the constitution

11 As discussed in (2.3.1, above), Afghanistan’s war of independence is rather complex, because at the time of the war the country was technically independent, except for in its foreign policy. Therefore, it is important to consider independence within the broader context of ‘the Great Game’. In the aftermath of the second Anglo-Afghan war, and as a result of the treaty of Gandumak, Afghanistan and Britain were able to maintain good relations for almost four decades. However, when Amanullah came to power he felt oppressed by internal strife and a limited scope for foreign policy. Accordingly, he decided to take over the country’s affairs entirely and go against the Gandumak treaty. This led to the third Anglo-Afghan war, also known as ‘the war of independence’, as it led to end the of Britain’s role in managing Afghanistan’s foreign policy.

12 *Nullum crimen sine lege* signifies that there is no crime without law, and that conduct cannot be considered criminal unless it is specifically described in the behavior-circumstance element of criminal statute.

as, according to some sources, “in 1924 a Jirga of *ulama* strenuously objected to this codification of law because in their view it denied them the ability to consider the individual circumstances of the case, as is required by the Sharia. For his part, [Amanullah] argued that the fixed penalties achieved greater deterrence because the criminal knew what the punishment would be ahead of time. Due to general disagreement with the codification of [tazeer] crimes, the constitution was amended shortly after adoption, to allow the *qazi* more flexibility in assigning punishments for a given crime.” (Una *et al.*, 2009, p. 16)

The first Prisons and Detention Centres Law (1923) is amongst the legislature produced during this era.¹³ The proximity between the prison law and Amanullah’s modernisation efforts, as well as the law’s enforcement alongside the constitution of 1923, emphasises the importance of prison institutions to the process of state-building at the time. The law is one of the first in a series of laws known as *Nezam namas*; it is compact and written in classic Dari (one of the two official languages of Afghanistan), but it contains all the basic requirements of a standard prison management system.

One important function of the law was to decrease the number of prisons and detention centres and prohibit an unlimited number of prisons overall. It allows only one prison per province to be used for confinement purposes, and it provides state courts with sole authority to send convicts to prison.¹⁴ In order to control any possible illegal use of prison institutions, prison staff are required to ensure that inmates have a written order from a judge or the *Kotwali* (local police). Failure to apply these provisions would lead to legal proceedings against the prison staff.¹⁵

The legislation not only prohibits the widespread arbitrary use of prisons, it also introduces measures to separate prisons and prisoners, based on the length of sentence a prisoner should be serving.¹⁶ The law also contains provisions about prison-based work and services, such as health and catering.¹⁷ However, these are not connected with concepts such as prisoners’

13 The first Prisons and Detention Centres Law was called, *Nizam nama-e-tawqif khana ha wa mahboos khana ha*, 10th Mizan, 1302 [3rd October 1923].

14 See rule number 10 of the 1923 law.

15 The following is a direct translation into English of rule numbers one and ten of the law: Rule one: “At the centre of each province [*Nayabulhokomagi*], zone [*Hokomat-e-Ahla*] and district [*Hokomat-e-Sayera*] there will be one detention centre. At the centre of each province, zone, and super-eminent municipality there will be one prison. In addition to this, one central prison will be established in the capital city, Kabul.”

Rule ten: “All prisoners and detainees entering a detention centre or prison (including the prison warden) will observe a written document issued by the city magistrate [*kotwal*] or judge, and register themselves in the registration book. Prison and detention centre staff cannot accept prisoners who have not first been officially convicted by the city magistrate or judge’s verdict, and if such a prisoner is admitted to the prison the staff will be punished in accordance with the provisions of the penal code.”

16 See rule numbers 3–6 of the 1923 law.

17 See rule number 18 of the 1923 law, about food and medical services, and rule number 22, about compulsory work during incarceration.

education and rehabilitation, neither of which are mentioned in the law. It is therefore clear that the only official objective of imprisonment is incapacitation, and hence the same is true of the system's fundamental legal mandate at the time.

However, it is important to note that the procedural sophistication provided by the law did not bring about changes in the actual physical condition of the prisons. Some authors maintain that the physical conditions of prison institutions did not show any progress at the time, that the system was predatory, and that prisoners continued to suffer abuse through being beaten and chained to wooden pillars in their prison cells. In sum, there was no sign of any prison-based programmes resembling rehabilitation (Ahrar, 2010).

With regard to the overall criminal justice system, the dual court system of Abdulrahman was maintained and the high court added to it as a final layer of adjudication. The high court was not permanent, and it was focused primarily on cases in which the other courts either had been unable to make a decision or had disputed jurisdiction; yet, it did place a greater emphasis on state courts. In this case, the prominence of state courts came from the fact that many of the crimes codified via decree and state laws were also considered crimes under Sharia. For example, stealing government funds was criminalised by decree, but theft was also a general crime under Sharia. Nearly all cases of this type involved disagreements over the jurisdiction of the two courts and were ultimately brought before the high court. As high court decisions set judicial precedent, subsequent judgements of a similar nature followed the precedent, resulting in a significant decline in the authority of religious courts.

In this way, tribal elders and religious leaders were not only alienated, but the age-old authority and influence they held over their societies and their connection with people's affairs were both fundamentally challenged. The conservative aristocrats, landlords, tribal elders, and clergyman were obviously not happy with all of these reforms because they found themselves in a disadvantageous situation due to the reform. As a natural consequence of losing power, they started to cause trouble in arenas such as social reform and modernization. These were the government's main areas of susceptibility simply because the society has been deeply rooted in traditional beliefs and hence it was particularly easier for tribal elders and the clergyman to provoke people when there were changes in those areas of life. As a result, the king was portrayed as a non-believer, and his reform initiatives were represented as being markedly disrespectful to Islamic and traditional values (Ghobar, 1978; Barfield, 2008, p. 349; Adamec, 2011; Ansary, 2012).

Although King Amanullah tried to convince the disencharnted religious leaders and elders by amending the constitution in 1925, which led to a partial restoration of their powers as well as recognition of the Hanafi School, it was probably already too late. There was opposition at a high level and on several fronts, leading to rebellions against Amanullah and his social

and legal reforms. The mainstream movement (with Islamic inclinations), led by Habibullah Kalakani, gained significant momentum and succeeded in overthrowing King Amanullah in January 1929. Habibullah Kalakani possessed no education, Islamic or otherwise, neither did he have solid social or religious qualifications for leadership of the country; and yet, he ascended the throne and became Amir. He then started to replace the values of the monarchy with his own version of an Islamic Emirate.

Habibullah remained in power for a very short time, and he reversed almost all the modernisation efforts initiated before his reign. For example, he abolished the 1923 constitution (along with its 1925 amendment), eliminated all state taxes, and closed down the education system for girls, because he considered it harmful to society and not Islamic, much as the Taliban did in 1995 and later in 2021 (see 2.8 below). In terms of the history of events, this period represents an interesting moment of change, demonstrating the adverse effects of tension between the elite's desire for modernity and society's preference for traditionalism.

In late 1929, Mohammad Nader deposed Habibullah Kalakani and embarked on a new set of reforms, taking into consideration the lessons learned from King Amanullah's time. As a first step, Mohammad Nader proposed a new constitution in 1932 that introduced Islam and the Hanafi School as the country's official religion. Since the new constitution was modelled on the French, Iranian, and Turkish constitutions, it provided a parliament with two chambers, and carefully restored the power of religious leaders. It was also the first parliament in the history of Afghanistan, hence another big step in the direction of a more inclusive and representative state and a clear example of copying totally new institutions through legal transplantation, see Watson (1993) discussed in (1.1.2 above).

The advent of a parliament meant that the tribal leaders and religious figures regained their share of power, and found themselves in possession of the kind of authority and influence that would otherwise need to be earned via election (Ghobar, 1978).¹⁸ Furthermore, because Sharia returned as a major feature of the 1931 constitution, legislative processes and the legislature itself both had to follow Islamic law and the Hanafi School of Islamic Jurisprudence. Therefore, any state laws passed by parliament were inferior to Sharia law; in a way, this also strengthened the status of the clergy.

The new constitution did not require that criminal offences and penalties must be specified in statute before being imposed. Instead, it allowed Sharia to decide the vast majority of criminal punishments. As a result, adherence to the principle of '*nullem crimen sine lege*' was neglected and courts were allowed to decide criminal cases in accordance with either Sharia or state law, as deemed necessary by the judge. Perhaps, via these changes, Mohammad Nader wished to illustrate his determination to

18 The parliament consisted of two houses, the Upper House (*Majlis-e-Aayan*) and the Lower House (*Shura-e-Milli*). Lower House members were elected for three years, but the king had discretion to appoint members of the Upper House.

remain in touch with the sentiment of the people, and that he intended to take balanced steps towards completing the modernisation process (including economic development).

In this way, the king was able to undo some of the regression that happened just before his rule, although he was not immune to criticism from divergent factions under his rule (Ghobar, 1978). A series of criticisms and hostilities culminated in the king's assassination (by a student from the Hazara ethnic minority) during a graduation ceremony in 1933. As a result of the assassination, Mohammad Nader's 19-year-old son, Mohammad Zaher, ascended the throne.

2.5 THE GOLDEN ERA

Muhammad Zaher ruled from 1933 to 1973, and remained a political figurehead throughout his time in office, assisted by a succession of prime ministers. His role was limited during the first ten years of his reign, when his paternal uncles Mohammad Hashim and Sha Mahmood served as prime ministers and effectively ruled from 1933 to 1946 and from 1946 to 1953, respectively. Thereafter, the king gradually took over the management of his kingdom, but he was still being assisted by Mohammad Daoud and Mohammad Yusuf, who served as prime ministers from 1953 to 1963 and from 1963 to 1965, as well as Mohammad Nur Ahmad Etemadi (from 1966 to 1971) and Mohammad Musa Shafiq (from 1971 to 1973).

The first part of this period essentially continued the policies and initiatives implemented by Mohammad Nader, and contributed greatly to the success of state-building, the rule of law, and (to a certain extent) criminal justice. At the beginning of this period, Mohammad Hashim insisted on building institutions such as schools and hospitals. Nevertheless, motivated by his dictatorial nature, he soon decided to focus on strengthening the armed forces and improving infrastructure, including roads and telecommunications. In his efforts to construct new roads and introduce new technologies, he was able to initiate a few projects, securing the cooperation of Germany, Japan, and Italy, instead of the Soviet Union and the United Kingdom, which had been the usual reference points before 1919 (Ghobar, 1978).

In 1946 Sha Mahmood replaced Mohammad Hashim, which marked the beginning of an era of significant developments for state institutions, including the legislature and judiciary. During this period the first representative parliament was established, with a majority of reform-minded members. For the first time, laws were being passed by a legislature whose members had been elected by the public. Since the newly elected lawmakers were interested in reforming the government, they quickly embarked on major codification projects, including redrafting the 1932 constitution, the first civil code, the first freedom of speech law, and the second Prisons and Detention Centres Law; all of which led to significant developments in the legislative sphere.

The second Prisons and Detention Centres Law was adopted in 1950 and is an almost exact copy of the 1923 law.¹⁹ There are only slight differences in the two laws. Due to a general trend in the legal profession, the official term *Nezam nama* was changed to *Usool nama*, and the official title of the 1923 law was also changed accordingly.²⁰ In addition, minor formatting modifications were made, in order to present the law in both Dari and Pashtu (the two official languages of Afghanistan). However, despite the changes in the prison law, the actual conditions of prisons remained the same as before, and there was no evidence to demonstrate any tangible improvement in prison conditions.

Throughout the first part of Mohammad Zaher's rule, the court system continued to work with the dual state and Sharia court. The period when Mohammad Hashim was prime minister is known to have been tyrannical and suppressive, whereas Sha Mahmood's term was relatively progressive, and Mohammad Daoud continued to pay special attention to the existing constitutional structure, as well as law-making and development projects. However, in all three periods no comprehensive criminal code existed; instead, royal decrees defined crimes and their penalties. Some authors maintain that "despite considerable economic developments, law reform not only slowed down but also regressed to the same normative bifurcation of 30 years earlier. The court system was allowed to apply Sharia in many areas, particularly in civil disputes, which caused so [much] confusions in the relationship between state laws and the Sharia norms as compared to earlier period" (Kamali, 1985, p. 36).

In 1964, Mohammad Zaher assumed control (more independently), and his first order of business was to amend the constitution. The king announced the formation of an advisory commission assisted by "Louis Fauger, a French constitutional expert who wrote the Moroccan constitution" (Kristina *et al.*, 2017, p. 86). Consequently, the country's most progressive and democratic constitution was adopted in 1964, offering a monarchy with a modern legislature, consisting of two chambers, an independent judiciary, and an independent executive, all working under a separation of powers arrangement.

As a result of the new constitution, the sovereignty of the people, and new democratic institutions, a strong central state emerged, which united the country. Every aspect of governance and development, including the economy, flourished and people's freedoms – including civil rights and women's rights – were guaranteed by law. To this end, the period from 1963 to 1973 was a time when the judiciary, legislature and government, as three independent branches of the state, worked together and at their best.

19 The second Prisons and Detention Centres Law was called, *Usool nama-e-tawqif khana ha wa mahboos khana ha*, 16th of Jadi, 1329 [6th January 1951].

20 Both *Nizam nama* and *Usool nama* mean "law", however, the former originates from Turkish and the latter from Egyptian legal terminology.

Laws were drafted by professional drafters at the MoJ and passed by a representative parliament. Whilst Islam continued to be the official religion, for the first time in history it was accepted (through democratic process) that statutory laws were more binding than Sharia. Also for the first time, courts were empowered to perform independent judicial reviews, and to decide the faith of laws and regulations if they did not conform to the constitution.

In terms of the justice system, although historical records present a mixed picture of the situation, there is some evidence testifying to a strong desire for a free and fair justice system. It starts with the unification of the dual courts that continued to dominate the criminal justice system for around half a century. The introduction of a Supreme Court and lower courts operating independently, based on statutory laws, was another hallmark of this period, which in turn is testimony to the fact that the state tried to put together a different (perhaps better) justice system.

A strong representation of the principle of legality in the 1964 constitution and comprehensive criminal law that was inspired by that constitution are other important aspects to consider. However, in practice, these had little effect on the adjudication of criminal cases, because state law still proclaimed that the laws of the *hudud* and *qisas* be prosecuted based on Sharia, and criminal law only had adjudication over *tazeer* crimes. In the specific area of the prison system, there was a secondary regulation (enacted in 1968) for Prison Awards. Its preamble indirectly declares that "... in addition to restoring justice, the main objective of government in punishing criminals and deviants is to reform and prepare them for future resocialisation..."

Another secondary regulation was enacted in 1971, which resulted in the establishment of the first Central Board of Prisons.²¹ The regulation proposed specific prison-based programmes, such as health, education, work, and vocational trainings, mandated jointly to prison administration and other state institutions. By delegating specialised prison services to the relevant state institutions, the regulation not only reduced the burden on the prison system, but also allowed for more fundamental steps to be taken towards upgrading the system's infrastructure. Furthermore, the board mechanism provided a workable coordination platform for prison management and services, which allowed prison system issues to move from a place of isolation to the state-level agenda.

Despite the many positive developments, some authors asserted that, during Amanullah, Mohammad Nader, and Mohammad Zaher (1919-1974), the government paid little or no attention to the physical conditions of prisons. Prison cells were dark, small, and filthy, with no natural light or ventilation. Hygiene conditions were poor, and prisoners were denied their constitutional rights. The most advanced prison of the time was Dehmazang

21 The name and publication date of the bylaw is: *Muqarara-e-tanzim wazaif bord markazi mahbis Afghanistan*, 31st of Hamal, 1350 [30th April 1971].

Central Prison, but people feared it to death because it had poor hygiene, there was no food, and prisoners suffered from insect infestation. According to the literature, almost all the prisoners made large sleeping bags, to protect themselves from insects during the summer months. The bags had zippers on one side, or at the top, and prisoners would get into them and zip them up (Ahrar, 2010, pp. 14-15).

I believe that poor prison conditions were more likely a result of human resources and economic circumstances than the political will of the then government. Historically, most prisons were managed by Kotwals and wardens who brought with them a history of abuse and misconduct, which appears to have been passed down from one generation to the next, eventually becoming institutionalised. However, some individuals believe that prison brutality was an effective strategy for controlling people through intimidation and fear.²²

Nevertheless, during the period 1964-1973 Afghanistan's legal history produced so much progress that many people referred to it as 'the golden era', and since governance, democratic institutions, and civil liberties were guaranteed by the state and the constitution, many more referred to it as 'the decade of democracy'. However, in continuation of the tragic events of the past, the regime experienced persistent social unrest and revolt, inspired by clashes between traditional and modern mindsets. Although most of the tensions were managed through a somewhat workable state institution and centre-periphery relationship, the first political rupture (in the form of a planned military coup d'état) marked the end of this era.

2.6 THE ONE-PARTY REPUBLIC

Mohammad Daoud, the retired prime minister of Afghanistan, was an autocratic character and cousin of the king. He felt that the king lacked leadership, and that his system of government prevented real progressivism, so in 1973 he planned a military coup d'état with the help of his socialist allies. Consequently, the king was removed from power whilst he was away on an official trip. Due to this coup d'état, the monarchy was abolished and replaced by a republican government. Mohammad Daoud proclaimed himself President of the Republic, abrogated the 1964 constitution, and appointed a committee to draft another constitution to articulate the republic's requirements.

22 Abultaqi (2013) argues that as part of the government's intimidation policy certain notorious Kotwals were usually responsible for the management of prisons. A few of the most famous include Tura' baz, Kotwal of Kabul; Abdul Wazir Abadi, a member of Kabul Kotwali; Sarajuddin Gardizi, the warden of Arg Prison; Abdul Qadir Logari, Kotwal of Kandahar Province; Mohammad Yosuf Herati, Kotwal of Farah Province; Nisar Logari, warden of Sarai Moti Prison; and Abul Ghani Gardizi, warden of Qal-e-Bigi Prison (2013, p. 123).

During this period, the change in political regime and overall system philosophy was significant. A new constitution was introduced in 1977, and a number of other laws were passed to accommodate the regime change. The constitution introduced a democratic republic, announced equal rights for men and women, and (for the first time in history) provided all citizens with the right to elect the president. The state formation was intended to be a single party modality, which raised a lot of concern amongst technocrats, notables, and the socialist party, who feared complete monopoly of power at the hands of the president. According to many authors, this was one of the key factors contributing to the eventual removal of Mohammad Daoud from power (see below for further discussion of this event).

Major codification projects of this period included the Criminal Procedure Code 1965 (amended in 1974), the Criminal Code 1976 (amended in 2017), and the Civil Code 1976. All these laws, especially the Criminal Code of 1976, are famous for their quality and comprehensiveness. To this end, one could claim that efforts made during Daoud's presidency were basically efforts towards standardising and completing the criminal justice system introduced in 1964. In this period especial attention was also paid to improving prison conditions, as a result of which Pul-e-charkhi, the largest and most modern prison of the country, was built. Due to the president's precision and thirst for development, other major themes flourishing at the time included the installation of a land reform and redistribution system, nationalization of natural resources, and economic and infrastructure development.

In 1978 the People's Democratic Party (PDP) conducted a military coup d'état, assassinated Mohammad Daoud, and massacred his entire family. It is believed that both internal and external factors contributed to the coup. Mohammad Daoud's autocratic character caused him to tyrannise both his socialist opponents and pro-Russian actors. He reportedly filled the prisons with pro-Russian political opponents. Nevertheless, Daoud's foreign policy played an even greater role, as he actively pressed the issue of the Durand Line with Pakistan and encouraged Pashtuns on the other side to unite against the unjust separation imposed by the British. At the same time, Daoud pursued a non-alignment policy with the superpowers of the Cold War era, by suppressing the socialists in his government and extending Afghanistan's relationships with NATO members, working against the welfare and interests of the Soviet Union.

In summary, this period, although short-lived, contributed greatly to the development of state institutions, laws, justice, infrastructure, and economic development. Focussing particularly on issues such as land reform, the nationalisation of natural resources, women's rights, and the one-party political system, it was ultimately a turning point towards a socialist-oriented state modality. Moreover, this period marks the inception of several political ruptures, upheavals, and subsequent regime changes, which led to a downward trend for state-building, and to long-term misery.

The remainder of this chapter is devoted to the series of events following the fall of the 'First Republic'. It is necessary to remember that the history, developmental paths, belief systems, party politics, and power dynamics in each of the above periods encompass many details beyond the scope of this chapter. Therefore, I will briefly summarise the most pertinent developments below, and refer the reader to other sources for further details (Ghobar, 1978; Amin, 1984; Kakar, 1995; Rashid, 2001, 2010; Goodson, 2001; Kaplan, 2001; Edwards, 2002; Their *et al.*, 2003; Dorronsoro, 2005; Peters, 2009; Barfield, 2010; Sinno, 2011; Ansary, 2012; Ruttig, 2013; Kohzad, 2018; Lee, 2019; Kallie, 2019; Maley, 2020).²³

2.7 SOCIALIST LEGALITY AND THE ONSET OF CIVIL WAR

To recap the above discussion, this period begins with the PDP's coup d'état, followed by the former Soviet Union's invasion of Afghanistan. The PDP was founded by Noor Mohammad Taraki and Babrak Karmal in 1965 and had a leftist orientation. The party's ideology had been somewhat closer to the mainstream reform agenda of Mohammed Daoud, and they helped him to overthrow Muhammad Zaher in 1973. However, following Mohammed Daoud's suppressive policy towards members of the socialist party – to the extent of removing its key members from positions of authority, imprisoning its sympathisers, and allegedly abducting its leaders, in pursuit of the one-party system – and his unfavorable foreign policy towards the Soviets, the PDP summoned its will and overthrew him in 1978.

Following the coup d'état, Noor Mohammad Taraki was President of Afghanistan from 1978 to 1979. During this time, he maintained cordial relations with the Soviets. However, due to his social reform policy and some internal rifts, the government encountered difficulties, and armed resistance was accentuated all over the country. Taking advantage of this opportunity, Hafizullah Amin, a hardliner and prime minister of the government, who was at odds with the Soviets, overthrew Taraki and took office in September 1979.

This was a blow for Afghan-Soviet relations, at the height of the Cold War. The Soviets attempted to stabilise the situation and remove Amin remotely, but they were unsuccessful. The Soviets did not find the state of uncertainty in their relationship with Afghanistan appealing, so they invaded Afghanistan in 1979 and remained there until 1989 (Ansary, 2012). The immediate outcome of the invasion was that the Soviets replaced Amin with Babrak

23 Sources which discuss the Mujahedeen's history include: Olivier Roy, *Islam and Resistance in Afghanistan*, London and New York, 1986; Henry S. Bradsher, *Afghan Communism and Soviet Intervention*, Oxford and New York, 2000; Gilles Dorronsoro, *Revolution Unending: Afghanistan: 1979 to the Present*, London 2005; Kit Spence, *Political Party Assessment Afghanistan*, National Democratic Institute for International Affairs, [Kabul], Spring 2006.

Karmal, who remained in power until 1986.²⁴ However, after about seven years Karmal was regarded as another failure and Mohammad Najibullah replaced him, first as General Secretary of the party, then as its leader, and finally as the President. Najibullah was in power from 1987 to 1991.

The PDP regime and the Soviet invasion introduced revolutionary changes to the entire system of government, including to the state institutions, laws, and criminal justice system. The regime abrogated Mohammad Daoud's constitution and replaced the legislature with a 'Revolutionary Council'. Until the council came into full effect, the government was ruled primarily by decrees issued by the communist politburo, instigating a set of infamous social reforms. Amongst these was decree number seven, in which the marriageable age was lowered to 16 (from 18), women were granted equal rights to men (including in civil and family affairs), and a maximum of 300 Afghans was set as a cap on the amount payable as compensation for the dissolution of a marriage. Likewise, decree number eight (to do with land reform) required that approximately half of the rural land available was redistributed to landless farmers. Finally, the decree concerning literacy, which required illiterate adults to learn to read within one year. All these policies, but particularly the latter, were commonly unpopular in rural areas.

Later, the council rewrote laws and adopted the Foundational Principles of the Democratic Republic of Afghanistan as its *de facto* constitution, which did not recognise Islam as the state religion.²⁵ In addition, an important step in defining the prison system's legal mandate was taken in 1983, with the adoption of the third Prisons and Detention Centres Law.²⁶ Besides being termed *Qanoon*, as opposed to *Nizam nama*, the law encompasses both incapacitation and rehabilitation as legal mandates of the prison system, but the official title of the law reads as 'The Law of Application of Punishment in Prisons and Detention Centres', which emphasises punishment rather than rehabilitation.

The law has 72 articles, which makes it not only a detailed law compared to its predecessors (that had only 27 articles each), but also a law with stronger technical aspects. Whilst the law states rehabilitation as its main objective, it focusses on a few important themes that are deeply relevant to the context in which it was born. The law is mainly geared towards shifting responsibility for prison management from the intelligence service

24 The invasion started with a direct military intervention called 'Operation Storm-333', in December 1979. Historical records suggest that in the first hour of this invasion Hafizullah Amin was assassinated in Tajbeg Palace, Kabul (Dupree, 1979; Galeotti, Stacey and Shumate, 1979).

25 The Foundational Principles of the Democratic Republic of Afghanistan was converted into a constitution in 1987 (i.e. at the end of the PDP regime). The two main changes the 1987 constitution brought about were recognition of Islam as the official religion of the state, and permission for new political parties to register and operate.

26 The third Prisons and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 15th of Jadi, 1361 [6th January 1983].

(known as *Khad*) to the Ministry of the Interior and police. Other major areas of concern include the separation of anti-government criminals from other criminals, the general living conditions of prisons, prison security, the introduction of prison-based (reforming or work) programmes, the proper use of prison equipment, and finally, reward and punishment.

When it comes to the practice of criminal justice, however, the PDP misrepresented its support of justice. Its intelligence service was actually predatory, so the criminal justice system was suffering from a critical disorder. In general, the criminal justice process consisted of three steps, beginning with arrests that were based on the kind of reports that were often fabricated by the PDP intelligence. The individual arrested was then subjected to an interrogation, in order to obtain a confession, and all interrogations typically involved some form of torture. The final stage of most cases was either indefinite imprisonment or execution.

A court system known as the 'Revolutionary Court' was introduced during the later stages of the PDP, but it was seen as nothing more than a layer of bureaucracy in addition to the three steps described above. According to several authors, the court did not disregard a single claim orchestrated by the intelligence agency (Ghobar, 1978; Rostar, 1990; Patman, 1991; Abdulrahimzai, 2009; Ghaznawi, 2010). As for the prison system, the newly constructed prison, Pul-e-charkhi operated in an extra-judicial manner, as a facility for intimidation, obstruction, and torture. Its typical customers were those opposed to communist ideology, irrespective of gender, age, social status, or tribal affiliation (see 6.2.2 below). The prison was particularly brutal in 1978-1979, creating an atrocious image in the public mind (Ghobar, 1978; Kakar, 1995; Ghaznawi, 2010).

In summary, due to the Soviet invasion an oppressive and authoritarian state emerged that lacked popular support. Its laws and justice system were inspired by a socialist legality that further alienated people, and its criminal justice system was brutal, carrying extra judicial prosecution and resulting in an environment of total fear and distrust. Consequently, strong social and military resistance took shape, which ultimately led to the collapse of the government at the hands of the Mujahidin in 1992.

2.8 THE ERA OF CIVIL WARS

Before entering into further details about the specific features of this period, in relation to state-building, lawmaking, and criminal justice, a brief introduction to the term 'Mujahidin' is necessary. Mujahidin is a collective noun, derived from the Arabic word *jihad*, meaning a holy struggle or effort, to exert strength, or to use every means to accomplish a task (with or without fighting). In this way, 'a mujahid' is a person who engages in such a holy effort or struggle. The original concept of jihad can be traced back to the early Islamic period, in 600 CE, when holy fighters tried to disseminate Islam (Meri, 2005; Morgan, 2010, p. 87).

In the context of Afghanistan, the term Mujahidin comes from the same root, but has a slightly different purpose. In this context, Mujahidin refers to Afghan fighters who opposed the expansion of British India during the 19th century (see 2.3 and 2.4 above). They were reshaped in the 1970s and became famous after organising themselves into seven parties, in or around 1979, to form a resistance to the former Soviet Union's invasion of Afghanistan (Barfield, 2010; Ruttig, 2013; Kallie, 2019).²⁷ In the immediate aftermath of the PDP, the Mujahidin factions gathered in Pakistan and reached a power-sharing agreement that led to the formation of an interim Mujahidin government.

In 1992, as the Mujahidin moved to Kabul, a council of religious scholars mostly comprised of pro-jihadi figures elected Burhanuddin Rabbani as president, and endorsed the establishment of the Islamic State by recognising the power-sharing agreement reached in Pakistan.²⁸ However, the Islamic State was a state in name only, and it could barely exercise control over the city of Kabul. Yet, due to their attachment to Islamic ideology and the spirit of victory inspired by the end of their Jihad against the Soviets, the Islamic State decided to erase the entire body of laws that had preceded it, particularly the constitution and other laws enacted by the Soviet-backed PDP regime.

In order to address the legal vacuum, in 1992 the Mujahidin government proposed a draft constitution. The draft suggested a system of government that consisted of three separate institutions: the Presidency, the Leadership Council, and the Jihadi Council. As per the proposed draft, the sovereignty of the state belonged to God, and the Islamic State was formed on the bases of Quranic provisions – in other words, the Quran was the constitution. To that end, the proposed system of government (including the adjudication of disputes) was based on Sharia, with no reference to statutory laws. However, the Mujahidin's proposed constitution never came into force, because the Mujahidin lacked a viable central government.

Instead, state affairs including the military, the courts, and general administration, were left to operate in accordance with the Mujahidin's interpretations of Sharia and their personal preferences. In addition, due to lack of capacity and the inclination towards corruption, self-interest, and

27 The Mujahidin groups were divided into seven parties, which can be grouped into two categories. The first category were political Islamists, including: Hezbi Islami, of the Khalis faction; Hezbi Islami, of the Hekmatyar faction; Professor Burhanuddin Rabbani's Jamiat-e-Islami; and Professor Abdulrab Rasoul Sayyaf's Islamic Union for the Liberation of Afghanistan. The second category were traditionalist factions, including: Peer Said Ahmad Gailani's National Islamic Front for Afghanistan; Professor Sebghtullah Mojaddedi's Afghanistan National Liberation Front; and Mohammad Nabi Mohammad's Revolutionary Islamic Movement (Kaplan, 2001; Ruttig, 2013; Kallie, 2019).

28 The religious scholars council was called *Shura e ahl e hal wa haqd*; for more details about the council see (Kakar, 1997). The term 'Islamic State' is used solely to replace its predecessor, 'The People's Democratic Republic'. It had nothing in common with Da'esh and its Islamic State.

power politics amongst Mujahidin leaders and foot soldiers, a deep sense of public distrust, insecurity, and a wide range of social and ethical divisions emerged within Mujahidin groups, as well as amongst the general population (Barfield, 2010).

The criminal justice system was in particular disarray, because the Mujahidin had denounced the entire body of laws (including criminal justice legislation), but failed to replace them with new laws. In addition, Mujahidin factions used to operate autonomously, with an utterly independent jurisdiction and in complete absence of the rule of law. Nearly all Mujahidin commanders and other warlords were allowed to maintain private prisons throughout the country. The groups' influence determined the capacity of these prisons; for example, the higher the rank of the Mujahidin leader or commander, the larger his prison.

According to a key figure, and respondent in this study, "those facilities were private and operated independently of state laws or anyone's control. The rest, you can guess!" The Mujahidin were unable to establish a single, nationwide justice system. In addition, as soon as they were at odds with the ruling faction (the Jamiat-e-Islami) which controlled parts of Kabul, the Mujahidin fractions fought for control of various regions and areas. It is believed that all of these factors contributed to a situation in which widespread warlordism, abuses of human rights, and criminal activities dominated, intensifying the civil war.

The inability of the Islamic State to find common ground gave rise to the Taliban movement, which took over from the Mujahidin in 1996 and ruled until 2001 (Rashid, 2001). As the Taliban took over the capital, Kabul, the Mujahidin government – led by Burhanuddin Rabbani, the then president – took refuge north of Afghanistan, where they formed a parallel government and resistance front. The resistance front reportedly maintained an anarchic government, running under its own laws and justice system, and with "excessively harsh prisons and detention centres" (Amnesty International, 2003b, p. 5).²⁹

The Taliban had vowed to end the civil war and restore a pure society, in accordance with Islamic principles. Indeed, to some extent that objective was achieved, as the war between the Mujahidin factions ceased, but in exchange, people were deprived of their basic rights. The Taliban established an Islamic Emirate, based on a radical interpretation of Islam. The state operated through a Supreme Shura (working from Kandahar) and a Jahadi Shura (based in Kabul). As a result of the two Shuras, the relevance of official state institutions such as ministries and public services, including the courts and justice system, began to decline.

The Taliban abolished the preceding constitution and the entire body of laws, and hence the entire legal system of Afghanistan. There were no

29 The resistance front not only fought the Taliban, but also allied forces to help the international military overthrow the Taliban in 2001. For this reason, and due to their location north of Afghanistan, they are also known as 'the northern alliance'.

impartial judges and no state laws, and there was no separation of powers. A committee was established within the MoJ, which would either formulate new laws or align the old laws with Quranic provisions; in practice, the committee simply added the term 'Islamic' and the official name of the state (i.e. the Islamic Emirate) to the laws. The committee also made special efforts to combine pieces of related legislation, so that it would be easier to locate them when needed, and this proved to be a useful contribution to the practice of lawmaking.

In terms of content, however, the committee hardly changed anything. For example, the Prisons and Detentions Centres Law was amongst the legislation reviewed and revised by the said committee in 2000, qualifying as the fourth prisons law in the history of Afghanistan.³⁰ A simple comparison of the two texts reveals that the committee only replaced 'Democratic Republic of Afghanistan' with 'Islamic Emirate of Afghanistan', and included 'Islamic' or 'strict application and observation of Islamic standards' in all the laws. The remaining contents stayed the same as in the version enforced by the PDP. For example, Article 2 of the law reads: "...the purpose of applying imprisonment is to reform prisoners so that they can follow Sharia orders properly."

Taliban law was generally interpreted and applied according to an especially strict and fanatical interpretation of Sharia and Hanafi jurisprudence. The Taliban's primary objective was to intimidate and control the population, so they employed all means towards that objective, including the criminal justice system. Therefore, public executions, stoning, and amputations were common punishments. Under the guise of Sharia, they not only applied intimidation and exemplary punishments, but also summary justice and on-the-spot harsh punishments. In many cases, the Taliban's militia-men and religious police were the ones who decided right from wrong and imposed punishments on the spot after perpetrators were arrested.

As a result, the era resonates very closely with what was going on during Abdulrahman in 1880, with a slight difference, in that the Taliban did not rely heavily on prisons. If used at all, prisons were generally for housing hostages, those awaiting punishment, and those convicted of minor crimes.³¹

30 The fourth Prison and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 20th of Jamadi alawal, 1421 [20th August 2000].

31 Under the Taliban certain normal conduct would count as a crime, although an explicit punishment for it might not exist. For example, it was compulsory for all men to grow a beard, wear a hat or turban, and pray in joint sessions. The prayer should always be made immediately after the call for prayer. Thus, not wearing a hat, cutting or shaving the beard, or not attending prayer on time were all crimes. Likewise, women were not allowed to go out unless fully covered and accompanied by a *Mahram* – a close male family member. The Taliban's religious police later banned music, dance, films, flying kites, football, volleyball, boxing, playing chess and card games, and other forms of entertainment. The religious police were part of a powerful establishment called the Ministry of Vice and Virtue, which policed people's behaviours, including (for example) forcing men to attend collective prayers and women to cover themselves from head to toe.

For example, citizens who were not familiar with the correct way to conduct prayers or oblations, were detained for seven days and housed in a small prison-like facility. The facilities were used to teach the prisoner how to conduct prayers, oblations, and the like. At the end of these trainings, the prisoners were required to take a test; if successful, they were permitted to go free, otherwise they were sent to prison for up to four weeks. This process was primarily managed by the Taliban's religious police.

Despite the Taliban's oppressive and tyrannical characteristics, some Afghans supported their system of government. Perhaps this was primarily because many Mujahidin and other groups involved in the suffocating conflict since the early 1990s had been disarmed by the Taliban, ending warlordism and anarchic situations across the country. Physical security improved and the state had control over a substantial portion of its territory as a result. Many people viewed this as a positive development, restored for perhaps the first time in 30 years since the fall of Mohammed Zaher.

However, the overall situation remained unsettled, because the northern alliance still resisted (and carried out armed attacks on) Kabul and other cities; hence, the civil war continued. The Taliban remained in power until October 2001, when an international military operation overthrew them. Afterwards the Taliban retreated to safe sanctuaries, mainly in and beyond the eastern and southern parts of the country, preparing to fight back until returning to power in August 2021 (see the epilogue, below).

2.9 POST-2001 INTERNATIONAL INTERVENTION

In response to the terrorist attack carried-out by Al-Qaeda on the United States of America in September 2001, an international military campaign led by the United States raided the Afghan territory in October 2001 and toppled the Taliban government in November 2001.³² An immediate result of this intervention was a power vacuum, which led prominent Afghans and the international community to gather together in Bonn, Germany, in search of a solution. All the major Afghan actors (excluding the Taliban), including politicians, local elders, and warlords, were invited to participate in the meeting, where they agreed on a road map known as 'the Bonn Agreement'.³³

32 In resolution number 1368, adopted on 12 September 2001, the United Nations Security Council approved the US military intervention in Afghanistan. The resolution strongly condemned the September 11 attacks in the United States, regarding them as threats to international peace and security. In response to the attack, the Council called on all countries to cooperate in bringing the perpetrators, organisers and sponsors to justice.

33 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, or the Bonn Agreement 5 December 2001. The UN Security Council also endorsed the agreement S/2001/1154: <https://www.un.org/press/en/2001/sc7234.doc.htm>. (Last accessed in July 2021).

All the parties to the agreement pledged to help rebuild the state, establish law and order, and work towards economic development, stability, and democracy. In this moment of euphoria, Afghan diaspora returned to the country to take part in the rebuilding process. The Bonn Agreement served as both a political roadmap and a work plan for the initial five years of state-building and development efforts.³⁴ Every step of the process demonstrated progress in a variety of relevant areas, including state-building, law reform, and the development of state institutions, such as prisons and the criminal justice system in general.

About five years after the Bonn Agreement state institutions gained momentum, leading to a somewhat well-functioning state at the conclusion of the process. However, further development work was needed and interventions were therefore justified. The state showed tendencies towards two types of design and implementation method, one that would be independently run by the new government, and one that would be run in conjunction with the state's international partners. As such, when considering the post-2001 development of state-building, lawmaking, and criminal justice in Afghanistan, in the historical period 2001-2020, it is best to divide the era into two phases, which I would like to refer to as the 'Bonn Process' and the 'Post-Bonn Process', respectively.

Other authors have used 'donor-led process' and 'Afghan-led process' or have even divided these into smaller parts, such as 'the self-reliance phase', the 'mutual accountability phase', and the 'transformation decade'. I would like to stick to the earlier classification, because it allows me to include actors and institutions involved in the broader process of reform. It also helps maintain connections to the original sources of reform ideas in their respective phases, without going back and forth between parts of the same process within a smaller time scale.

Ad 1.

The Bonn Process essentially outlined a three-pronged approach for the establishment of a new government in post-Taliban Afghanistan. This included the formation of an Interim Authority, followed by a Transitional Authority, and finally an elected government, all of which was planned to

34 Several studies (academic and otherwise) have discussed different aspects of the Bonn Agreement, including its strengths and weaknesses (Suhrke, Harpviken and Strand, 2004; Jalali, 2006; Sky, 2006; Rubin and Hamidzada, 2007; Fields and Ahmed, 2011; Ponzio, 2011; Afsah and Hilal Guhr, 2019), which I will not discuss in this work. A study by Afsah & Hilal Guhr (2019) examines how the agreement would have yielded better results by bringing together a number of factors and working with realities on the ground, whereas Suhrke et al. (2004) provide a concise summary of the Bonn Agreement and its success during its early stages of implementation. Nevertheless, many analyses overlooked important aspects of the agreement in relation to the three storylines discussed in this work, which is yet another reason for the importance of this section.

happen within the first two years of the Bonn Agreement being declared.³⁵ According to Section I, Article 2 of the Bonn Agreement, the Interim Authority consisted of the following three institutions:

- A) The Interim Administration: As the highest authority in the country's bureaucracy, this was the first and the most important institution in the aftermath of the Taliban. The administration had a chairperson and five deputies, as well as 24 members who headed different departments; they were all selected and agreed upon during the Bonn conference. As soon as it was appointed the administration assumed all government responsibilities, not just inside the country, but also with regard to its international relations – as the repository of Afghan sovereignty. It also occupied Afghanistan's seat at the United Nations.
- B) The Supreme Court: This was the second institution of the interim authority. Although the proposed Supreme Court clearly intended to help with and oversee the justice system, (unlike the interim administration) its leadership and other members were not defined in the agreement. On the other hand, the agreement's reference to the 1964 constitution as the temporary legal framework implied that the supreme court of that time would also be reactivated. Nevertheless, in reality it was not possible to activate (or reactivate) the court system within a short period of time, so the interim administration's chairman controlled everything, including the judiciary.
- C) The Special Commission for the convention of the Emergency Loya Jirga (ELJ): Another vital institution intended to facilitate the formation of the 'Transitional Authority' through a broad consultation, using the traditional 'Jirga' mechanism. Just as with the Supreme Court, the leadership and members of the commission were to be selected later, via a series of consultations between Afghans under the supervision of the UN.

The commission managed to convene a Jirga that included about 2,000 delegates (it was planned for 1,450 delegates) from June 11th to June 19th 2002 (Singh, 2002). In spite of some deadlocks at the start of the Loya Jirga, the planned election took place and Hamid Karzai was elected president with an overwhelming majority. The new president was also required to introduce his cabinet and receive a vote of confidence from the Loya Jirga. Accordingly, Karzai announced the names of 14 ministers and vice presidents, for whom the Loya Jirga voted, and the cabinet was also approved.

Eventually, as the second step in the Bonn Process, the Interim Authority installed its own replacement (i.e. the Transitional Authority). As initially outlined in the Bonn Agreement, it took the Transitional Administration two

35 The Interim Authority was a temporary government, assigned to help with the transfer of power to a transitional government (from the Mujahidin, who temporarily took over in the immediate aftermath of 2001) and fill the power vacuum created by the overthrow of the Taliban.

years to prepare for the third and last phase of the Bonn Process and introduce an elected government. Nonetheless, the Transitional Authority had several important tasks before that, including drafting a constitution and overseeing other reform processes, including reform of the justice sector. Altogether, these constituted a blueprint for the construction of an overall state structure, with presidential and National Assembly elections forming the final step in the Bonn Process.

Although each of these activities involved some roadblocks, interruptions, and arrests, they were ultimately successful, in a broad sense. At a more technical level, however, all the processes and interventions featured deviation, setbacks, and (in general) a great deal of the information I will cover in subsequent chapters. For example, following an admittedly arduous and troubled process a constitution was adopted in 2004, which ended up being a moderate success in the broader sense, because it allowed the overall process of state-building to move forwards in a relatively positive direction, after all the years of instability and civil war.

A significant overhaul of the legal sector was also a hallmark of this era, including the establishment of a Judicial Reform Commission (JRC) (see 3.2.5 below), and the enactment of laws such as the 2004 Interim Criminal Procedure Code (see 4.3.2 below) and the 2005 Prisons and Detention Centres Law (see 4.3.5 below). Thus, before drawing conclusions on the basis of this section alone, it is best to refer to the relevant sections below.

The last step in the Bonn Process included the 2004 presidential election and the 2005 national assembly election, resulting in two groundbreaking outcomes: with it the first ever president elected with popular support, and a representative legislature being installed after a very long period of arrest. This is not to say that the election outcomes were perfect; on the contrary, the outcomes were very troubled processes (Morgan, 2007; Smith, 2011). Nevertheless, looking at the elections in a broader sense, they did contribute to the success of state-building, law and order in a country that had just emerged from decades of civil war. I am inclined to call this success moderate as well, because it instigated a timeframe which entailed that the process of state-building was lengthy and challenging.

The Bonn Process was officially ended by the Afghan President's statement at the inauguration of the new national assembly in December 2005. The statement concluded that 'Afghanistan, with military and financial aid from the international community, successfully met all benchmarks of the Bonn Agreement. Thus, the process officially ends but Afghanistan has a long way to go before it becomes a self-governing state with functioning institutions.'³⁶

36 From President Hamid Karzai's speech on the historic occasion of inauguration of the first elected legislature since 1969.

Ad 2.

The Post-Bonn Process was essentially a continuation of the preceding stage, although the role of international actors gradually declined, in favour of putting domestic actors in the so-called 'driving seat'; the Bonn Process was both the cause and effect of this. It was the cause, since over the course of the process many of the state institutions grew into fully functional entities that could plan and implement their development agenda independently, or with minimal assistance. It was an effect, since in many cases reform failures were attributed to their donor-driven nature. Although, the need to change previous approaches to development eventually became apparent, leading to the development of more domestically-led substitutes, such as the partnership approach.

The partnership approach (2006-2007) reduced the international community's role in setting priorities for Afghanistan. With this in mind, the 2006 London Conference endorsed a new roadmap, known as 'the Afghanistan Compact', which proposed a reform agenda that would strengthen Afghan leadership with the support of the international community (see 3.3.1 below). The compact aimed to guide efforts towards state-building in a coordinated manner, in partnership with the Afghan government (UN Security Council, 2006).³⁷ Whilst this stage brought some changes to the donor-driven approach, it also had many shortcomings for a comprehensive reform programme, given Afghanistan's conflict-affected situation (Naylor, 2011).

Consequently, the Afghan ownership phase (2007-2012) replaced the partnership phase. The ownership mechanism recommended that the Afghan government set priorities and establish partnerships with the international community. This led to formulation of the Afghanistan National Development Strategy (ANDS), after which the National Priority Plans (NPP) were developed, both of which served as new reform frameworks. However, it should be noted that previous mistakes had already sparked a blame game between the Afghan government and the international community, and the newly formed partnership was not immune from these effects. As Thiessen (2013) argued, "for each argument related to Afghan ownership there exists a valid counter-argument that is another piece to the overall puzzle." (2013, p. 70).

In the blame game that ensued, questions were raised as to who was ultimately responsible for delivering agreed-upon commitments, and this led to the development of the mutual accountability frameworks (2012-2014) as the next strategy for overcoming reform effort failure. The Tokyo Mutual Accountability Framework (TMAF), named after a 2012 meeting held in Tokyo, was the first in a series of similar frameworks. Consequently, the Afghan government and its international partners heralded 'the Transformation Decade' (2015-2024), which was focussed on securing aid flow in the context of promising a radical shift from aid dependence to a self-sustaining situation (see 3.3 below).

³⁷ Also see (UN Security Council, 2006).

Indeed, the Transformation Decade was meant to be part of an exit strategy for the international military.³⁸ However, in 2019 some of the US policy makers simultaneously launched the *Doha Process* and set in motion negotiations for peace and power-sharing with the Taliban, after nearly twenty years of staunchly fighting them. The Afghan government was not involved in the negotiations, but a special US envoy kept them informed via briefings of the process. The process quickly gained momentum, resulting in a peace agreement between the international community and the Taliban representatives, entitled *The Agreement for Bringing Peace to Afghanistan*, which was signed in Doha, Qatar, in February 2020.³⁹

As part of the agreement, which was designed to end the war in Afghanistan, the international military forces were to withdraw from Afghanistan in exchange for the Taliban's commitment that terrorist groups would not be allowed to operate on the Afghan soil. As an additional confidence-building measure, and condition for resuming intra-Afghan negotiations, the international community committed to releasing the military and political prisoners, who were formerly part of the Taliban, from Afghan prisons; although unilaterally, and without coordination with the government of Afghanistan. In its resolution S/RES/2513 of March 2020, the United Nations Security Council endorsed *The Agreement for Bringing Peace to Afghanistan*, calling for its full and expedited implementation, in order to end the long-lasting state of war in the country (Farr, 2020, p. 1).

However, as the Afghan government was neither party to the negotiation, nor a signatory of the agreement, it became increasingly resentful of how the peace process was progressing. The government felt excluded from discussions and necessary arrangements regarding the future of its own country, resulting in intense conflicts between Kabul and its international partners, particularly Washington. Consequently, the government's control was impaired, due to the internal split within the administration (including the ANSF) resulting from confusion and (possibly) hidden agendas. In the end, the government collapsed in mid-August 2021, and the Taliban regained control of the country (see the epilogue, below).

According to my assessment of events, the Doha Process disrupted a smooth transition of the Transformation Decade and returned the country to its pre-2001 state of affairs. It would therefore be imprudent to categorise the drawdown in state-building as either a miscalculation or an unintended consequence of reform interventions. It is also imperative to note that marking it as a deliberate set of actions geared towards deterioration of the situation would also be unreasonable. In order to understand what went wrong, it is essential to examine specific areas of intervention in full, through the lens of 'insider information', and by using a comprehensive and multi-dimensional research methodology.

38 For more information about the exit strategy see (Fearon and Laitin, 2004).

39 For a public copy of the agreement see: *Agreement for Bringing Peace to Afghanistan* (Last accessed in June 2021).

2.10 CONCLUSION

In spite of Afghanistan's long history, the first thread of viable state-building effort dates back to the middle of the eighteenth century, under Ahmad Shah Durrani, the founder of an expansionist dynasty that lasted from 1747 to 1772. Later, Afghanistan became a scapegoat for the Great Game, three Anglo-Afghan wars were fought in the process and ultimately Afghanistan became a buffer state between the British and Russian empires. After the war of independence in 1919, the country gradually stepped towards modernisation of its state and institutions, as well as of its culture and society.

The country experienced serious turbulence under the influence of a number of domestic and foreign factors, including conflicts between modern and traditional mindsets, and a prevailing regional power dynamic. However, it enjoyed its longest period of relative peace and stability from the 1940s until 1970, with the latter decade being a golden time in numerous arenas, including in state-building, the rule of law, and justice. After 1970, there were dynamic changes in the process of state-building, law, and order, which are best defined by terms such as 'checkered history', 'ruptures', and 'subsequent regimes'.

From this point onwards, the flow of developments slowed down, halted, and even changed direction towards deterioration, culminating in a regime change in 1973. In 1979 Soviet occupation led to decades of instability and a downward path in state-building, the rule of law, and order. This was followed by political ruptures, further regime changes, and rapid transition from a republic to a socialist one-party system, then to an Islamic state, followed by an extremist Islamic Emirate, a western type democracy, and finally back to an Islamic Emirate in 2021 (for the latter event, see the epilogue, below).

Except for Afghanistan's short golden era, the common characteristics of the latter part of its history are successive state failures, the deterioration of law and order, civil war, and instability. These factors have allowed very little time for most ruling governments to plan for development and think about good governance. As is commonly understood amongst most Afghans, the country has experienced the impact of external interventions and changes to its state structure, including its political system and state institutions, at a frequency which matches how often other nations would normally hold their national elections.

As a matter of fact, there is a side to Afghanistan's history, involving conservative aristocrats, landlords, tribal elders, and clergyman, which is often overlooked by analyses. These groups typically respond harshly to development, and create blocks ahead of any attempts to change direction, because changes in any direction would eventually threaten their power bases. The brief account presented above is testimony to the fact that Afghanistan has been caught up between such opposing historical blocks. For example, all reform attempts – no matter how large or small, modern or traditional, national or foreign they were – have met with opposition that was initially weak but which gradually grew into a block.

Amanullah's modernisation was prevented, because some people thought it was against tradition and Islam. In the latter part of the twentieth century, the communist-oriented PDP completely undid all the achievements of the golden era, because the era was too royalist and religious for them; yet, their government collapsed as the Russians left Afghanistan. In the mid-1990s the Taliban reinstated a pre-1919 Islamic arrangement that was fundamentalist and traditional. The arrangement was erased by post-2001 state-building and democratisation efforts, which ruptured back to a fundamentalist Islamic arrangement only weeks after the international presence had left Afghanistan.

This account of Afghanistan's history teaches us two lessons.

First, one must always pay attention to the deep social dynamics that exist as two broad historical blocks defining the social structure. One of the historic blocks saw the future as change, modernisation, and liberalisation, wanting to advance towards better social conditions. However, the other historical block saw the future in the past, thinking it would be better to return to the past and live there forever. Both of the blocks contained a variety of characters, including progressive reformers and fanatical hardliners of different ideologies.

Internal dynamics and their effect on state institutions reveal that the ethnolinguistic nature of society calls for a broad-based consensus between all Afghans, which has never been achieved due to the historical blocks. The resistance to Amanullah's modernisation efforts and the Taliban's Islamisation initiatives are excellent examples, showing that people will resist when forced to follow practices or beliefs, whether modern or Islamised, that are different from their own traditional views. None of the governments compelled society to follow purely traditional practices, either by way of regulations or by other official means. However, if this were ever to occur, I believe the people would resist, because not all Afghans believe in a single tradition that is acceptable for everyone.

Second, other factors that played a significant role in Afghanistan's checkered development included: troubling geographical boundaries, imposed by colonial powers; poor state institutions; a lack of resources, including professional human resources and leadership; and, a lack of synergy in almost all state-building and development interventions across history. With every new intervention came new sets of rules and regulations, as well as short-lived and concurrent governments, which attempted to impose new regulations on inconsistent and fragmented structures. This seemed to have the most significant impact on state-building, in terms of making it fail. Throughout history, international intervention in Afghanistan has not only proved ineffective in terms of improving these conditions, it has also discouraged the growth of national institutions.

For example, over time, the financing schemes for the 'Great Game', the 'Cold War', and the recent 'Global War on Terror' have not only intensified hostilities between the domestic historical blocks, they have also prevented growth in domestic taxation, trade, and other financial structures. In the

absence of these financial aspects, statesmen have nevertheless needed to pay a lot of attention to them. Additionally, the moment the schemes ceased to exist, the country experienced a crisis that was worse than before, as evidenced by the severe humanitarian crisis the country has been experiencing since August 2021, due to a sharp reduction in international aid and the Taliban takeover (for an exploration of the latter event, please see the epilogue, below).

3.1 INTRODUCTION

This chapter provides an overview and assessment of the post-2001 institutional context. Its main focus is on exploring *how and to what extent the post-2001 international interventions influenced state institutions, legislative processes and legislative products, with special reference to criminal justice legislation*. As discussed above, the post-2001 international intervention broadly addressed various reform and development challenges, needs, and technical matters, in two phases: 2001-2005 (the 'Bonn Process'), and 2006-2021 (the 'Post-Bonn Process').

Initially, the Bonn Agreement served as inspiration for the reform, and several commissions, international conferences, and temporary institutions were set up to help with agenda setting, implementation, and follow-up. The Constitutional Drafting Commission, and the JRC (summarised below) were amongst the temporary institutions relevant to this work. In addition, over the course of the Bonn Process and beyond, a series of conferences were held so that key actors, the Afghan government, and its international supporters, could stay informed and adjust their interventions as necessary.

The most relevant of the conferences were Tokyo 2002, London 2006, Rome 2007, Tokyo 2012, and Tokyo 2014, which are discussed briefly below.¹ Almost all the conferences concerning post-2001 international interventions in Afghanistan prompted funding commitments for different areas of reform. Additional conference by-products included implementation and oversight institutions, such as management bodies, commissions, working groups, and programme implementation units. Before going into further details about the Constitutional Drafting Commission and the JRC, two clarifications are necessary.

1 There were several other conferences with similar general or intervention objectives in other specific areas. A few such important ones were Berlin 2004, Paris 2008, Moscow 2009, The Hague 2009, London 2009, London 2011, Bonn 2011, London 2014, Brussels 2016, Geneva 2020, and Doha 2020, and the full list and specific details for each can be found at: <http://policymof.gov.af/home/category/conferences>, (Last accessed in June 2021).

First, the overviews I will provide below are self-explanatory, but I would like to point out that they primarily aim to clarify which institutions existed and how they functioned during the post-2001 reform. I do not claim to have analysed them exhaustively, neither do I ascribe to those approaches any credit for successes or responsibility for failures.

Second, having used the term ‘temporary institutions’, I would like to clarify that the official administrative structure of the state is made up of recognisable permanent entities, which include centralised ministries and general directorates, and subordinate technical and administrative institutions at the provincial and district levels. These entities have been established based on specific criteria that have been outlined in the constitution and in ordinary laws throughout history.² As a result, they carry a wealth of institutional memory and clearly defined linkages with other official structures across the government.

For instance, in the criminal justice sector, permanent institutions include the Supreme Court, the MoJ, the police or the Ministry of Interior (MoI), the Attorney General’s Office (AGO), the prison system, and the Afghan Independent Bar Association (AIBA).³ Due to post-2001 reform, these permanent institutions (and many other state institutions) were supposedly ‘reinforced’ with donor-imposed temporary institutions that performed better for the donors than for their host, and which sometimes exceeded their authority, causing tensions to arise. In addition, most donors preferred to work with the temporary institutions rather than the permanent governmental bodies, which they viewed as ineffective, corrupt, and outdated. As temporary institutions were seen as subject to a lot of donor influence, any tensions and misunderstandings resulting from this were also attributed to donor intervention.

2 For example, Article 136 of the 2004 Constitution provides that: “administration of the Islamic Republic of Afghanistan is based on central government units and local offices, and shall be regulated according to the law. Central administration shall be divided into several administrative units, each headed by a minister. The local administrative unit shall be the province. The number, area, divisions and organisation of provinces, as well as the number of related offices, shall be regulated on the basis of population, social, and economic conditions, as well as geographical location.”

3 Although a somewhat vague practice of defence law existed previously within the MoJ’s structure, an AIBA was established in 2008, for the first time in the history of Afghanistan. Its source of legitimacy dates back to a 2007 defence lawyer’s law, published in Official Gazette 934 of December 2007.

As further clarification, the police are a part of the MoI, which is a military institution. In addition, the police are traditionally involved in criminal investigation and law enforcement, and particularly in prison management.

3.2 THE BONN PROCESS: TOWARDS REFORM AND REBUILDING (2001–2005)

Most studies looking at early post-2001 reform, particularly those viewing it with scepticism, emphasise flawed calculations, a lack of donor coordination, and heavy international engagement in reform initiatives as significant challenges which hindered the development of domestic institutions. Moreover, it is usually argued that the Bonn Agreement led to a process dominated by donors, and the term ‘donor-led process’ was born out of these discussions (Suhrke, Harpviken and Strand, 2004; Jalali, 2006; Sky, 2006; Rubin and Hamidzada, 2007; Tondini, 2009; Fields and Ahmed, 2011; Jupp, 2013).

In general, I believe that the term ‘donor-led’ has been adopted to contrast with the term ‘domestic-led’, but neither concept is well-defined, as the terms are often used in relation to politics, resources, *and* technical characteristics. In a fragile situation featuring weak domestic institutions, like in Afghanistan, ‘leading’ can take several forms, ranging from policy-level instructions to interventions such as direct operations, joint operations, funding conditionality, oversight, and technical assistance. It is safe to say that one or more of these ‘leading approaches’ were present in all the reform interventions undertaken after 2001.

The ‘lead donor’ approach, introduced at the Tokyo Conference in 2002, represents a clear example of donor-driven tendencies during the early reform years. A similar trend was followed by the Afghanistan Compact of 2006, the TMAF 2012, and the Geneva Mutual Accountability Framework (GMAF) of 2020. All of these initiatives installed parallel sets of project oriented and temporary institutions that played a role in the reform process. The institutions resided and functioned within the state bureaucracy, but they were highly dependent on their donors and sources of funding.

Therefore, throughout the post-2001 interventions, there has always been a very fine line between direct donor influence and influence via sets of donor-imposed temporary institutions, and even more so during the Bonn Process. For this reason, the remainder of this section deals with the institutional context throughout the ‘Bonn Process’, through the lens of the three storylines mentioned earlier: state-building, lawmaking, and criminal justice. First, the constitution-making process and resulting institutional arrangements are outlined, as part of state-building efforts. Afterwards, the relevant judicial reform measures and their consequences for prison institutions and prison regulations are discussed.

3.2.1 The new Constitution: problems and dilemmas with the drafting and reviewing phases

Whilst the Bonn Agreement mandated the government to adopt a new constitution within 18 months of its establishment, it also suggested that the 1964 constitution should serve as a transitional legal framework until

adoption of the new constitution.⁴ The 1964 Constitution, as a piece of technically mature and democratic legislation, contained specific provisions regarding amendments that were the technically correct way to repeal all or part of the governing constitution. In the midst of the reform process, however, the 1964 Constitution was disregarded in favour of a completely new constitution-making process, as recommended by another part of the Bonn Agreement. The new process involved three interconnected steps: drafting (*tasweed*), reviewing (*tadqeeq*), and adopting (*tasweeb*).⁵

The drafting phase: The process began with a dilemma over how to hire a balanced combination of legal scholars, jurists, and others to form the Drafting Commission. Ultimately, a commission consisting of nine legal scholars, jurists, and other Afghans was established through a presidential decree in October 2002. In terms of its composition, most members were drawn from a pool of Afghan scholars, who taught or studied law at the faculties of Sharia in Kabul University and Al-Azhar University, from those who taught or studied positive law in Western nations (in particular in the United States), and from educated Jihadi leaders.

However, only two members represented positive law and liberal ideology, and they were reportedly appointed to the commission due to their legal qualifications alone. To this end, members with Islamic backgrounds outweighed those with liberal inclinations, even though the liberals were technically stronger. From the moment it was established, the commission was therefore divided between Afghans who were known to be Western-oriented technocrats, and those known to be Islamic-oriented and Jihadi leaders (Sadr, 2021, p. 35).

The split became more evident when the Islamic side assembled around Nehmatullah Shahrani (who also served as the commission's chairperson), whilst the liberal members of the commission worked independently. As a result, nearly all aspects of the work and methodologies were viewed

4 According to Section one, Article 6 of the Bonn Agreement (2001), "A Constitutional Loya Jirga shall be convened within eighteen months of the establishment of the Transitional Authority, in order to adopt a new constitution for Afghanistan. In order to assist the Constitutional Loya Jirga adopt the proposed Constitution, the Transitional Administration shall, within two months of its commencement and with the assistance of the United Nations, establish a Constitutional Commission."

In accordance with Section two, Article 1 of the Bonn Agreement, "the following legal framework shall be applicable on an interim basis, until the adoption of the new constitution:

i) the constitution of 1964 a) to the extent that its provisions are not inconsistent with those contained in this agreement, and b) with the exception of those provisions relating to the monarchy and the executive and legislative bodies provided in the constitution..."

5 Despite my criticism of the International Crisis Group reports that were published in early post-2001, I opted to use its June 2003 report entitled, *Afghanistan's Flawed Constitutional Process*. Although the report predates the final stage of the constitution-making process, it presents a holistic picture of the problems and shortfalls of the drafting and review phases. I concur with many of the technical concerns and disparities raised in that report, because I observed them personally during the lawmaking process in 2003.

differently by the two groups. Instead of collaborating, the two factions developed their own drafts independently, reflecting the opinions of their members. Islamists believed that their draft would have a good chance of being adopted by a majority vote within the commission. The liberals, on the other hand, believed that they stood a better chance, because their work was supported by the international community and it sought to avoid over-reliance on Islamist ideas.

This led to endless debates and disagreements over two essentially incomparable drafts. As the commission could not reach consensus on the widely divergent provisions of the two drafts, following a comprehensive discussion a negotiation stage was held, in order to focus on the decisive issues (Hartmann and Klonowiecka, 2011, p. 269). According to reports, the negotiations took place under the direct supervision of international actors, particularly the United Nation's Assistance Mission for Afghanistan (UNAMA) and political figures closely related to the president, against the advancing deadlines provided in the Bonn Agreement. The consequence was a compromise between the two groups, although substantive differences were not resolved and a number of controversial issues were deferred to the next step of the process.

The final draft that emerged from this process contained "172 Articles, 44 more than the 1964 Constitution, and appears to have been copied and pasted. Its poor technical quality is unsurprising given the relative paucity of legislative drafting experience within the Commission, whose members hold degrees in Islamic law and not statutory or civil law" (International Crisis Group, 2003, p. 15). To this end, many believe that the drafting phase was a complex and 'flawed' process, not only because it produced a poor first draft with numerous legal caveats, but also because it was based on an unrealistically tight schedules, poorly designed process, and a poor institutional arrangement, with an inadequate flow of input from the permanent government institutions, such as the MoJ and the Supreme Court.

As indicated earlier, one example that is generally missing from the literature concerns the drafting mandate against the legal framework provided in the Bonn Agreement (i.e. the 1964 Constitution). If the 1964 Constitution was accepted as the governing law, the new constitution should have been an amendment to that constitution, instead of being a completely new constitution. This is because the 1964 Constitution provided specific instructions about amendment procedures in Articles 120-122.⁶ Even if we assume that some of the institutions provided in the 1964 Constitution (such as the National Assembly) did not exist, and that the conditions were fragile,

6 The full text of Article 121 suggests, "the proposal for amendment is discussed by the Loya Jirga and in case a majority of the members approves its necessity, a committee shall be appointed from amongst its members to formulate the amendment. The committee shall formulate the amendment with the advice of the Council of the Ministers and the Supreme Court, for submission to the Loya Jirga..." Therefore, technically, the development process of the 2004 Constitution should have adhered to these procedures.

there is no doubt that institutions like the MoJ (which was in any case more relevant to law-making) existed and were actively involved in drafting and implementing other laws.

Aside from the fact that an amendment was the most appropriate method, the ‘procedural hook’ provided by the 1964 Constitution would have enabled the process to alleviate many planning deficits and power politics that the drafting process had to deal with. Additionally, institutions such as the MoJ could have played an essential role in the drafting process, as their age-old institutional memory and links with other state institutions would undoubtedly have contributed to the success of the process, by eliminating many technical challenges. However, as a result of a heavy influence of the Bonn Agreement and its recommended procedures, the government chose to leave all the existing permanent institutions out of the process and even tried to avoid them altogether.

The reviewing phase: The draft ultimately went on to the second stage of the process, which was carried out by the Constitution Review Commission (consisting of 35 members). This time, the commission’s composition was carefully crafted to ensure a proper balance between opposing groups, that women were represented, and that there was adequate expertise from other fields.⁷ The commission’s role was to finalise the draft, and to educate and consult with the public on the final draft (Constitution Commission, 2003). However, as with the first commission, it faced allegations about opacity and secrecy regarding the selection process of its members, raising questions of legitimacy and consensus-building within the commission (International Crisis Group, 2003, p. 16).

To that end, similar dynamics to the drafting phase kept influencing the review process. Reportedly, the commission members and outside influencers were preoccupied with discussing matters such as the possibility of including the term ‘Islamic’ in the official name of the country and across various other provisions, in order to strengthen the “practical application of the Sharia as much as possible”, and with making reference to less fundamental matters such as *hijab* for women (International Crisis Group, 2003, p. 9). In some instances, even senior members unilaterally decided on and added provisions to the draft constitution, including changing significant policy-level issues, such as the type of state.

According to Rubin (2004), the draft initially named the state a ‘Republic’, but the commission’s chair added ‘Islamic’ to the name, even though many members of the commission did not agree to it (2004, p. 14). In addition, in order to achieve consensus and allow the review process to move forward, members of the opposing groups within the commission had to make substantial compromises over key provisions. Ultimately, decisive and contradictory issues were intentionally kept ambiguous. In the area of

7 The Review Commission was appointed in May 2003, and there were more liberal members this time, including Parween, Majrooh, Gillani, Mirajuddin, Maroofi, Kamali, Ahmady, Afzal, and Patman (Sadr, 2021, p. 37).

criminal justice, for example, the commission was unable or unwilling to resolve inconsistencies between articles 25, 27, and 130 of the draft.⁸ This was a good indication of the overall quality of the technical process and how it allowed for substantial compromises to be made regarding vital legal and criminal justice concepts.

As part of the review phase, public awareness and consultation were the two most important and challenging tasks. The process was plagued by poor design, poor planning, and issues related to donor influence. For example, it was reported that “[e]ven if public education [were] adequate, the public consultation process is not presently designed to gather a wide segment of views. Repeatedly, UNAMA’s constitutional support staff have stressed that the constitution-making exercise is ‘not a referendum’, that the goal of the consultation is ‘quality’, not quantity, and that ‘people in rural Afghanistan cannot distinguish [between] the facts and issues’. Thus, public meetings will be small and held in provincial capitals.” (International Crisis Group, 2003, p. 19)

In another instance, UNAMA reportedly prevented publication of the draft for the purpose of public education, and the “UNAMA officials claimed that a published draft would harm public debate because it would polarise opinions” (International Crisis Group, 2003, p. 15).⁹ Nevertheless, the commission claimed that it conducted public consultation meetings in May and June 2002, with groups from nine different social categories. According to the commission, “A total of 150,000 people came to 523 meetings/ [consultative sessions across Afghanistan and in Iran and Pakistan, for Afghan diaspora]. The Commission distributed 460,000 questionnaires to the public for their consideration. The Commission [also] received more than 80,000 completed responses, over 6,000 written recommendations, and 17,000 verbal recommendations in various public consultation meetings” (Constitution Commission, 2003, p. 9).

8 Article 25 of the Constitution provides that, “Innocence is the original state. The accused shall be innocent until proven guilty by the final decision of a competent court.” Article 27 provides that “no deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offence... No-one shall be punished without the decision of a competent court taken in accordance with the provisions of the law that came into effect prior to commitment of the offence.” Meanwhile, Article 130 sets the scene for judge discretion when there is neither provision in the Constitution, nor other laws pertaining to a case, “the courts shall, in pursuance of Hanafi jurisprudence, and within the limits set by this Constitution, rule in a way that attains justice in the best manner.” It is noteworthy that Article 130 has been subject to debate in the broader legal community of Afghanistan, and there is growing resistance to it. However, irrespective of the debates, the Supreme Court of Afghanistan relies on Article 130 and gives judges the discretion to use Islamic Law in ‘a complementary manner’ to the statutory law.

9 There are reports claiming that neither UNAMA nor the government initially intended to conduct public education or public consultation for the draft constitution. No budget was allocated for public consultation at the time of designing the constitution-making process. Thus, UNAMA repeatedly resisted consultations, but finally orchestrated a vague process to demonstrate that public input had been sought (International Crisis Group, 2003; Thier, 2006).

As noted earlier, I worked on the constitution-making process. My responsibilities included providing research assistance to the commission members, and helping with public education and consultation efforts covering substantive matters, as well as helping with some operational aspects. As an insider, I would like to draw attention to some issues that other authors have not yet addressed. In line with the commission's report, at the end of the review phase, public consultations were held in Afghanistan – and in Iran and Pakistan, for Afghan migrants – which involved many conceptual and technical issues (Thier, 2006).

I believe that the constitution-making process was designed under the influence of individuals who believed a presidential system of government would be more effective in Afghanistan. Several international actors, including so-called 'political advisors', participated in daily discussions with the commission, where they actively fought for a presidential system. They cited Lakhdar Brahimi, the UN secretary general's special representative, who proposed that a robust presidential system was the best fit for Afghanistan. The advisors often quoted examples from the Mujahidin's parliamentary system, as well as pointing out the lack of mature political parties. As discussed before, during the Mujahidin, the Pashtun prime minister used to fight the Tajik president over things other countries would have solved through the usual bureaucracy (see 2.8 above).

Such deliberations were not limited to the commission's meetings, but tended to influence the technical aspects of the process in material ways. For example, due to concerns about polarising the general debate and possibly damaging 'the larger state-building process', the international actors prevented the printing and distribution of the draft constitution, at all stages. As a result, there was no shared constitution draft to accompany even the public consultation process. In the absence of a draft constitution and proper consultation materials, the public outreach programme relied heavily on complex and incomprehensible questionnaires.

One of the controversies I personally observed relates to the design process for the questionnaires. Initially, the commission had posed a straightforward question to measure people's preference for political systems, asking: "Would you prefer a parliamentary or a presidential system?" However, international consultants from UNAMA argued that the question was not understandable, and that they preferred to break it down into 32 separate 'yes or no' questions. Their suggested version started with a general statement, "Would you like...", followed by separate presidential or parliamentary system options.

In the battery of questions relating to the presidential system, options began with "...a leader to be the president elected by the people – yes/no?" followed by other options related to requirements for becoming president. Similarly, the options relating to the parliamentary system started with the question: "...power to be shared between the president and prime minister – yes/no?" followed by choices about the conditions and qualities of the prime minister.

Contrary to the consultants' expectations, the changes made it more difficult for respondents to understand each question, and subsequently the changes made it difficult to combine and analyse the data; this is also echoed in other works, but from a different perspective, see for instance (Kakar, 2020, p. 7). Even so, the new version was approved by the commission and public opinion was gathered on that basis. However, despite that change, I believe that people mostly voted for the option of "power to be shared between the president and prime minister", followed by "leader to be a president, elected by the people". That information was evident from reports I gathered at the end of each day, from enumerators working on the coding and data entry processes.¹⁰ However, when the data analysis system produced the final result, over 50% of the respondents were reported to have chosen "leader to be a president, elected by the people" as their first choice. The consultant concerned translated this to mean that people had voted for a presidential system. This provoked some debate about the accuracy of the findings, and many domestic actors seriously questioned it. In response, the consultant pointed out that 'those questioning the validity of the data likely saw most of the questionnaires, but not all of them. Accordingly, they do not have a complete picture. In contrast, the system provided a comprehensive analysis of the data, due to its ability to read the entire database at once.'

Some domestic researchers proposed checking all the data again, which was done to some extent. However, this proved problematic because the concerned questions were broken down in a way that meant they could be classified into several categories, making the re-checking process pointless. With their admittedly limited knowledge of technology and data processing, many of the actors involved were bewildered and (as a result) unable to make an independent determination at the time. But subsequently, with a greater understanding of new technologies, data manipulation, and the overall political dynamics, things became clearer.

Based on this observation, it is safe to conclude that public views were not just gathered accurately, but also that the information gathered during the symbolic consultation process did not make it into the draft constitution. This was mainly due to the efforts made in support of a presidential system, in which international and domestic actors had similarly important roles. In addition, just before sending the draft to the Loya Jirga, the commission held another thorough consultation with the government, political actors, and international experts. The consultation meetings were not disclosed publicly; they were therefore heavily criticized, and viewed as a platform for the excessive political influence exerted on key revisions of the draft.

10 A Kenyan citizen was hired by the donors to design a specific data management system. The consultant came up with a system that was different to conventional data management software, such as SPSS and others that were already available for data processing. The system was only known to that particular consultant, so he was the only person who could use it for data processing and analysis.

3.2.2 The Constitutional Loya Jirga: problems and dilemmas in the adoption phase

As the final step in the process, the post-consultation draft made its way to the Constitutional Loya Jirga (CLJ), which convened in December 2003.¹¹ The Jirga adopted a comparatively viable structure, supported by procedural arrangements, in order to enable an open exchange of views. The Jirga worked according to a three-layered structure. The structure consisted of: the plenary, comprised of all 502 members of the Jirga, along with its chairman and executive staff selected from within the Jirga; ten working committees, each consisting of 50 members, and comprised of all the members of the plenary; and a reconciliation committee, comprised of the heads of the ten working committees and the Jirga's executive staff.¹²

The plenary was the highest level decision-making body of the CLJ. However, working committees did the actual work of reviewing the entire draft. Since participants were all divided into one of these committees, all the Jirga members were given the opportunity to express their views on almost all aspects of the draft. The Reconciliation Committee was responsible for differences of opinion and incorporating them into the draft constitution. There was also a full-service secretariat, heavily staffed with consultants providing technical, operational, and logistical support to all the three layers of the Jirga.¹³

In terms of its workflow, the Jirga began with an official opening ceremony, at the end of which the president nominated Sibghatullah Mujadedi, a spiritual figure and the first president of the Mujahideen government, as chairman of the Jirga. Nearly all the Jirga members openly supported this nomination, and went on to decide on the composition of the ten working committees. This was followed by 20 days of discussion and debate about

11 As mentioned previously, I served in a key technical role as the lead rapporteur and deputy of the policy department within the Secretariat of the CLJ. In that capacity I was directly involved in the implementation of the Jirga and its day-to-day management, which afforded me the opportunity to comment on and discuss the Jirga dynamics and work process, from time to time.

12 Each district selected a number of delegates to reflect the size of its population, and a total of 502 Jirga members (including 102 female, and 400 male) were selected. The members then travelled to the provincial seat, where the provincial representatives were selected by secret ballot. Refugees in Pakistan and Iran, as well as Hindu and Sikh communities in Afghanistan, were able to elect 42 representatives through the election process. In this sense, provincial members of the Jirga were indirectly elected. However, at the end of the process the president appointed 50 additional delegates, which was heavily criticised but not prevented.

13 Throughout the process, UNAMA maintained a strong presence, to the extent that it operated a parallel office on-site that was used by the special representative of the UN Secretary General, the US Ambassador, and a handful of international consultants. The UNAMA office and its field staff had several times the political, technical, and operational capacity of the secretariat.

the draft, and about other issues related to the constitution and the overall state-building process.

The debates involved highly intense dynamics over several controversial issues that needed to be decided on, such as the type of political regime, the state's official name, the court system, and the official language. The process was full of all sorts of tension, including that between domestic and international actors, and that caused by the differences of opinion between Islamist and Western-oriented technocrats.¹⁴ In addition, certain controversial issues were dealt with undemocratically, including via political interference, intimidation, bribery, and the bypassing of procedures (Tarzi, 2012; Ruttig, 2014). For example, on January 1st 2004 about 150 delegates signed a resolution proposing the name 'Republic of Afghanistan', rather than 'Islamic Republic of Afghanistan', as the country's official name.

However, the chairman declined to accept that resolution. Instead, he publicly referred to the initiators as 'unbelievers' and 'apostates', who would be punished after the Jirga ends; since apostasy carries the death penalty, many initiators either withdrew or silently abandoned their proposal. Shortly afterwards, all ten working committees finalised their debates, and the Reconciliation Committee promulgated a final draft of the constitution on January 3rd 2004. At the same time, the committee announced that the plenary session would reconvene on January 4th 2004, so that all the committees could report their findings and conclude the Jirga. At the conclusion of the reporting session, the Jirga's chairman asked all the delegates to stand up in their places and support the adoption of the new constitution. Almost all the delegates stood up, resulting in the 2004 Constitution's ratification, in 12 chapters and 162 articles.

3.2.3 Substantive problems throughout

In addition to technical and political concerns, all three steps of the constitution-making process suffered from substantive and operational inadequacies. Although there was need for extensive consultation with political leaders, constitutional experts, and the public, the drafting phase was completed mainly behind closed doors. There was also a split within the commission, which resulted in two separate drafts with two opposing ideologies. International experts and advisors intensified the tensions, by being excessively lenient towards the liberal group.

The review phase was similarly problematic and involved some challenging stages. Although it aimed to ensure balanced debate, and that synergy could be brought to the provisions of the draft, the commission members (who were selected for their diverse backgrounds and ideologies)

14 This was essential, and an example of what some analysts have labelled 'a Juggle of Quran and Democracy' (Carlotta, 2003).

were divided into opposing groups. Like the preceding commission, they worked against each other, producing contrasting content for the constitution's final draft. Due to these oppositions, several contradictions exist in the law. For example, Article 27 states *nullum crimen sine lege* as the guiding principle for criminal justice, but Article 130 sets the stage for applying Sharia in the absence of any explicit provisions, which clearly contradicts the earlier principle.

In terms of the timeline, the drafting and review processes worked to an unrealistic plan. As difficult as it was to reconcile the different viewpoints mentioned above within the five to six months allowed for the commission, a further challenge the commission faced was carrying out a nationwide public education and consultation campaign. This had to be done without the commission being able to share even a rough draft of the content on which it wished to educate people; therefore, it could not ask the public if the content of the text was acceptable to them.

Ultimately, although it behaved as a traditional mechanism, the CLJ played a fundamentally positive role. In the end, the Loya Jirga passed the product of a flawed drafting and review process as a constitution that was better than that produced by the two commissions. Nevertheless, the adoption phase also had its problems; for example, it lacked a precise mechanism for step-by-step adoption of the constitution. The most important part of the adoption was the last day of the Jirga, when people were required to express their support by standing up. Although everyone stood up, it was unclear how many of the 502 delegates wanted to express their opposition.

In addition, although a robust structure and various procedural rules allowed for open exchanges of opinion at the level of the working committees, opinions gathered from these committees were not always accepted at the reconciliation stage, at which point influential figures would set the agenda. Finally, some authors argued that the CLJ also suffered legitimacy issues, because its members were selected from a pool of delegates already chosen for the ELJ, which was known for its "weak chairmanship; unruly, unordered debates; last-minute delegate packing, and intimidation" (Thier, 2006, p. 4). Last but not least, the Jirga suffered from poor planning, resulting in the failure of support and logistics mechanisms. This was evident in the occasional lack of access to printing facilities and the insufficient dissemination of updated drafts, which happened from time to time under the Jirga.

3.2.4 Temporary and permanent institutions

As argued previously, the Bonn Agreement introduced temporary institutions at all levels, including the Interim Authority, the Transitional Authority, and several commissions, including the Constitution Commission(s) discussed above. The intention was that the institutions would take responsibility for state operations in the immediate aftermath of the Taliban, in

2001. In the meantime, as the overall skeleton of reform, the mechanism was considered to be a blueprint for others to follow as well. Thus, it created a tradition of working through institutions that often presented themselves as temporary, donor imposed, and project-oriented. The institutions not only intervened in state affairs (particularly reforms), they were also the source of many tensions which blocked the natural development of domestic institutions and ideas.

With numerous approaches to choose from, I will delve into the lead-donor approach, using an example of legal reform (below). I chose this area not only because it is directly related to this work, but also because it provides a good example of how donors asserted measures to control projects, often compromising both quality and domestic content as a result. In the following section I will also discuss the JRC as an example of a mainstream reform institution in the area of criminal justice. However, I am concerned that, due to the limited scope of this work, I will not be able to do full justice to the topic. I therefore hope that examples of the lead-donor approach will provide context for a better understanding of some of the dynamics behind the JRC as well.

The lead-donor approach was basically a product of the Tokyo Conference in 2002, where the *National Development Framework* was proposed as a coordination platform with corresponding financial commitments. The framework divided all the areas of development intervention into four groups, including Governance and Security, Rule of Law, Counter-Narcotics, and Disarmament-Demobilization and Reintegration. Along with their financial commitments, different countries also had to take the lead in one or more of the reform areas. As a result, the United States of America led the security sector and army, Germany led the police, the United Kingdom led counter-narcotics, Japan led the disarmament-demobilization and reintegration efforts, and Italy led reform of the rule of law and justice sector (Jalali, 2006, pp. 9-10; Sky, 2006, p. 23).¹⁵

The lead-donor for the rule of law was subject to a lot of debates, as some observers consider Italy's selection to have been a mistake, rather than a step towards reform. For them, Italy's role and its performance was "inept", because Italy lacked an understanding of the circumstances and hence had no influence over its area of intervention. Reportedly, Italy also lacked the resources it needed to succeed; therefore, it was to blame (at least

15 According to some authors, there is historical evidence of Italy having been involved in Afghanistan's "political transition since the early seventies", as well as being the founder of the so-called 'Geneva G4 Group' that also involved Iran, Germany, and the United States, all of which were interested in political transition in Afghanistan (Tondini, 2006, p. 93).

partially) for the slow pace of reform during the Bonn Process (Dobbins *et al.*, 2003, p. 101).¹⁶

It is interesting to note that these arguments are in line with those made in official reports by the Italian Directorate General for Development Cooperation, claiming that “the first problem confronting Italy as the lead country was that of trying to understand the justice system and how it operated in practice.” (Perathoner *et al.*, 2011, p. 15) The method that was adopted to mitigate this knowledge gap turned out to be a cure worse than the disease. The Italian response to this complex issue was to organise “an onsite investigation employing young local students. Given their lack of training and experience, they first attended an ad hoc preparatory course and were then supplied with questionnaires to distribute in each district to individuals who had knowledge, direct or indirect, of the justice system. Based on the information collected, supplemented by interviews conducted by experts from the Italian lead, a report was compiled.... The knowledge obtained in this manner was used to identify the sectors of intervention, and to establish priority planning of the stages for the reconstruction of the [criminal justice] system.” (Perathoner *et al.*, 2011, p. 15)

The outcome of such an endeavour is fairly obvious, but to put it in perspective one can look at the JRC’s dynamics (see 3.2.5, below) and the Interim Criminal Procedure Code 2004 (see 4.3.2, below) as two specific examples of the problematic nature of this intervention. Several other legislative products can also be mentioned here; indeed, as many as 287 legislative documents were produced during the Bonn Process, including the Prisons and Detention Centres Law, and 26 other laws.¹⁷ Although I did not review all these laws, statistically speaking, all of them were either repealed or replaced within a short period of time, which points to the fact that all the legislation suffered from common difficulties, and that there is a

16 Some other authors go further, claiming that Italy’s role resulted from chance and circumstance, rather than being a deliberate choice. According to them, all the other sectors had already been decided. Thus, Enrico Gerardo De Maio, Special Envoy of the Italian Ministry of Foreign Affairs, “took it upon himself to nominate Italy as the justice lead nation without prior consultation or authorisation by the Italian Parliament, and arguably without proper consideration of its capacity to fulfil this role.” (Jupp, 2011, p. 122) This does not seem to be very accurate, because according to people who were aware of the Italian side of the story, Italy did want to step in and engage in legal sector reform. This is because, at the time, the Italian government had broader plans to gradually brand itself as the ultimate domain of legal reforms, for which it had other serious competitors (such as the Netherlands), although none of them were in the same domain with regard to Afghanistan.

17 The laws are listed in the Official Gazette 801-881, which can be accessed on the MoJ’s legal database.

need for further research to learn from them and apply the lessons to other development situations.¹⁸

3.2.5 The Judicial Reform Commission

As part of the Bonn Agreement, the government had to institute a 'powerful JRC' to regulate, restructure, and oversee the reform of permanent criminal justice institutions to reflect accepted 'international standards'.¹⁹ The commission was compelled to relinquish its role after the justice sector institutions were reformed and enabled to operate independently. To this end, the commission was a temporary institution dealing with complex reform within permanent justice institutions.

In its first attempt to create a commission composed of Afghan elites, the government encountered significant discord over its composition. Due to the resulting compromises made, commission members brought pre-existing differences of opinion to the table, which were so intense and complicated that the commission was disbanded soon after all its members had been appointed, in May 2002 (Thier, 2004, p. 8; Christensen, 2012, p. 124). The government failed to recognise the fundamental flaws of the commission concept. Based on naive and positivist assumptions, supported by international partners who believed that the permanent criminal justice institutions were obsolete, the government therefore attempted to create another commission, with the aim of navigating reform barriers and leading age-old institutions towards reform.

The donor community pushed firmly for the creation of a commission from a less politically oriented group of Afghans. As a result, in November 2002 the second JRC was established, consisting of 12 Afghan legal experts,

18 The Civil Service Law is another example that demonstrates the dynamics of the law-making processes and the quality of laws produced during this period. The law was the only product of this period to remain in effect for a longer time; it was only amended in 2019. In my experience, however, the longevity of that law was not due to its rich content, but rather to internal politics within the government. Considering that the commission was responsible for directing all government recruitment, a relatively influential group of ministers were not pleased with it, and sought to dissolve the commission together. In contrast, another group that was equally strong felt it was in the interest of disbanding patronage networks to have another entity manage hiring; it therefore supported the commission. Whenever a proposed amendment to the Civil Service Law was raised, one of these parties would find a way to put it on hold until they could more effectively control or bend the process to their own advantage. In the end, the latter group was successful, and in 2019 the law was amended to further institutionalise the commission.

19 Section II, Article 2 of the Bonn Agreement provided that "the Interim Authority shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." The existing institutions and the role they could play in the process are neglected in this provision.

practitioners, and members of academia.²⁰ In spite of the fact that the new combination of 'less politically oriented people' appeared to provide the commission with an opportunity to survive, its design flaws and ineffectiveness issues, as well as the acceptance of the commission's leadership role within the permanent institutions, had not yet been addressed. Thus, the Italian government hosted a summit in December 2002, which aimed to foster consensus on the commission's role and leadership issues. The permanent criminal justice institutions, and other national and international partners, were invited to the summit, and there they agreed to designate the JRC as leader of the reform process. Furthermore, Italy committed to funding the judicial reform process through the JRC. In this way, issues around funding the commission, and around its acceptance as the lead institution, were resolved, resulting in progress in both staffing and initial planning.

However, the real trouble began once the commission entered the implementation phase. In the commission's honeymoon period, it developed a 'reform master plan'. The plan contained 30 programmes, set to be implemented in 18 months, and was divided into four thematic areas: 1) Reform of laws and regulations; 2) Surveys, physical infrastructure, and training; 3) Legal education and legal awareness; and, 4) Structural adjustment of judicial institutions. As part of its endorsement procedure, the Afghan cabinet approved the plan, calling it the 'strategic framework for reforming the justice sector'. The commission had now entered the implementation phase of its ambitious master plan, covering all of the four thematic areas simultaneously (Christensen, 2012, p. 124).

Since the commission did not have any implementation capability, the commission had to rely on institutions which it considered ineffective, corrupt, and obsolete, in order to implement its reform plan. At this point, I want to pause the implementation matter for a moment, in order to bring two other factors into the discussion: First, the power dynamics between the three permanent institutions, over the division of authorities, were already tense. There was a tendency to find reasons to disagree, and to start arguments over seemingly minor issues. Second, by assuming the coordination and leadership role, the commission took control of foreign aid away from the permanent justice institutions, causing indirect animosity to occur.

Regarding the implementation issues, as soon as the commission began to engage in reform areas substantively, the permanent justice institutions found themselves intrinsically too powerful to follow the commission's lead, as it lacked a clear institutional role within the state structure. Thus, the commission gradually lost support. It shrank into a role restricted to proposing reform strategies that had been developed with the assistance of international consultants, seeking funding from international donors, and soliciting assistance from justice institutions to implement the strategies.

20 See Presidential Decree No. 153 on the Formation of the Judicial Reform Commission and its Duties, dated 11/8/1381 (2-November-2002).

In addition, the commission faced problems with donors, whose poor coordination and interconnection severely undermined its work. For example, it is reported that Italy did not feel sufficiently involved in developing the reform master plan as a lead donor. It felt that [other] foreign consultants had primarily written the plan, as “the Italian Ambassador publicly welcomed the plan in a coordination meeting hosted at their Embassy, but in private, he expressed their displeasure to [the Commission’s] leadership” (Thier, 2004, p. 12). In other instances, disagreements between donors who had agreed to provide the necessary funds for reform severely hampered actual implementation.

Regarding the latter issue, the commission was a victim of internal donor politics that endangered its only functional wing of donor coordination. Thier (2004) argues that “the Italian government, the lead country, has maintained a distance from the Afghan institutions. Rather than support Afghan-led decision-making, the Italian effort has preferred to choose and implement its projects with limited consultation. [the JRC’s] efforts to coordinate the sector without Italian support were unsuccessful, and the relationship between the [JRC] and the Government of Italy soured – leading to an unsuccessful Italian effort to have the Commission disbanded altogether.” (2004, p. 13)

In light of the complexity of the situation, I would like to briefly discuss surveys as a method for formulating the commission’s recommendations on law reform and prison management. I focus on law reform and prison management issues, because these apply more directly to the intervention areas that are pertinent to the case study. Within the four thematic areas of reform proposed by the commission, surveys fall into the category that needed least support from the permanent justice institutions. Thus, anyone would have expected surveys to be relatively free from contextual dynamics. Accordingly, it was a good starting point for the commission, which planned and carried out surveys in about 11 judicial institutions in 2003, including prison institutions.

The surveys mostly covered the needs of the institutions, such as infrastructure, staff, and operations, but they completely ignored any assessments of the caseload or identification of systemic problems. However, the survey findings nevertheless became the basis of reform recommendations, including for restructuring and rehabilitating the police and prison system. For example, one suggestion drawn from the studies recommended shifting responsibility for prison management from the MoI, which is a military institution, to a civilian agency, preferably the MoJ. According to the JRC’s chairman, the necessity for such a transfer arose directly from the surveys, and it was discussed thoroughly within the commission. According to him, ongoing human rights abuses were one of the major arguments against

prison management by the MoI. In light of the survey findings, the commission was convinced that the MoJ should manage the prison system.²¹

However, other information suggests that shifting the responsibility for prison management was also recommended by EU member states; it was not purely an invention of the commission. Nevertheless, the prison system experienced its first post-2001 fundamental reform, based on these recommendations. In theory, this reform was geared towards the reform and rehabilitation of prisoners, and the restoration of human rights standards in prison institutions. Likewise, the commission's recommendations on law reform seem to have been inspired by findings in reports published by the International Commission of Jurists (Lau, 2002) and Amnesty International (2003a, 2003b, 2003c).²²

3.2.6 Donor-led reform leads to disruption

The Bonn Process and its succeeding events brought together a number of formerly warring factions, including those in the Northern Alliance, as well as those who had recently emerged as leaders, Western-oriented technocrats, and ordinary bureaucrats. As discussed in Chapter One, under the Bureau Political theory, each of these groups possessed their own power base and influence. The warring factions claimed to represent Islam, and also managed to retain a significant influence, due to their participation in the international coalition that ousted the Taliban. The factions also exerted influence via coercion, making it generally known that they could destabilise an entire region where they had power bases there.

The newly emerging leaders, technocrats, and bureaucrats were also influential, because they were engaged in the processes due to their technical abilities and extensive demands for reform from international partners. To that end, the state-building and law reform processes which were not

21 According to a personal interview with the then chairman of the Independent Judicial Reform Commission, "the Commission members believed the management of prisons by the MoI hindered reform and rehabilitation. Typically, the police are involved in detecting crimes, arresting suspects, and initiating investigations. At all times, the police use force against criminals. It is generally true that when police use force, it results in damage and grievances on both sides. That, in any case, may adversely affect the accused, however a grievance on the part of the police would also prompt practical retaliation. As a result, the inmates' human rights may be violated, which may jeopardise their reform and rehabilitation."

22 All of the reports cited above were published concurrently with the work, recommendations, and changes proposed by the commission. It is impossible to deny their significance to the work of the commission, based on the fact that nearly all its actions and reform recommendations were linked to the reform proposals contained in the reports. The commission's recommendation for a "criminal justice system based on human rights standards", for instance, was clearly connected with reports that actively advocated human rights standards.

neutral (in general) experienced particular problems with conflicts of interest and politicised reform. Almost all the major reform efforts were marked by strife between opposing groups, and excessive international demands for change that were not always in line with what was necessary, let alone possible, in Afghanistan.

Although the post-war situation and inadequate infrastructure played an important role in both cases, one cannot overlook unclear approaches and power politics amongst the donor community. This continued to perpetuate itself and affect Afghanistan's overall state-building process, law, and order.²³ However, it is worth reiterating that the international community's intentions were not necessarily harmful, even though it is beyond doubt that they lacked precise analysis, attention, and specialised domestic knowledge.

3.3 THE POST-BONN PROCESS: TOWARDS AFGHAN-OWNERSHIP (2006 AND BEYOND)

By the end of the Bonn Process in 2005, many aspects of the reform efforts, but particularly the areas of state-building, lawmaking, and criminal justice, were generally characterised by a some successes but mostly failures. This essentially called for changed approaches and a new road map for development intervention. The Afghan government and its international partners therefore laid new foundations for a long-term partnership, followed by an increase in Afghan ownership through the creation of policy documents and platforms such as the ANDS, the NPP, and the Mutual Accountability Frameworks, all of which are discussed below.

3.3.1 London conference 2006: the Afghanistan Compact and the Afghanistan National Development Strategy

The London Conference was an important platform, geared towards reorientating donors' approaches in response to the demands of a new era of reform. The conference mainly focussed on Afghan ownership and leadership; concepts that have been debated on various platforms since 2001, but never officially incorporated into any reform processes. As a result of the London Conference, Afghan ownership and leadership were emphasised and endorsed as the fundamental principles and guidelines for further reform.

23 Also see the peace process discussed in the epilogue, below.

Consequently, subsequent phases of reform were (at least in theory) Afghan-owned, and several mechanisms were put in place to ensure that processes were Afghan-led. As a first step in the Afghan ownership phase, the 2006 gathering in London led to the planning and prioritising of development needs via a political agreement called *The Afghanistan Compact*. The compact confirmed the international community's commitment to concluding the donor-led approach and placing Afghan actors in the driving seat of all future reform initiatives.²⁴

However, emphasis was also placed on the need to maintain international cooperation, in order to bridge the transition from a donor-led to an Afghan-led phase, implying a mixed institutional approach. The compact also allowed for some benchmarks and implementation guidelines to be agreed, to achieve these goals, including developing and finalising the ANDS. As soon as the London Conference concluded, the government and its stakeholders, including multilateral and bilateral donors, UN agencies, civil society organisations, the private sector, and non-governmental organisations, engaged in intensive consultations to finalise the ANDS and its sector-specific strategies.²⁵

The ANDS uses the pillars, principles and benchmarks of the Afghanistan Compact as its foundation, and hence is organised into three pillars: 1) Economic and social development; 2) Governance, the rule of law, and human rights; and 3) Security. The three pillars are comprised of eight sub-pillars and five cross-cutting themes, including gender equality, counter-narcotics, regional cooperation, anti-corruption, and the environment (GIRoA – ANDS, 2008a, p. i). In addition, the London Conference provided for the establishment of a Joint Coordination and Monitoring Board (JCMB), consisting of government agencies, a donor community, the UN agencies, and civil society representatives. The board was intended to monitor progress towards the achievement of key benchmarks and to ensure its consistency.

24 For further details about the London Conference, and the full text of the Afghanistan Compact please see: <http://policymof.gov.af/home/london-conference-2006> (Last accessed in May 2021).

25 It is important to note that the ANDS qualified as Afghanistan's Poverty Reduction Strategy Paper - a World Bank requirement, permitting donors to allow for the flow of aid money into Afghanistan. The conference had already approved the 'INDS' as the strategic framework for future reform, and the 'Justice for All Plan' as its strategic pillar for the justice sector. These were prepared before the London Conference, in order to illustrate Afghanistan's development needs, set priorities for the justice sector, and connect the Bonn Process with a new beginning for Afghanistan.

It is necessary to point out, however, that both the ANDS and the London Conference have been criticised for their quality, relevance, and development processes.²⁶

3.3.2 Rome conference 2007: The National Justice Sector Strategy and the National Justice Sector Programme

Despite progress on the planning front, instances of insecurity gradually showed up in this period that affected a universal focus on all aspects of state-building, and on justice sector reform in particular. One year after the London Conference, an important event for the rule of law (i.e. the Rome Conference 2007) took place in Rome, Italy. At the conference, the international community and Afghan government discussed a critical assessment of reform activities during the donor-led phase, and the way ahead for an Afghan-led process. The international community reached a consensus on the strategic way forward for justice sector development. The conference also urged formulation of the National Justice Sector Strategy (NJSS) and National Justice Program (NJSP), to feed into the rule of law and human rights pillar of the ANDS, and to integrate the individual goals of permanent justice sector institutions (Bassiouni *et al.*, 2007; Rome Conference, 2007).

To that end, the NJSS was built into the ANDS, outlining additional development goals for the justice sector. The NJSS outlines three high-level reform objectives, and adheres to the same vision and general goals of the ANDS. It maintains that “The Government’s vision for justice is of an Islamic society in which an impartial, fair and accessible justice system delivers safety and security for life, religion, property, family and reputation; with respect for liberty, equality before the law and access to justice for all.” (GIROA – ANDS, 2008c, p. 13).

26 Shah (2009) argues that the INDS and the Afghanistan Compact are neither new nor specifically Afghan-led documents. The London process relied on the *National Development Framework* (2002), which was developed mainly by foreign experts, and *Securing Afghanistan’s Future* (2004), in which Afghans were only marginally involved. Some consultations have taken place regarding the INDS, but they were primarily symbolic, as “a group of ambassadors referred to as the tea club” was responsible for setting many of the indicators and benchmarks (2009, p. 9). Similarly, Parkinson (2010) claims that the INDS’ main focus was on relieving Afghanistan of its international debt and encouraging donors to fund its idealistic development programmes. As such, it can be considered an “upward-looking” document, and a manifest example of national-level policy processes motivated by the need to lobby for international aid (Parkinson, 2010, pp. 19–33). Likewise, the *Justice for All Plan* has been characterised as little more than a gap analysis project that portrays a glowing picture of a 12-year framework for the justice system, with measures for long, medium, and short-term improvement.

In order to achieve the three objectives, it was necessary to develop a multi-faceted implementation plan, and thus the NJSP came into being. The NJSP is a very lengthy document, organised into four sections, each of which is divided into six broad categories related to the three strategic goals of the NJSS. Additionally, the NJSP identifies several mechanisms through which the government and donors can define specific projects that are geared towards the desired results. Such mechanisms include the identification of leading institutions for each intervention, the establishment of implementing institutions, the identification of funding sources, and monitoring and evaluation activities.

One implementing institution that is particularly relevant here is the dual approach, proposed by the NJSP, which is composed of both policy-making and operational components; with a committee of donors overseeing both components. The latter has a fully-fledged administrative structure, with a central programme support unit that serves as its secretariat. The secretariat has smaller units that serve as temporary support units for each of its projects within the permanent justice sector institutions (GIRoA – ANDS, 2008b, p. 33).²⁷

3.3.3 Kabul conference 2010: the National Priority Programs

With further deterioration in security and a gradual shift of responsibilities from international to domestic institutions (including security), the Afghan government began to realise the importance of prioritising the ANDS, and its suggested areas of intervention, in accordance with domestic realities. As a result, an international conference was held in Kabul in July 2010, where the government presented a prioritisation and implementation plan for the ANDS. As part of this initiative, the government outlined its goals for security, development, governance, and the rule of law within 22 National Priority Programs (NPPs). In general the NPPs addressed a variety of development issues, whereas NPP-5 focussed specifically on justice sector development and the rule of law, so it was also called the National Program for Law and Justice for All.

NPP-5 placed emphasis on issues directly and immediately relevant to citizens' interactions with the legal system. It contained five components: legal reform and legislative effectiveness; enhancing the efficiency of the justice sector; increasing meaningful access to justice; building institutional capacity to strengthen justice delivery; and increasing physical assets to

27 The National Justice Program refers to the lack of drafting, analysis and review capacity within the National Assembly and the government as the main issues on the legislative reform front. It suggests "enhancing the skills of personnel in the Taqnin [legislative department] and other executive agencies responsible for drafting legislation, along with the efficiency, effectiveness, and quality of the legislative process as a whole." (GIRoA – ANDS, 2008b, pp. 33–34)

improve justice delivery systems. The five components were all drawn up in close coordination with the Supreme Court, the MoJ, the AGO and the AIBA.²⁸

In the area of legal reform and legislative effectiveness, NPP-5 called for efficient internal processes for the production of legislative documents, with input from government agencies and civil society through “improved responsiveness of the Legislative Drafting Department (LDD), such as training in research and drafting, the provision of research tools, and the improvement of internal organisational structures and coordination between the LDD and the ministries requesting legislation.” (GIRoA, 2013, p. 8)

3.3.4 Tokyo conference 2012: the Mutual Accountability Framework

The goals of the ANDS and the policy lines drawn on the basis of NPPs were reaffirmed in several conferences following the 2010 Kabul Conference, including at the Tokyo Conference (in 2012), which was very important in terms of its programmatic outcomes.²⁹ At the conference, the government presented a strategy called *Towards Self-Reliance for Sustainable Growth and Development* and committed to implementing it through the NPPs. Consequently, the TMAF was also adopted at the conference. The TMAF aimed to consolidate partnerships and recognise the importance of international assistance, as Afghanistan transitioned to self-sustaining governance over the next decade.

In addition, it reiterated the need to respect the constitution, including its human rights provisions; notably, women’s rights. In the area of justice reform and the rule of law, it mandated that the government ensure the constitution and other fundamental laws are enforced expeditiously, fairly, and transparently, and that women enjoy their full economic, social, civil, and political rights. Furthermore, the TMAF specifies particular targets, to ensure that all citizens’ human rights are respected, and encourages the continued enforcement of a Presidential Decree on the Elimination of Violence Against Women.³⁰

28 I have examined some archival records and reports regarding the ANDS process. In the records I did not find a significant amount of input from institutions such as the police and prisons. It appears that they have been considered either secondary or less relevant to legal and justice-related matters, and thus have been disregarded in substantive debates.

29 See the TMAF 2012: <http://www.thekabulprocess.gov.af/index.php/tokyo-framework/tokyo-framework>. (Last accessed, November 2020)

30 The Law on Elimination of Violence against Women is both relevant and important, because it represents one of the controversial legislative products of the post-2001 era and a push by donors to codify the decreed law. Thus, it also qualifies as an example of what I refer to as ‘project laws’, below.

3.3.5 Tokyo conference 2014: Preparing for transformation (2015-2024)

The year 2014 was the moment when two important transitions were planned to happen. The first was a political transition, from the administration that had been led by Hamid Karzai since 2011, to a new president. In the meantime, the international military forces were scheduled to complete a process of transferring security management, particularly the operational part, to ANSF. Both of these transitions were partly delayed, due to some internal disagreement and further deterioration of the security situation that had been intensifying since 2006.

After 2015, several ‘hypothetical’ chapters were involved that were symbolically denoted as transition, mutual accountability, self-sustainability, and transformation periods. All the phases essentially had two goals: holding parties accountable for their commitments, and reducing Afghanistan’s dependency on foreign aid (over time). Many believe that problems associated with the Afghan-led reform process primarily resulted from these policies and from donor imposed temporary institutions, both of which not only resulted in lopsided reforms but also prevented the adequate growth of domestic institutions.

3.3.6 A critical discussion regarding reform intervention

At this point, I would like to return to the issues associated with the policy instruments and reform interventions employed during the Post-Bonn period discussed above. The development process, content, and quality of all the instruments (including the ANDS) created a heated debate. Some critiques stated that these were ‘expensive’ documents and products of international consultants, which only expand on already existing frameworks such as the Interim National Development Strategy (INDS) (Rotberg, 2007, p. 137; Parkinson, 2010).

Many domestic actors also regard these policy instruments as irrelevant, expensive and alien. In a personal interview, a senior official of the judiciary concurred with this statement, adding that “the international community would usually develop these documents, and the government would only apply or at least pretend to apply them – with a philosophy that having something is better than having nothing.”³¹ A senior member of the General Attorney Office said that he never read the ANDS or the Justice Sector Strategy, and he knew that although the documents cost millions of dollars to produce, 99% of government actors did not pay heed to them.³²

However, in my view, the development process of the ANDS represented an opportunity for national ownership, in terms of policy-making.

31 Personal interview with official from the Supreme Court (August 2017).

32 Personal interview with official from the MoJ (August 2016).

At least eight sector-specific strategies were initiated by the ANDS, each of which provided national actors with many opportunities to participate in policy-making. For example, throughout the development process for the NJSS, the three permanent justice sector institutions came together. In addition, they set goals and coordinated efforts with other relevant institutions outside of the justice system, such as education, media, and security sector institutions.

Therefore, the development processes for the ANDS, the NJSS, and other sector strategies can be considered the most effective mechanisms for domestic actors to influence policy development in a meaningful way. The mechanisms, and other policy-making initiatives, offered opportunities for domestic actors to consult and coordinate with each other on numerous occasions. As a result, domestic actors could determine the course of their own action towards achieving the country's priorities under the Afghanistan Compact, the ANDS and the TMAF, as powerful shields against political and administrative interference, leading to a true Afghan-owned and Afghan-led reform process.

In the meantime, some aspects of the policy instruments and methods of implementation, chosen for subsequent reform intervention, appeared to present a problem. First, it should be noted that all the important documents produced during this period were highly complex and technical. Average civil servants and other officials would have had difficulty understanding their full themes and concepts, let alone relating to them. The language barrier was another layer of difficulty, because all essential documents and communications were in English, making it incomprehensible for the majority, who did not know the language.³³ Translation was common, but this also qualified as a cure worse than the disease, because it often made it even more challenging to comprehend the basic ideas of the original text, communication, or process. As a result of these issues, policy products were not relatable to many people, and they instead served as barriers to ensuring Afghan ownership and involvement.

The situation was similar for donors and projects that were working to immovable deadlines and conditions (imposed by both the government and the donors). The donors used different strategies to mitigate the language barrier and understand issues better, by conducting training, workshops and orientation sessions, which were all useful to a certain extent. In spite of these, the donors met with a number of challenges from the institutions that would be adopting reforms, as well as those that would be managing and supervising them. In this regard, all reform intervention adopted an implementation method that was identical to the Bonn Process Period, by involving temporary and parallel structures beside or within permanent government institutions. Thus, in addition to domestic actors' symbolic participation, Afghan leadership was also prohibited.

33 See for example (Hartmann and Klonowiecka, 2011).

3.3.6.1 *Afghan National Development Strategy's secretariat*

Whilst there are numerous examples to choose from, I would like to highlight and discuss the ANDS Secretariat, because I believe it was a significant factor in many of the ANDS process failures. The secretariat was initially proposed at the London Conference in 2006, as part of the JCMB, which consisted of the government agencies, donors, UN agencies, and civil society organisations responsible for monitoring progress towards key benchmarks and ensuring their consistency. In a sense, this meant a government within the government, which would coordinate and oversee the implementation of this multi-million-dollar programme.

In addition to being institutionally disconnected from the bureaucracy, the secretariat lacked the authority and legal experience either to instruct powerful institutions, such as the Supreme Court, the AGO, and the MoJ, or to hold such institutions accountable against fixed benchmarks. Many of the most powerful ministers did not bother to go to the secretariat meetings, let alone report to it on the progress or challenges of reform projects within their sphere of authority. This problem was linked to the secretariat's lack of capacity and experience to coordinate such a large-scale operation effectively.³⁴

As the ANDS sectors clustered government agencies, based on their common interests and activities, conflicts between agencies within one cluster became inevitable. In many cases, resolving the conflicts and building consensus required the involvement of the ANDS secretariat throughout the technical processes. The secretariat was therefore constantly challenged and forced to use short-term consultants and contractors to deal with the conflicting interests of the influential institutions. The majority of these consultants had limited knowledge of Afghanistan, and hence usually made reform proposals based on their experience in other developing nations (Shah, 2009, pp. 21-23).

3.3.6.2 *Dedicated project management units*

The dedicated project management units were a form of temporary institution, and they were adopted widely during the post-2001 reform process. In spite of their inefficiency, the project management units were (in the long run) the quickest solution for donors looking for specific types of human

34 The secretariat also had difficulties with general management and operation on its own front. For instance, according to reports, the UNDP recorded 219 pages of written comments, provided by donors during a dialogue session about ANDS sector strategies. The UNDP provided the comments to the ANDS secretariat, and the latter consolidated them into a final strategy, after removing duplicate comments. It was reported that several donors were unhappy, as they found that their comments had not been reflected in the strategy (Shah, 2009, pp. 22–23). Apart from the ANDS capacity issues, this example also demonstrates the level of international engagement, as opposed to the level of local engagement.

resources and institutional flexibility, which were not likely to be available within government institutions. Donors tended to build these units parallel to existing structures, as a condition for funding reform activities. For example, the NJSS provided that “the justice institutions will establish dedicated units to create and implement development strategies and assist in donor relations. The units will play an important role in implementing the National Justice Program. Because the Afghanistan Reconstruction Trust Fund (ARTF) will likely be one funding mechanism used for the National Justice Program, the units should be designed and structured following the ARTF’s Justice Sector Reform Project requirements.” (GIROA – ANDS, 2008a, p. 53, 2008c, p. 21)

In the process of establishing the temporary institutions, donors would often bypass many official procedures as well. For instance, almost all the aspects of a project unit’s administrative and professional life, including qualifications, salaries, personnel affairs, reporting channels, work process flow, and even work ethics, would differ from that of the permanent employees of the host organisation. In return, domestic actors did not recognise the units and their staff as employees of the host institution. Instead, they were only ‘project staff’, alien to the institutional setting, values and deep social dynamics (Ron Renard *et al.*, 2013, p. 104).³⁵ Nevertheless, the ‘project staff’ generally possessed a higher level of skills and specialised education, so they played central roles in their respective projects. Institutional memory and capacity within the project units and temporary structures was therefore strengthened outside of the recipient institutions.

The project management units and their staff had no future prospects within the host organisation. After one project ended, they would seek similar projects elsewhere. It was a prevalent pattern, and with it, all the soft skills, technology, and institutional memory built up throughout the project implementation process were reduced to a few documents that were often outdated and irrelevant after a few months. As a result, the host institutions could not benefit from the project cycle in their normal capacity-building processes, except for in material domains, such as salaries, international travel, short training courses, and office equipment.

35 These parallel units have been widely criticised in the development literature for failing to strengthen permanent indigenous administrative bodies. See, for instance, an evaluation carried out by the Asian Development Bank: <https://www.adb.org/documents/project-implementation-units>, which maintains that “[T]he debate revolves around frequent observations that PIUs, as supported by external agencies, would have high direct and indirect costs, would tend to develop into parallel organizations, and dilute central government policy through their allegiance to donor agendas. PIUs, although widely used on account of their supposed efficiency, are alleged by some to be less efficient than assumed.”

3.3.6.3 *Working groups as institutions of reform*

In areas where temporary setups and project implementation units were not applicable, an alternative (yet relatively successful) approach was adopted under the working group mechanism. Working groups were an invention from the Tokyo Conference in 2002, and they aimed to set the stage for a type of implementation institution that included all the relevant and permanent national organisations and the international community, including UN agencies, civil society, the media, and others. The groups usually intended to integrate the efforts of government agencies and the international community in specific sectors, and hence they were usually named after a target sector.

For example, the Justice Sector Consultative Working Group (JSCWG) was created specifically for justice sector reform intervention. It managed the development process of the Justice for All Strategic Plan and the NJSS, and hence it generally qualified as a project-based activity. Another example of this approach was the Criminal Law Reform Working Group (CLRWG), officially assigned via presidential decree to draft the 2014 Criminal Procedure Code and the 2017 Penal Code (see 4.3.3 and 4.3.4 below).³⁶

The group worked under the governance of the Minister of Justice, alongside the United Nations Office for Drugs and Crime, serving as its secretariat. It also served the Justice Sector Support Program (JSSP) as its technical advisory body. The latter was a Tetra Tech project, “a leading provider of consulting and engineering services worldwide... a diverse company, including individuals with expertise in science, research, engineering, construction, and information technology.”³⁷

Many viewed the CLRWG as effective in terms of international intervention and legislative reform, some calling the 2017 Penal Code that resulted from the working group’s approach “a landmark product of post-2001 legal reform” (Hartmann and Klonowiecka, 2011; Rahbari, 2018). Indeed, the group’s institutional set-up and the manner in which it operated allowed for sufficient time and internal consultation; hence, it can be considered a positive reform aspect. This was also confirmed by leading domestic actors who were also involved in the process.³⁸

The CLRWG involved four specialised sub-committees which focussed on national laws, Islamic law, international treaties, drafting techniques, and content development. In addition, there was extensive representation from

36 Decree No. 1439, dated [2010] 1389/03/08. The CLRWG produced a first draft of the Penal Code in 2016. The draft, which was prepared over almost seven years, passed into law in May 2017. The law was amended for the first time only one month after its adoption, and practitioners argue that the code still has serious ambiguities and shortfalls that call for further amendments.

37 Tetra Tech is implementing the JSSP, to support organisational capacity building, legislative drafting, and case management development for Afghan justice institutions. See the *JSSP Profile* and *Tetra Tech profile* (Last accessed in June 2021).

38 Personal interview with Rasouli and Dr. Sadiqi, who considered the process inherently rich and comprehensive in nature.

other institutions, including the Supreme Court, the MoJ, the AGO, and the Ministry of the Interior. Moreover, several non-governmental, multi-lateral, international, and bilateral donors also had active representation within the working group. The latter category included the Afghan Independent Human Rights Commission (AIHRC), the AIBA, the Afghan Women's Network, the United Nations Assistance Mission for Afghanistan, the United Nations Office for Drugs and Crimes, the United Nations Development Program, the UNIFEM, the US Department of Defense, the US Justice Sector Support Projects, the Italian Cooperation, the EUPOL, the GTZ, the International Security and Assistance Forces, and the embassies of the United States, Canada, the United Kingdom, and France.

To this end, the group involved many actors who often lacked an appropriate legal background, but who nevertheless participated in meetings with arguably competing interests, such as those more inclined towards human rights-based criminal justice, as opposed to those who were less in favour of that system. In particular, when the United Nations Office for Drugs and Crime (UNODC) and the JSSP served together as secretariat for the working group, the process seemed overwhelmed by international technical experts and consultants. In addition to providing funding for the project, the JSSP also provided technical support for relevant drafting activities. As a result, whilst the MoJ served as the lead, all technical drafting assistance, hosting of meetings, preparation notes, and translation generally took place at the JSSP or UNODC offices in Kabul.

Thus, the CLRWG was essentially another temporary institution, intended to share responsibility for drafting new laws with the MoJ. In addition, its accountability mechanism was unclear, because it was not actually staffed with MoJ staff, and it did not have a reporting channel there either. Instead, based on deliverable number 34 of the JSSP's Scope of Work (for instance), the secretariat was mandated to present its monthly report on legislative reform to 'the embassy policy community'.³⁹

3.3.6.4 *Benchmarking as an institution of reform*

Another prevalent reform mechanism was benchmarking, or determining the conditions for funding certain development projects. Although this mechanism existed from the start of the post-2001 process, it was used more frequently after 2015, and it created another dilemma for local ownership. In the area of lawmaking, this was the worst of all reform types, because its products did not connect with social needs, as suggested in (1.1.2 above).

39 The embassy policy community was an informal gathering of various diplomats, consultants, and development workers at the US embassy in Kabul, which was put together to discuss progress and the likelihood of funding and technical issues regarding ongoing projects.

Instead, the mechanism connected with funds and meeting donor conditions, so that money, rather than the real needs of the society the mechanism was supposed to be serving, became the target. Thus, it also represented indirect donor control over the contents of reform.⁴⁰

A general negative aspect of this type of intervention is that recipients of funds tend to avoid the normal lawmaking process, in order to secure a flow of funds to their concerned projects. To this end, domestic actors have frequently used legislative decrees as a shortcut method which replaces lengthy lawmaking processes. Although excessive use of legislative decrees created contentious and problematic legislative products, almost all the laws associated with benchmarks and funding conditions have been passed in this way.

3.4 A STORY OF CONFLICTING CONTRIBUTIONS (THE BAGRAM DETENTION CENTER)

At this point I would like to share a story of conflicting contributions, focussing on Bagram Detention Center and illustrating how its operation and handover affected the Afghan prison system. The Bagram Detention Center operated within one of the biggest military bases of the coalition forces in Afghanistan, the Bagram Airbase.⁴¹ US military personnel operated the facility entirely outside the reach of the Afghan government, which undoubtedly resulted in blocking of development assistance to the Afghan prison system in the initial post-2001 period. The centre operated through a dedicated criminal justice workforce, including judges, prosecutors, and defence lawyers. Its junior level staff were mainly Afghan, but international criminal justice staff helped to manage investigations and court procedures, all paid for by the United States army. The centre hosted over 3,000 prisoners, many of whom were suspects arrested on the battlefield, or otherwise accused of helping anti-government militants. According to reports, the coalition forces picked the majority of prisoners in error. They locked them

40 Although many donors would like to think that they were working towards fulfilling real social needs, while local bureaucracies were all incapable and corrupt, this was not always the case. Afghanistan was an extreme example of poor donor coordination and poor connection of development projects with the social reality.

41 According to (Clinton *et al.*, 2011), the Bagram Airbase was built in the 1950s. The former Soviet Union used the base as one of its main military establishments during its invasion of Afghanistan in the 1980s. After the withdrawal of Soviet forces in 1989, the subsequent civil war seriously damaged the base, but after the international intervention in 2001, the US military reportedly spent millions of dollars renovating the base. The renovation included construction of eleven blocks for the Bagram Detention Center, which had over 3,000 inmates. To this end, it became the primary operations centre for the coalition forces, see Tim Golden (2008) 'Foiling U.S. Plan, Prison Expands in Afghanistan' (Last accessed in December 2019).

up in Bagram, with little or no evidence to associate them with the accusations they faced.⁴²

As mentioned previously, military forces refused to share information about the prisoners and denied any claims of mistaken imprisonment. Therefore, in late 2010, whilst I worked with the Cabinet Secretary, the office tasked me with leading a team of government agencies and collecting some demographic information about the prisoners of Bagram Detention Centre. In order to establish a solid foundation for our work, it was recommended that we consult available official statistics. Therefore, our first task was to approach a group of government officials, including the AGO, who was actively involved in the detention centre.

The official records of this government institution were surprisingly limited and inaccurate, a phenomenon that is characteristic of Afghanistan's statistical difficulties. For example, the office knew only that Bagram Detention Centre had eleven blocks, which were controlled jointly by the Afghan National Army (ANA) and the United States military. They also had some rough records of prisoners who had been either freed or transferred to other prisons. This was problematic, because the lists were not self-explanatory, and officials' oral explanations tended to differ. For this reason, we planned to establish a direct information flow between the Cabinet Secretariat and the Bagram Detention Center.

According to the Cabinet Secretariat, this would simplify things for all parties. It would relieve the constant pressure on relevant government agencies, helping to keep the cabinet dynamically up-to-date, and to influence the decision-making process, based on accurate data. However, efforts to establish these linkages did not lead to what we had planned, since the United States military was unwilling to cooperate.⁴³ Our next alternative was to travel to the detention centre to collect data, and to write down our own observations. As a civilian institution, we knew that we had no authority over the international military. Despite this, we were confident that something could be worked out, since we were representing one of the highest levels of the president's office.

42 See Tim Golden (2005) in the U.S. report, 'Brutal Details of 2 Afghan Inmates'. Also see Alex Gibney's Oscar-winning documentary, *Taxi to the Dark Side*, which explores the use of torture by focussing on the case of an innocent Afghan man who was beaten to death by American soldiers whilst being held in a private detention facility belonging to the United States military. The documentary was available on www.watchdocumentaries.com until late January 2019. However, the Zelus Film Holding Company, LLC has claimed copyright and removed the publicly available version of the documentary. See also, *The Guardian – Taxi to the Dark Side* (Last accessed in December 2019).

43 The reluctance of the military was understandable because we sought information within a domain that involved the biggest war on terror as well as notorious insurgents, who were actively fighting against the Afghan government and its international allies. This information was treated as confidential by the military, and was not shared with other institutions. The ICRC was one of the few institutions granted frequent access to the facility; it was able to visit the centre several times, speak with inmates, and hear their complaints. However, the ICRC never issued any public reports about interviews and complaints at the centre.

Nonetheless, we soon realised that gaining access to the detention centre would be more difficult than we had initially imagined. As the Bagram Detention Center was located in an utterly military environment, it resembled the frontline or headquarters of a boundless war; in this case, the 'War on Terror'. The first time we visited Bagram Detention Center, we were not allowed to stop even for a second at the front barricade, to ask permission to enter. We were required to stay a considerable distance from the entrance until the Afghan National Security Forces (ANSF) assisted our registration process, and our names were listed on the entry schedule for the day. The visit provided good exposure for the team, since it allowed us to observe the situation of the detention centre for ourselves. However, we could not access the data, which resulted in failure to complete our mission.⁴⁴

It seemed that the mysterious prison was running on expenses that were beyond imagination, and that it was being shielded from all outsiders. There were no signs of US military willingness to share information about the people being kept in the centre, let alone to hand the prison over. The US military constantly claimed that the Afghan prison system could not handle those in custody in Bagram. Hence, it was not advisable to let them take over, or to transfer the prisoners to other facilities run by the government. Indeed, after the infamous prison break of Sarposha (see 7.2.2 below), the likelihood of such a handover was even slimmer.

The government, on the other hand, had big plans to ensure that the security situation of prisons was improved, so that it could claim the transfer of Bagram Detention Center as soon as possible. It believed that this would be important to Afghan national interests and public trust in the government. Thus, issues related to Bagram prison found their way onto the agendas of several public platforms, including Peace Loya Jirga, in a matter of months.⁴⁵ This resulted in a series of very high-level talks between Afghan and US authorities, leading to the transfer of the Bagram Detention

44 Later, the cabinet assigned the High Commission for Monitoring Implementation of the Constitution, a new team, to take over the task which was initially assigned to my team. This led to the establishment of an Afghan Review Board, assigned by the Afghan president to free those who had been incarcerated based on inadequate evidence. The new team was able to gather and report official demographics and additional information about allegations, length of sentences, living conditions, and other facts regarding the detention centre. The new data mostly confirmed the findings of the media reports released beforehand.

45 A Loya Jirga is a Pashto term that means 'grand council'. It stands for an institution that is centuries old and involves a mass national gathering of representatives from various ethnic, religious, and tribal communities. This traditional mechanism has been used to approve new constitutions, declare war, choose a new king, and deal with national crises or settle national issues. The National Consultative Peace Loya Jirga, for instance, called on both the international community and Afghan governments to release the Taliban from prisons and to solve the issue of Bagram and other detention centres, before the two governments entered into further cooperation agreements and talks about peace with the Taliban. For further information about Jirgas convened between 2001 and 2020 see (Afghanistan Analysts Network, 2020).

Centre to the Afghan government in 2013, which was completed in about a year.⁴⁶

Initially, the ANA took over the prison, which kept the MoI and the rest of the prison system at a distance. However, the detention center soon became a significant part of the prison system and a point of reference for prison management and reform initiatives. Needless to say, the transfer of Bagram brought a strong sense of necessity to higher security arrangements across all the other prisons in the country. In turn, the government strengthened its position by taking a security-first approach to the prison system and making it easier to adopt the Bagram style of management (see 7.2.3 below).

3.5 CONCLUSION

The system inherited by the Interim Administration in 2001 had its own serious problems, caused by the wars, ruptures, and long instabilities of the past, as well as the overall socio-cultural, political and economic context. Solving the problems in themselves would have been a huge challenge, without any problems with post-2001 international intervention. Nevertheless, state-building efforts culminated in the formation of fundamental state structures at the end of the Bonn Process. Following the 2004 election, the first ever elected president took office, and in 2005 a representative National Assembly was elected, which voted for a representative government and Supreme Court.

All three important organs of the Islamic Republic of Afghanistan were therefore operational, albeit not perfectly functional. However, individual processes such as the constitution-making process and the judicial reform process, failed to direct future reform towards a well-informed, holistic, and sustainable process. There were a number of design flaws, differences of opinion amongst domestic actors, and donor influences on the process. In addition, the Constitution Commission and the JRC, as two institutions of reform, served as starting points for subsequent changes to the legal system. This included (in particular) laws being created in a less systematic manner, which led to a complex body of programmatic laws, similar to Allotte (1980). The laws were made under multiple sources of influence, including further temporary institution and project-oriented modifications.

As a temporary institution, the constitution commission initiated a constitution-making process that effectively deepened the divide between

46 Consequently, in early 2012 the Commander of Coalition Forces and the Afghan Defense Minister signed a Memorandum of Understanding, which described a roadmap towards the full transfer of the Bagram Detention Center to the Afghan Government. See ISAF Public Affairs Office on US Central Command (2012-03-09). See also The Guardian's report, 'US finally closes detention facility at Bagram airbase in Afghanistan', (Last accessed in October 2021).

those who believed in traditional and Islamic ideas of justice and those who believed in more liberal and Western-oriented ideas. This is a good example of the dilemma of 'historical blocks', as discussed above (see 2.10 above). It gave hardliners in the two streams reasons to argue and disagree (even years after the constitution had been passed) at several levels, and over legal concepts that were allegedly compromised or forged during the lawmaking process. The application of Sharia in parallel with the Penal Code is one example that is justified under Article 130 of the 2004 Constitution, and it resulted from the compromises made during the lawmaking process.

The JRC, as another temporary institution, could not establish an adequate theoretical and administrative foundation for the reform process. Its far-reaching inability to draw a clear roadmap for reform and define a clear relationship structure with the permanent institutions, added to its failure to reconcile differences of opinion within those institutions, left the future of reform open to ad hoc intervention. The commission not only failed to open a place for itself within the permanent justice institutions, it "also represented, in many instances, the arena in which different donors confronted each other for leadership in the sector rather than representing an avenue for reconciling the interests and prerogatives of the justice institutions" (Tondini, 2010, p. 46).

Additionally, there was a political dimension to the issue of reform. The brief outline of the two commissions demonstrates that involving outspoken domestic and political actors in the reforms led to conflicts and technical issues. Later, the processes became less political and more 'technical', as well as being more internationally controlled, making them look less 'legitimate' in the eyes of many domestic power holders. To this end, there was a deep relationship between these issues and the fundamental problem of 'multiple domestic sources of influence' or as (Riggs, 1964) calls it, 'poly-normativism' within Afghan society, and the inability of its various (liberal, religious, tribal, and ethnic) political elites to reconcile and compromise over issues of national interest.

After the Bonn Process a new era of reform interventions began, as (unlike the early post-2001 period) state structures were in place and ready to assume responsibility for reform. In addition, years of development work had encouraged some confidence in domestic actors, who had not only called for Afghan ownership and leadership of the reform process, but had also pointed fingers at flaws in the previous reform interventions, which were generally characterised as many failures and a large grey area concerning law and order. The latter issue had become a problem because the security situation had deteriorated significantly and people appeared to have lost faith in the international efforts to assist them (Rubin and Hamidzada, 2007, p. 8).

Although the London process laid the foundation for a long-term partnership, followed by an increase in Afghan ownership through the establishment of ANDS, NPPs, and TMAF, donors commonly opted to use temporary institutions imposed by funding agencies as their implementa-

tion vehicles, bypassing any direct engagement with domestic actors and institution personnel. In certain cases this may have been due to the complexity of reform, tight timelines, and the limited capacity of domestic institutions, but in others it was the choice of the donor. However, in all cases the sustainability of reform was severely hindered, since the natural development of institutional capacity within the host institutions was being prevented, leading to a wider gap between domestic actors and reform goals.

One can claim that, in addition to the Bonn Process, which was influenced by donor planning and direct intervention, the Post-Bonn Process also witnessed continuous instances of donor influence through projects, benchmarks and temporary institutions being imposed as conditions for funding. Almost all these approaches resulted in a degradation of the capacity development cycle within the host institutions. For example, in the case of temporary projects, the institutional memory and capacity that had built up over time usually dissipated or shrank to a few documents and papers after the project had ended.

As a result, the natural capacity-building process of the permanent state institutions was undermined, resulting in a decline in the quality of policy instruments and reform interventions as the process moved forward. In more cases than not, this alienated permanent institutions and distanced them from domestic realities. In the earlier stages of the reform, this was an issue for both policy and practice. After 2006, the issue improved in policy (theory), but still existed in practice to a large extent. In the end, reform was often counterproductive, since intervention did little to reinforce permanent institutions and even weakened them.

A particular aspect of weak institutions has been evident in the lawmaking sphere, leading to countless decreed legislation and project-oriented laws. In the latter, lawmaking ventures tended to avoid the normal lawmaking process, in order to secure a flow of funds for their own projects. The former served as a shortcut method, both for project laws and political elites passionate for change in general. Although excessive use of this method created contentious and problematic legislative products, almost all the laws associated with funding conditions were passed in this way. As an example, the government decreed all criminal justice laws from 2001-2020 and enacted them prior to National Assembly approval.

4 | A case study of criminal justice laws reformed due to the post-2001 overhaul

4.1 INTRODUCTION

This chapter examines *how criminal justice legislation has been affected by the post-2001 reforms* in Afghanistan. In addition, the chapter explores the process, problems, and dilemmas of lawmaking and the evolution of the prison system's legal mandate post-2001. Hence, it focuses on the most relevant procedural and substantive criminal justice laws. These laws include the Criminal Procedure Codes 2004 and 2014, the Penal Codes 1976 and 2017, and the Prisons and Detention Centres Laws 2005, 2007 and 2020. However, before moving into the reality of lawmaking, it is necessary to briefly discuss what has been the standard lawmaking process throughout the post-2001 era.

4.2 THE STANDARD LAWMAKING PROCESS POST-2001

The 2004 Constitution is the first normative framework to consult, when considering the legislative processes.¹ Articles 94 to 100 of the constitution stipulate guidelines for lawmaking and determine the course of action for all legislative activities. For example, Article 95 provides that, “proposals for drafting laws shall be made by the Government or members of the National Assembly or, in the domain of regulating the judiciary, by the Supreme Court, through the Government...” Accordingly, all three branches of the state (executive, judicial, and legislative) may propose legislation to

1 It can be argued that the 2004 Constitution has a unique feature, namely that it was the principal piece of legislation adopted as part of the post-2001 reform intervention. The constitution-making process was so central to the reform and state-building effort that one can safely regard it as the starting point for the reform of all other laws. The constitution itself, as the ultimate result of that process, contains several provisions that lay out a roadmap for substantive legal reforms and direct the government towards implementing them with the utmost precision. As a matter of fact, with adequate resources, leadership, and persistence, the roadmap might have led to the establishment of robust state institutions and a sound system of governance. However, there were several obstacles (including technical, social, and political issues) which prevented the law from fully realising its purpose, particularly in the area of lawmaking.

be processed either by the government, also known as a government bill, or by the National Assembly, also known as a members' bill.²

The government also enjoys a right to enact laws through legislative decrees, during the recess of the National Assembly. As per Article 79, "in case of an immediate need, the government shall issue legislative decrees, except in matters related to budget and financial affairs. Legislative decrees, after endorsement by the president, shall acquire the force of law. Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void." As a result of the government's ability to legislate unilaterally and the National Assembly's ability to control the lawmaking processes, a number of interesting dynamics emerged during the post-2001 reform. For instance, the government overused its opportunities to legislate via presidential decrees in the specific area of criminal justice. However, the National Assembly completely underestimated its role by adopting every decree as law, with either minor or no changes (see 4.4 and 9.4.2 below).

Whilst the constitution is the primary legal framework regarding the standard lawmaking process, the Law on the Manner of Processing, Publishing, and Enforcing Legislative Documents also provides important details and procedural sophistication.³ According to the latter law, all law-making activities must be coordinated with a Legislative Plan, prepared at the beginning of each fiscal year. The plan is intended to prevent incoherent and uncoordinated legislation whilst prioritising the needs of different sectors. The MoJ therefore uses a detailed checklist and feedback from govern-

2 According to Article 94 of the constitution, "law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise."

3 This is one of the most critical yet most undermined laws of Afghanistan. When looking at the chronology of its development, the law was initially promulgated in 1964, under the name of "Law of the Official Gazette", published in the Official Gazette 001, of 1964 (Hoot of 1343). The law provides the means and methods for publishing legislative documents, but delegates all details on the actual process of lawmaking to a secondary law (i.e. a regulation). It went through its first amendment in 1984, and again in 1999. Both times, the contents of the law remained the same, but the name of the law and the name of the political regime changed. As mentioned earlier, more practical details about law-making were delegated to a secondary law (i.e. the Regulation on Methods of Preparation and Proposing Legislative Documents), which was adopted in 1984 (Saratan of 1363) and stipulates all the technical details of the lawmaking process – from drafting to enforcement. The regulation was amended several times, first in 1987, then in 1999 during the Taliban regime, then in 2012, and finally in 2017. The final amendment in fact merged the regulation into the 'Law of the Official Gazette', in an unprecedented attempt to make it the "Law on the Manner of Processing, Publishing and Enforcing Legislative Documents" (Ministry of Justice, 2017a).

ment agencies to formulate a draft plan that is subject to approval by the cabinet.⁴

After the cabinet's approval, the plan is shared with the National Assembly to ensure the smooth passage of new legislation. The plan thereby becomes a framework with which all relevant lawmaking activities must be aligned, unless something emerges that was not anticipated. Moreover, the law defines different state institutions' precise roles and responsibilities for actual legislative initiatives, and outlines the steps a bill must follow in order to become a law (Ministry of Justice, 2017a Art. 3.24 & 7). The steps include the following, which are somewhat analogous to Institutional Legislative Theory and Methodology (see 1.1.4 above).

Drafting: Generally, the drafting process begins with the institution from which the idea or proposal for a bill originated. The institution assigns a committee of experienced members from within the organisation to prepare the initial draft; when several organisations are involved, a joint committee prepares the draft. As part of the preparation of the draft, the committee takes into consideration the general principles of Islam, the constitution, the contents of similar pieces of legislation, international conventions, the economic, social, and cultural development of the country, accepted traditions, and the stability of the rule of law (Ministry of Justice, 2017a Art. 11 & 17).

The committee is also responsible for ensuring that the new legislation contributes to the legal stability of the country, by providing precise and durable provisions, clearly assessing the expected outcomes, and identifying any problematic aspects, ambiguities, and pitfalls of the previous legislation. In the course of this process, subject matter experts, as well as government and non-government institutions, including civil society, academic, and research institutions, may be consulted extensively.

The committee can also decide whether to publish the draft on the institution's website or other media, to reach out to the public. Finally, the drafting committee must compile a comprehensive report of all those processes and submit it with the draft for scrutiny by the Legislative Department of the MoJ (Ministry of Justice, 2017a Art. 17-23).

4 A Legislative Plan also serves as a safeguard against excessive legislation, because state agencies must meet a number of requirements for their draft to be included in the draft plan, see Article 9-15 of the law. Nonetheless, Art 16 of the law has a political bent intended to circumvent all the aforementioned conditions and enlist legislative projects that come up as an urgent need at any given time, provided the Council of Ministers approves them. As in the case of legislative decrees, this is another interesting post-2001 reform dynamic that I explain further in the following sections.

Scrutiny: The Legislative Department of the MoJ (or, the *Taqnin department*) is a key actor in the drafting and review processes.⁵ Even though it is the responsibility of that department to examine and make all the necessary changes to work submitted by the drafting committee, the department has the option to enlist the assistance of other government agencies. If this happens, a review committee, including experts from the MoJ and other relevant actors (primarily from the Ministries of Finance and Economy), handles the review and evaluation process.

In most cases, the latter two ministries are involved, since the draft's conformity with the country's economic policies is always an essential factor, requiring a thorough analysis of its financial and economic implications. Finally, the Taqnin department reviews the draft from a legal perspective, to ensure compliance with the constitution and the overall legal framework of the country. The Taqnin department must also compile a comprehensive report of all the processes and submit it with the draft, for review by and confirmation from the council of ministers (Ministry of Justice, 2017a Art. 24-26).⁶

Confirmation: In the lawmaking process, the confirmation stage represents an important step, in which the MoJ submits its draft for consideration by the cabinet, via the Office of Administrative Affairs and the Council of Ministers Secretariat. There are two phases, and the draft is discussed in front of the relevant government bodies: first, at the legislative sub-committee of the cabinet, and then at the principal meeting of the Council of Ministers. In both phases, the draft is addressed as a whole, rather than as individual articles; however, one or more rounds of discussion may be necessary before approval. After confirmation, the draft is returned to the MoJ, which sends it to the Office of the State Minister of Parliamentary

5 *Taqnin* is an Arabic word meaning lawmaking, and in this case it is also the name of a department within the MoJ that is responsible for making legislative plans, reviewing and coordinating drafts, processing drafts, and publishing laws on the Official Gazette.

6 According to Article 7.2 of the Law on the Manner of Processing, Publishing and Enforcing Legislative Documents, different procedures apply to members' bills. Since the first four steps (drafting, scrutiny, confirmation, and approval) are defined as the responsibility and authority of the National Assembly, the MoJ does not examine drafts submitted by National Assembly members. The step by step process of a member's bill includes: 1) The Proposal: at least 10 members from either house of the National Assembly propose the initial idea of a bill. 2) Confirmation: at least one fifth of the house where the proposal was initiated will confirm the proposed idea. If confirmed, they will prepare and enrich the draft bill. If not, the plenary dismisses the proposal and the process ends. 3) Approval: the committee submits the final draft for approval by both houses of the National Assembly. To approve the members' bill, a similar process is adopted as when the government bill is passed before the National Assembly. 4) Endorsement: once approved by the National Assembly, the bill is sent to the president for endorsement. It involves a similar process as the government bill for the president to endorse and turn the bill into a law. 5). Publication: the MoJ is responsible for publishing the law in the Official Gazette, and for disseminating it throughout the country.

Affairs, which then submits it to the National Assembly for approval. When the draft legislation is a regulation (*muqarara* or below), approval by the Council of Ministers is sufficient for its enactment and publication in the Official Gazette (Ministry of Justice, 2017a Art. 27-30).⁷

In this regard, the confirmation process also marks the end of the substantively technical processes and the beginning of a more political and institutional power struggle. At this point, the Office of Administrative Affairs and the State Minister for Parliamentary Affairs are involved. These are not technically part of the lawmaking entities, but are sometimes inclined to make substantive interventions. The Office of Administrative Affairs, for example, besides serving as the cabinet's secretariat, is also responsible for coordinating and facilitating state affairs on a broad political level. Since it officially falls between the technical process of drafting and the political process of confirmation, it has the potential to influence the draft either at its onset, or just prior to confirmation. In my experience, the earlier situation is more likely to occur, since the drafters already know the processing requirements and the office's role, so they attempt to anticipate its requirements in advance.

Approval: At this stage, the draft passes through two more politically charged environments: Wolesi Jirga (the Lower House) and Mishrano Jirga (the Upper House). With assistance from the Office of the State Minister for Parliamentary Affairs, the MoJ presents the draft to the Lower House, along with a written report summarising all the previous phases. Next, the house

7 There is a hierarchy of laws in Afghanistan's legal system, as in many other countries following the civil law system. In the hierarchy, laws are categorised into three groups, including the constitution, ordinary laws, and organic laws, which are also called regulations and *muqarara*, and they are different in three ways: 1) Substantive difference: The higher level laws describe general principles, whereas the lower level laws tend to provide more technical details, as well as the main framework of their implementation. As an example, the constitution provides that mines and other subterranean resources are public property... There will therefore be ordinary laws to define public property and explain certain standards, such as the type, quality, excavation limits, subsidies, and the responsibilities of various government and non-government actors. Details of how the bylaw (*muqarara*) should be implemented are explained, including the institutional framework – for example, how the ministry of mines should operate. 2) Procedural differences: the approval process of laws differs, depending on the extent of their regulatory power; the broader the regulatory power of the legislation, the more sophisticated its approval process. This is believed to have been helpful, both in terms of legal stability and general public interest, because the process not only ensures that attention is paid to the issues; it also ensures that discretionary changes and amendments are blocked, because any amendment would require the same sophistication. For example, a constitution can only be approved by the Loya Jirga, ordinary laws are approved by both the government and the national assembly, and *muqarara* is approved only by the government. 3). Regulatory power: The higher the law in this hierarchy, the broader its regulatory authority will be. Using our previous example, the constitution covers the entire country, the mining law applies to any state (or part-state) institutions that work in the mine sector, and the relevant *muqarara* governs the ministry of mines and its relationship with others.

assigns the draft to the relevant committee, where it is thoroughly discussed. The committee considers: the general principles of Islam; the constitution; the contents of similar legislation; international conventions; the country's economic, social, and cultural development; accepted traditions; order; and, the stability of the country at the time of debating the draft. In addition, the committee is responsible for ensuring subject matter experts, civil society organisations, academics, and other relevant governmental and non-governmental institutions are consulted extensively. Modifications by the committee then go to the Lower House plenary, for approval. Following passage, the draft goes to the Upper House and undergoes a similar process of discussion in committees and final approval by the House.

If both National Assembly houses approve the draft, it returns to the government for endorsement by the president. If one or both houses have reservations, or if there is a difference of opinion within the National Assembly, the draft will be subjected to another level of discussion by joint commission. In general, the joint commission comprises representatives from both houses of the National Assembly, who are tasked with resolving conflicting points and opinions. At the conclusion of its work, the commission presents a resolution to the joint plenary of the National Assembly. Following approval of the resolution, the draft is considered final and ready for presidential endorsement (Ministry of Justice, 2017a Art. 31-34).

Endorsement: As per Article 94 of the constitution, the president is responsible for the final endorsement of laws. If the president is satisfied with the final version presented by the National Assembly, he approves it. If the president disagrees with part (or all) of the content of the draft, he must return it to the National Assembly within fifteen days, with a note explaining the reasons for his disagreement. In that case, the National Assembly may adopt a new resolution to accommodate the president's observation, if it is considered appropriate. Alternatively, the National Assembly will insist on its previous resolution, and renew it with a two-thirds majority of its members. The draft will be deemed final, and become law without the president's endorsement (Ministry of Justice, 2017a Art. 35 – 37).

Following Article 33 of the Law on the Manner of Processing, Publishing, and Enforcing of Legislative Documents, all legislative decrees must be presented to the National Assembly within thirty days of its first meeting, following a recess. If the government fails to consider these measures, the concerned legislative decree(s) are null and void. Despite all the efforts made towards a purely presidential system, as discussed in (3.2.3 above), at least in the realm of lawmaking, it is clear that according to the constitution and subsidiary laws, the president is not the final authority for passing legislation.

Publication: As the last step in the lawmaking process, publication of the law in the Official Gazette also constitutes its formal promulgation. Unless it specifies a transitional period, the law becomes effective after passing this phase. Along with the official promulgation, this step of the law-making process aims to raise awareness of the new law's rules and norms.

The MoJ is therefore responsible for publishing the law and disseminating it to government agencies and the public using various methods, including the media, bookshops, libraries, government centres, law enforcement agencies, and diplomatic missions within and outside of the country.

Unlike most countries of the Global North, where drafts are circulated and publicised before adoption, or even developed from public debates, the Afghan government usually imposes excessive restrictions on access to draft versions of every law made during the post-2001 law reform. Thus, official publication is the most likely point at which many people can access the full content of the laws. With this explanation of the standard lawmaking process in mind, the next section will examine the processes and methods that were used during the post-2001 reform of criminal justice laws.

4.3 THE PRACTICE OF LAWMAKING POST-2001

As discussed previously, the Bonn Agreement authorised the 1964 Constitution and its subsidiary regulations as the interim legal framework of the country. To that end, the Criminal Law of 1976, the Criminal Procedure Law of 1965, and the Prisons and Detention Centres Law 1950 emerged as the practical legal frameworks for the criminal justice and prison systems. However, implementation was not straightforward, because human resources and the physical infrastructure of the judicial sector were severely damaged, due to almost three decades of war and devastation.

In the meantime, the entire system of government had undergone several changes, and different political regimes had left their marks on the criminal justice system and the corresponding legislation (see 2.9 above). The Criminal Procedure Law of 1965, for instance, had gone through changes in 1967, 1974, 1981 and 1991 (Jupp, 2013, p. 93). As a matter of fact, some of these changes were due to technical requirements, such as defining detention periods (which was not clear in the 1965 law), but the 1974 amendment filled in that gap, as well as resolving several other issues with the original text.

As a result, the justice system and the justice apparatus were not fully familiar with the old procedural laws, and the system was unprepared for adopting them. At the same time, some confusion existed in the provisions of the Bonn Agreement, which stipulated that the 1965 Criminal Procedure Law would serve as the relevant legal framework. Specifically, since the correct provisions were included only in the amendments to the law (to which the agreement did not refer), and because the laws reverted to the past, the common understanding was that judges should adhere to the original law, and consider any amendments void. Thus, in the wake of the 1965 law's revival, practitioners were confused about whether the law itself or its amendments should govern issues like detention periods.

A detailed assessment of the post-2001 situation for the criminal justice system can be found in two reports compiled by the International Com-

mission of Jurists – Lau (2002) and Amnesty International (2003c).⁸ Indeed, these two reports became the main drivers of change, indicating the bulk of motivations behind the reform. The reports maintained that, in the aftermath of 2001, almost all judicial facilities and infrastructures had experienced severe damage, administration was deficient, and law enforcement facilities were poor or absent in certain areas. The reports also illustrate weaknesses in the criminal justice system's substantive and procedural legal frameworks.

The ICJ report concluded that the Afghan government had faced an impossible task in enforcing a legal system without available and printed laws. It asserted that, "neither judges, lawyers, nor educational institutions have access to applicable statutes and other legal materials. [It claims that] Afghanistan's prolonged civil war has brought with it the destruction or disappearance of most statutes." The report also recommended that laws establishing the framework of criminal procedures were of "particular importance", and in need of "urgent reform and subsequent dissemination" (Lau, 2002, pp. 4, 6 and 23). In essence, the overall criminal justice system was subject to reform, and its legislation was the priority.

Admittedly, this was the basic reality of the early post-2001 situation. Nevertheless, one can easily argue that jumping straight into redrafting laws was not what the country needed right away. In fact, the 'statutes and legal material' were not completely missing; almost all of them existed, and were actually used to write new laws. They were rather less accessible at the time, hence it was easier to spot them as a problem and turn them into intervention programmes, and consequently 'reform projects'. In this sense, the two reports are good examples of how development works could easily ignore or misunderstand the broader context, yet strongly influence action (Arnscheidt, Rooij and Otto, 2008, pp. 53-54).

In the remainder of this section I will examine how the reform affected the three most relevant legislative products in this context, including the Criminal Procedure Codes 2004 and 2014, the Penal Code 2017, and the Prisons and Detention Centres Law 2005, 2007 and 2020.

4.3.1 The criminal procedure codes (2004 and 2014)

The domestic and international actors involved in the early reform process were aware that several areas of the criminal justice system needed to be improved and reformed, as recommended by the ICJ and Amnesty International reports. The newly established government had neither the capacity nor the clear strategy to handle the situation. Neither did its inter-

8 The International Commission of Jurists and the Amnesty International reports aimed to examine the 1964 legal framework against international human rights standards benchmarks, and as part of reporting and campaigning on human rights, respectively.

national legal reform sector partners. Italy, as the lead nation, reportedly lacked a comprehensive understanding of conditions in the justice sector in Afghanistan, and it had limited experience of dealing with its issues (see 3.2.4 above).

Nevertheless, when Italy assumed the role of lead nation at the Tokyo Conference in 2002, it had to remain the primary donor for all financing activities, including fundraising for and coordinating programmes in the legal sector. Therefore, it was also responsible for overseeing criminal justice reform, including revision of the relevant legislation, which at the outset presented many challenges. According to an official report from the Italian Directorate General for Development Cooperation, “the first problem confronting Italy as the lead country was that of trying to understand the justice system and how it actually operated in practice...” (Perathoner *et al.*, 2011, p. 15).

As discussed before, in spite of using a defective and flawed method to comprehend the dynamics and operations of the criminal justice system, Italian experts used those admittedly shallow sets of information to develop a variety of ‘portfolios’ and ‘priority plans’ for reconstruction of the criminal justice system. A ‘direct action portfolio’, covering the functions of the criminal justice system, was one of these priorities. As a first step, the portfolio had to establish the rules of operation for police, prosecutors, judges, and prison officers. These were deemed necessary, because of allegations of ‘violations of human rights within the justice system’ and the ‘tragic consequences of the abuse of power’, that in theory could be mitigated via well-defined procedural laws.

In addition, it was imperative to ensure the outcome was “modern, human rights compliant, and aligned with Afghan culture and tradition” (Lau, 2002). Although, ‘modernity’ and ‘traditionalism’ precluded coexistence, in the same way that human rights standards would directly challenge many traditional practices, leading to a complex reform situation. The elementary yet cosmetic products, including questionnaires, the direct action portfolio, and other contradictory material, were used as the basis for reforming the criminal justice legislation.

Moreover, these reforms were influenced by the assessments of human rights groups, such as Amnesty International and the International Commission of Jurists (see footnote 8, in 4.3.1 above). The ICJ and Amnesty International reports clearly expressed a need for the international community to play an active role in lawmaking processes, and showed suspicion if domestic actors and institutions were able and willing to adhere to international human rights standards whilst drafting laws. As stated previously, the latter reports reflected the basic reality of these institutions and actors, but not necessarily the needs of society or the broader context as to why these actors and institutions were not very lenient or prepared to introduce revolutionary human rights-related changes and other new ideas.

Nevertheless, the reports not only fundamentally influenced lawmaking processes, they were also part of the underlying disagreements and problems. As we examine the creation process for the 2004 Constitution and 2004 Interim Criminal Procedure Code against the backdrop of these recommendations, it becomes evident that there was much room for international intervention and leadership, yet in certain areas of reform, such intervention and leadership, reform caused complications, ultimately leading to conflicting legislative products in several instances.

4.3.2 The Interim Criminal Procedure Code 2004

The Interim Criminal Procedure Code for Courts (or the Interim Criminal Procedure Code 2004) and its development process is a good example of a failed legal transplant attempt. Several authors have described the code as merely a transplant of the Italian Criminal Procedure Code, insufficiently tailored to the conditions in Afghanistan and out of touch with reality on the ground (Tondini, 2007; Eddy, 2009; Hartmann and Klonowiecka, 2011; Jupp, 2013; Rahbari, 2018). Taking discussions of the broader context (presented above) into consideration, the principal question is: How this state of disarray developed and what factors contributed to it? However, before engaging in the development process of the code in order to address that question, it is essential to reflect on the following background consideration. As soon as Italy assumed its role as lead donor, it established the Italian Justice Project Office (IJPO) as an independent project implementation section. The office was intended to oversee the justice reform mission for Afghanistan, and it was supervised by Guiseppe Di Gennaro.⁹ As this office was already involved in reform initiatives, such as the JRC, and in training judges, it also took on reform of the 1965 Criminal Procedure Code. This arrangement allowed for an unreasonably isolated drafting process for the code.

According to some sources, Di Gennaro personally assumed control over the drafting process of the code. He was assisted by a small team of lawyers from his office and military lawyers from the United States troops, who were leading Operation Enduring Freedom in Afghanistan (United States Institute of Peace, 2004, p. 8). The team had no (or limited) consultation with Afghan officials and other domestic actors during the drafting process. As a result, they produced a simplified and empty draft, consisting of 98 articles that were mainly drawn from the Italian Criminal Procedure

9 Guiseppe Di Gennaro, a former Italian anti-mafia magistrate, was a respected lawyer and high-profile legal figure in Italy. An expert in Italian criminal law and international human rights standards, he worked as 'special advisor' to the Italian government, and he used to be Italy's main reference person for justice reform in Afghanistan. Di Gennaro also worked as the Executive Director of UNODC in 2003.

Code of 1988. The draft was then directly submitted for cabinet approval.¹⁰ Consequently, the Afghan government promulgated the draft in February 2004.¹¹

According to some authors, the “lack of consultation created resentment at domestic level in the Afghan justice institutions, and the Afghan National Assembly initially rejected the Code and urged President Karzai to refuse to ratify it. It was only after the Italian government exerted political pressure by threatening to withdraw funding for other justice projects that President Karzai invoked his presidential powers and issued the Code as an interim decree.” (Suhrke and Borchgrevink, 2008; Jupp, 2013, p. 60). The problematic drafting process and forceful adoption of the code are confirmed by other authors as well (Tondini, 2007, p. 324; Hartmann and Klonowiecka, 2011, pp. 275-6; Rahbari, 2018, p. 293).

In contrast, the Italian General Directorate for Development Cooperation reports that “despite its brevity and simplicity, [the Code] contained all of the basic principles enunciated in the United Nations conventions for the protection of human rights in legal proceedings... [and] contained a mechanism whereby the administration of criminal justice could be extended to the entire national territory, notwithstanding the absence of an organised structure” (Perathoner *et al.*, 2011, p. 15).¹² Although parts of this assertion are correct, implementation of the code suffered a combination of the issues mentioned above.

The code not only lacked an organised structure, but it did not match the resources within the government. For example, the police and prosecution had to apply the 1965 Code and its 1974 amendment, in conjunction with the new code and alongside their personal assessments of the situation. As a result, within two years of the code’s implementation, the Supreme Court reported a five-fold increase in pending criminal cases. Likewise, the prison population increased three-fold in five years, indicating an increase in arrests and convictions based on the new procedures (Jupp, 2013, p. 61 – cited from UNODC and others).

To this end, the new code not only categorically failed to replace previous and competing legislations, it adversely affected the universality of legal proceedings based on a single law, because it enabled autonomous

10 Originally transplanted from Egyptian law, the Criminal Procedure Law of 1965 was modified several times, but more substantially in 1974. The law was is a comprehensive set, containing 500 articles covering criminal procedures, whereas the Interim Criminal Procedure Code only contains 98 articles, largely sourced from the Italian Criminal Procedure Code of 1988, which contains more than 300 provisions.

11 The Interim Criminal Procedure Code for Courts (Ministry of Justice, 2004). The code contained 98 articles governing criminal procedure, from the arrest and detention of individuals, to the investigation and prosecution of criminal offences, to trials and the implementation of decisions.

12 The Interim Criminal Procedure Code indeed conforms to fundamental sources of criminal law, such as the Penal Code of 1976 and the 2004 Constitution, which are aligned with all 98 articles of the United Nations convention on the protection of human rights.

judicial bodies to determine the applicable rules and procedures according to their own preferences, instead of according to a universally applicable law. According to drafters of the code, “the text was designated ‘interim’, in order that it might immediately be put into effect by Afghan jurists but, at the same time, allow them to subsequently draw on their own judicial experience for making suggestions on how the Code could be improved.” (Perathoner *et al.*, 2011, p. 15).

This is evident in what happened with Article 98.3 of the code, which revoked only a few incompatible provisions of previous laws and gave way to the rest, as well as to the personal interpretations of criminal justice actors in many other areas. As a result, judges and prosecutors regularly consulted other laws to resolve issues such as granting bail, which were not covered in the new code. The problem of multiple norms further intensified alongside an escalation in insecurity and the emergence of new legislation regulating specific areas, such as counter-terrorism, anti-money laundering, and the investigation of crimes against the internal and external security of the country.

In addition, the Police Law (2005) and the Counter-Narcotics Law (2005) expressly superseded the Interim Criminal Procedure Code in matters concerning allowable police custody and drug-related issues, such as search, seizure and covert surveillance. In many cases, there was a tendency for criminal justice actors to look beyond the agreed legal framework, believing that their own judgement would be less confusing than the law. This approach towards the application of law introduced a new institutional culture within the criminal justice system, which I would like to refer to as: constant reflection on and adjustment of the law, to make life easier for officials and enable them to ‘rule by law’. Similarly, the approach sparked an interest in challenging the validity of applicable rules, by making speculative and hypothetical arguments in the public domain.¹³

Another complication caused by the new code, which stemmed from lack of experience with and knowledge of the Afghan legal system, was the division of labour between criminal justice actors. Traditionally, police assumed responsibility for discovering and investigating criminal offences. However, as is stipulated in the Italian Criminal Procedure Code, the new code required that police should work under the supervision of prosecutors whilst investigating crimes.¹⁴ As a result of this abrupt departure from established criminal justice practices, there was confusion about the roles and responsibilities of the police and the prosecutors, which led to profound mistrust between the permanent institutions of criminal justice.

13 An example of this is the protest against Article 26 of the Criminal Procedure Code 2014, which women’s rights activists organised.

14 Articles 23, 29(1) and 29(2) of the Interim Criminal Procedure Code are exact copies of Article 370(1) of the 1988 Criminal Procedure Code of Italy, which provides that: ‘investigations should be undertaken by the prosecutor who can supervise and direct the police.’

Despite all these problems, it took the criminal justice actors over two years to convince the government and international community that the Interim Criminal Procedure Code needed thorough reform and adjustment. In early 2006, the government of Afghanistan decided to revise the Interim Criminal Procedure Code. The government assigned the MoJ to revise it, with the help of the CLRWG. This process would eventually lead to the Criminal Procedure Code 2014.

4.3.3 The Criminal Procedure Code 2014

The development process for the Criminal Procedure Code 2014 was reportedly different and more broad-based. The process involved numerous stages and institutions, and a number of important steps. First, in 2007 the MoJ began revising the interim Criminal Procedure Code in response to the issues discussed above, and it produced its first draft in 2009. A further two-year review, scrutiny, and consultation process with international experts was conducted through the CLRWG (see 3.2.6.3 above). Finally, the draft was subject to further consultation and review by the National Assembly, which adopted the draft in 2014.¹⁵

Some authors and practitioners view this specific drafting method as a more substantive and (in some ways) institutional approach to post-2001 reform process intervention. The working group initiative was considered “a serious effort to achieve the complicated aspirations outlined by the constitution” (Rahbari, 2018, p. 294). As a result of this approach, the draft followed the normal legislative process, incorporating procedural rules and allowing for research and consultation on various aspects of the draft. The thorough drafting process resulted in balanced and practical provisions, especially with regard to international standards, fair trial arrangements, and the rights of accused individuals. Eventually the process culminated in a code that could eliminate all the free-standing procedural provisions.

The code also introduced improvements in a number of other areas, including the integration of modern criminal justice concepts. A few of these concepts and options include (for example) the postponement of punishment, conditional release, bail release, parole provisions, the dismissal or lightening of punishment for pregnant women, and the dismissal of cases due to insufficient or weak evidence.¹⁶ More generally, the new Criminal Procedure Code gives particular weight to alternatives to imprisonment and

15 The provision of Article 38.3 of the Interim Criminal Procedure Code was the only amendment made during this period. The provision relates to the composition of a review committee for court decisions, which was originally comprised of two members of the appeals court and one member of the Supreme Court. In the amendment, the two appeals court judges were replaced by two advisory members from the Supreme Court, and this was published in Official Gazette Number 1013, in March 2010.

16 See, for instance, Article 17, 248-330 of the Criminal Procedure Code (2014).

rehabilitation. For example, the code specifies that one of its nine objectives is the rehabilitation and reintegration of criminals. Furthermore, it provides clear instructions on how procedural instructions and modern institutions should be applied, which is the first instance of such a clarification attempt in the post-2001 era.¹⁷

Despite the positive aspects of the Criminal Procedure Code, the field-work conducted for this dissertation and my previous observations of the drafting process revealed some downsides to the process that had not been covered elsewhere in the literature. Although very little information about or records of the eight years of drafting (2006-2014) were publicly available, I could access and review scarce archival data and could interview people who were not accessible to others (see 1.4 above). My findings indicate that the process deviated from the standard lawmaking processes; it was also flawed. More importantly, the published version of the code differs from the final version approved by the National Assembly. Despite the significance of all the other matters, the latter indicates seriously undemocratic codification behaviour. This resonates closely with the arguments I presented earlier, in relation to an overly empowered government and its impact on the National Assembly (see 6.3 below).

I want to begin with an account of the inter-institutional dynamics that I compiled via interviews and my previous observations of the drafting process. According to the lead technical actor at the Taqin Department, the Criminal Procedure Code 2014 was drafted based on the Interim Criminal Procedure Code of 2004 and the Criminal Procedure Law 1974, as well as the model Criminal Procedure Code for the United Nations. According to him, “the Taqin and the CLRWG thoroughly reviewed all relevant material and drafted the new Criminal Procedure Code.”¹⁸

The consultations and drafting meetings were mostly held at the United Nations Office for Drugs and Crime, whilst others were held in the MoJ. However, after the draft was finalised, one individual with outdated views and a tyrannical mentality [referring to the then Minister of Justice] intervened and made discretionary changes to the draft, without consulting those involved in the drafting process. As a result, about 50 articles of the code need amendment, as we speak.”¹⁹ When asked why the minister made such unilateral changes, the respondent replied that the reasons were “self-interest and fear.” The minister did not have a positive relation with other technical experts or the legislature. For example, my respondent claimed that “one day, the minister argued with the team of national and interna-

17 In the original version of the Criminal Procedure Code there were no sections providing alternatives to imprisonment. As a result, an amendment prompted by Article 157 of the Criminal Code of 2017 arose as an annex to the Criminal Procedure Code in March 2018 – see Official Gazette Number 1286.

18 Personal interview with the Criminal Law Section at the Taqin Department, MoJ – August 2016.

19 Ibid.

tional experts from 13.00 to 18.00 hours about Article 26.²⁰ Some experts expressly rejected the minister's views, and others left the meeting to show their disagreement, but the minister would not accept anyone's ideas... On the other hand, later, we learned that some members of the National Assembly did not like the work of Taqnin. So they proposed some changes in the department and pushed the minister hard, and he was warned that he would lose his job... One member of the legal committee in the Lower House told us in a meeting that they planned to summon the minister of justice. However, they decided to let it go when they saw that he had changed the 'ridiculous' concept developed by the Taqnin."²¹

I also drew on some observations made whilst serving as cabinet under-secretary, which shed light on another aspect of these inter-institutional dynamics. I must admit that, at the time, I was not aware of the dynamics; I discovered them after interviewing the lead technical actor from the MoJ and comparing my notes with those I took in cabinet meetings. In brief, I was present at the cabinet meeting when the MoJ presented the draft Criminal Procedure Code. After the Minister of Justice had thoroughly presented the draft, the cabinet members discussed and criticised different aspects of it. The president, who also chaired the meeting, was particularly disappointed, and he criticised the minister's presentation harshly. The president even claimed that the Minister of Justice had wasted the cabinet's time.

Although this was very embarrassing for the minister, he had to retreat, claiming that 'the contents of the draft were okay, but language issues and the order of the provisions made the draft seem contradictory.' He admitted that the draft had many linguistic and grammatical mistakes, as well as conflicting provisions. He also openly reported that he accepted the blame for leading a team of 'inexperienced professionals', who could not even put together a decent and fluent draft. The minister promised the cabinet that he would go back and work with some of his team members to align all the contents and re-submit the draft. However, he needed time to complete the review and fix the issues, either by himself or with the help of 'some qualified people', because he did not want to waste the cabinet's time on what he called 'imperfect drafts'.

As part of my job, I noted all the minister's statements and recalled them precisely as he said them. Thus, I firmly believed that the minister did personally review the draft out of fear and anger resulting from the concerned cabinet meeting, as was claimed by the respondent. This, along with the short statement from the lead domestic actor, illustrates several important inter-institutional dynamics that occurred during the development of the code. First, it indicates a serious lack of leadership at the senior and technical levels, resulting in tensions within the legal drafting agency.

20 This is a controversial article in the Criminal Procedure Code (see footnote 13 above), which is further explained at the end of this section.

21 Personal interview with the Criminal Law Section at the Taqnin Department, MoJ – August 2016.

A tension so high, that key actors had to work independently and against the procedural rules within the very lawmaking institution that was legally obliged to prevent such conduct.

Second, it emphasises the strong involvement of international actors through the CLRWG, even to the extent that most of the 'drafting and consultation meetings' were hosted by the UNODC in Kabul, rather than by the ministry. Some members of the National Assembly had even argued that the code was drafted in 'embassies', referring to the UNODC office in Kabul, so they wanted to punish the minister for not trying hard enough to prevent it and for not controlling the Taqin staff. In this way, the Minister of Justice was under immense pressure from several fronts, including the technical people working with him, his peers in the cabinet, the National Assembly, and the international community. However, I did not know if the minister actually changed the draft in the way my respondent claimed, or if there were any other reasons behind his unilateral changes. Hence, I thought this was precisely the point in time when triangulation of data might help (Bryman, 2016). Therefore, I tried to compare the statements and my findings with archival data from the MoJ and National Assembly.

Starting with issues within the MoJ, according to its standard procedure the Taqin Department assigns a drafting committee to every bill. The committee consists of seven members of the department and representatives of other institutions. The Taqin department produces hard copies of the draft under revision and distributes one copy to each committee member. The committee members write down their comments and suggestions, provide their signatures, and place a date on the cover of these hard copies. The proposed changes are then incorporated into a consolidated version by the department. However, hard copies with handwritten comments are archived and labelled with the commentator's name. The Taqin department keeps these files until the bill becomes law; then they are destroyed.²²

I located the last working copy, which belonged to the then minister, in the Taqin archive. The copy contained comments on 300 out of the 382 provisions of the law, and it was full of suggestions for changes, omissions, additions, editorial changes, and the reorganisation of articles. Amongst the controversial articles removed from the draft were those that allowed criminal cases to be suspended during investigation. However, most other changes and comments were geared towards easing prosecution measures in cases that were based on national security allegations.

22 The so-called 'standard work procedure' was not actually standard in all cases. The MoJ applied it only when drafting important and controversial laws (such as the Criminal Procedure Code). In response to a question on where they keep all the archival documents related to the drafting process, the secretariat said: "we used to make hard copies, and members wrote down their comments for some laws ... However, for other laws we would connect a computer to a projector and type out everyone's comments. We do not keep any records, but we do keep one incoming draft and one outgoing draft."

The next step was to examine the archival data of the National Assembly regarding the Criminal Procedure Code, to find out about debates concerning finalisation of the code. The archived data contain a 59-page verbatim transcript of the plenary discussions devoted to the code. The transcript contained little information on debates about the contents of the code, concentrating instead on the country's general political and social issues, although ultimately the house states its endorsement of the code. In the meantime, I found the adopted version of the code attached to that report, along with a separate sheet containing the National Assembly's comments and remarks.

In order to compare the officially published law with the final draft adopted by the National Assembly, I used the National Assembly data discussed above. To my surprise, unilateral changes to the draft were not limited to those allegedly imposed by the Minister of Justice. There were at least two instances in which the views of the National Assembly did not make it into the final Criminal Procedure Code. For instance, in the final draft adopted by the National Assembly, both houses voiced objections to articles 102 and 308 of the draft, which provided for conditional detention due to objections to acquittal verdicts.²³

In theory, the National Assembly argued that the court's decisions were immediately effective. Consequently, when the court discharges someone s/he must also be freed promptly. They argued that several practical issues might arise if this did not happen. For example, since it could take months (or maybe years) before the court of appeals reopens the case, the defendant would remain incarcerated unnecessarily. Thus, the National Assembly repealed the articles with a majority vote and dropped them from the draft.

Nevertheless, the articles were retained in the published version of the law. Upon further investigation of the issue, I discovered that there had been a series of negotiations between the government and the secretariat of the National Assembly who had agreed to allow the articles to remain, but this was not made official. As the National Assembly argues, the articles caused many problems in the court system and prisons. For example, I noticed that countless defendants were being held in detention centres, including high-ranking officials charged with corruption and national security, who were incarcerated due to the provisions in articles 102 and 308 of the code. Yet, as a result of the heavy caseload and increasing security threats, the courts could not rule on faith alone.

23 Article 102 of the Criminal Procedure Code provides that "when the prosecutor disagrees with a court ruling that sees a convict sentenced for a felony freed, the convict shall be kept incarcerated. The secondary court has 15 days to decide, and if it does not, the convict may be set free". According to Article 308, "if the accused person is in detention and the court issues a decision for his acquittal; or if s/he is sentenced to punishment, which does not include imprisonment; or if suspension of enforcement is ordered; or if s/he has completed his sentence: s/he shall go free immediately, even if the decision has been objected. Unless the prosecutor requests a higher court to order either an extension of the detention or a nullification of the suspension of enforcement."

In light of these issues, although I believe that institutional dynamics could have had detrimental effects, I contend that the code's problems cannot merely be the result of a chaotic work environment. Instead, the problems are part of a more calculated arrangement, aimed at a specific outcome relating to terrorism and national security arrangements. The presence of foreign military lawyers in the drafting committee, plus several questionable amendments made to the code during the four years after its adoption (2014-2018) could explain some of these allegations.²⁴

Another interesting aspect of the lawmaking dynamics that came to light during the adoption process for the Criminal Procedure Code relates to its first amendment, published in the Official Gazette 1132 of May 2014. The amendment addresses specific objections from women's civil society and human rights organisations regarding Article 26 of the Criminal Procedure Code. In the article, waivers were provided to exempt people from serving as eyewitnesses to cases involving their spouses, as is also common in other legal systems. Activists protested against this provision because, to them, it could potentially offer 'perpetrators of violence against women with de facto immunity'.²⁵ As mentioned earlier, the notion of challenging laws via international pressure and by engaging diplomats and aid workers are new phenomena inspired by the international push to adopt the Interim Criminal Procedure Code, discussed in (see 4.3.2 above). The government has demonstrated flexibility, either by adopting new laws or by changing the provisions in existing laws, as in both the cases mentioned above.

The second amendment was geared towards tightening measures against the perpetrators of terrorist activities. It criminalised all conduct listed under Article 5 of the Rome Statute in the International Criminal Court's interest. Many argue that this was biasedly used with a sharper focus on anti-government militants and favouring the War on Terror, rather than focussing on fair treatment of all sides involved in the conflict. In support of this assertion, critics point to the fact that, whilst defending its request for deferral of the ICC investigation, the government had difficulty providing evidence to prove its willingness and ability to prosecute its own forces and those of its allied international forces. This inability was due to the fact that the criminal justice system was focussing mainly on insurgency, rather than on crimes as a whole.²⁶

24 There have been four amendments to the Criminal Procedure Code 2014, most of which came from the relevant government agencies and were frequently triggered by implementation issues, although the two controversial issues relating to Arts. 102 and 308 were never addressed.

25 For a detailed report, see *The Guardian*, Tuesday February 4, 2014 *New Afghanistan law to silence victims of violence against women* | Afghanistan | The Guardian

26 For further details about the Situation of Afghanistan at the ICC, and the government's response, please consult (Afghanistan Analysts Network, 2021; Hakimi, 2021; Ishii, 2021; ICC, 2022).

The second amendment also revoked Article 10 of the Criminal Procedure Code, which dealt with ‘precautionary detention’, because it was found to be in conflict with the Constitution of Afghanistan. The amendment, published by Official Gazette Number 1222 on September 16th 2016, forms the first annexe to the Criminal Procedure Code, and it relates to areas that either did not exist in the earlier text or contained provisions that were too lenient. The third and the fourth amendments are known as the second annexe to the Criminal Procedure Code and are concerned with alternatives to imprisonment. The annexe is published in Official Gazette numbers 1286 (March 2018) and 1318 (October 2018).

The latter modifications were inspired by Article 157 of the Penal Code 2017, which suggests some procedural sophistication in implementing modern criminal justice concepts, including alternatives to imprisonment, parole, and community service. However, the criminal justice system and the control measures employed by the law enforcement agencies do not meet the criteria for institutions such as parole, conditional release, and community service, as alternatives to prison. Thus, all the modern concepts proposed by the code were almost impossible to realise in Afghanistan’s social, political, and geographical context.

In summary, the Criminal Procedure Code’s commitments and the realities of criminal justice are at odds. Particular concerns regarding the modern concepts proposed in the law included credibility, transparency, and application issues for judges, prosecutors, and other actors in the criminal justice system.²⁷ Thus, it is fair to conclude that the code added responsibilities to a malfunctioning system, without considering the feasibility, resources, capacity, and leadership required to handle those responsibilities.

27 The Criminal Procedure Code allows inmates to take leave, but in reality it is impossible to allow inmates to leave the secure parameters of the prison, because they have no registered addresses and there is no surveillance system – hence, no guarantee that the inmate will return. In particular, if an inmate visits an insecure area of the country or crosses the open borders with Pakistan or Iran, the police will be unable to return them to the prison.

4.3.4 The Penal Code (1976 and 2017)

This section concerns the development process for the Penal Code 2017, but it begins with the 1976 Penal Code because that has been the law governing punishment for most of the post-2001 period. The 1976 Code applied until 2019, about two years after it was replaced by the Penal Code 2017.²⁸ As mentioned previously, during the late 1970s several new laws were promulgated in five areas, including civil service, land reform, civil and commercial affairs, taxation, and criminal justice (see 2.5 and 2.6 above). Several sources have referred to the period as the era of democratic codification, the point of maturity, and a defining moment in the legal history of Afghanistan (Dupree, 1978; Kristina *et al.*, 2017).

The 1976 Penal Code was amongst significant legislative acts of the time, and contained a comprehensive description of crimes and punishments that restricted the arbitrary punitive practices of the past. Dupree (1978) argues that the code was the first step “towards creating a government based on law, not simply on the whims of those in the judiciary.” (1978, p. 4) Although the law was generally lenient toward Islamic Jurisprudence and the Hanafi school, it continued to adhere to important international standards for criminal justice.²⁹ Article 1, for example, limits the code’s applicability to tazeer crimes only, and thus accepts the legal validity of Sharia in the cases of *Hudud* and *Qisas*. As such, the code provides for

28 The 1976 Penal Code remained in effect for a transitional period, because all the criminal justice apparatus was aligned with its provisions, and actors in the justice sector (particularly judges and prosecutors) understood almost every technical matter, contextual challenge, and implementation requirement of the law.

It is worth mentioning that all examples provided in this dissertation are based on the 1976 Code, which was the competent punishment law at the time of my fieldwork, and which continues to apply in parallel with the new Penal Code. Moreover, all imprisonment cases studied for this work were based on the 1976 Code, since it was unlikely that the new Penal Code would be fully implemented and able to yield results for this study before 2020.

29 A) These internationally accepted norms include the principle of legality and the principle of non-retroactivity for crime and punishment. For example, Article 2 of the Penal Code states that “No act shall be considered a crime unless it is in accordance with the law”. Article 3 states that “No-one can be punished but in accordance with the law promulgated before commitment of that act”. Article 27 states that “A person committing a crime is punished according to the law in force at the time of the act, with the exception that, prior to issuing the final verdict, a new law in favor of the accused is brought into force. In the event that a law comes into force after the final verdict and the new law does not consider the act that was the basis for the individual’s sentence to be a crime, the execution of the sentence will be suspended and the penalties associated with it will be voided.”

B) The Hanafi jurisprudence is one of four religious sects of Sunni schools within Islamic jurisprudence, which is named after Nuhman ben Sabet Abu Hanifa, scholar and founder of the school. Maliki, Shafi’i, and Hanbali are the other major schools. For more details, see (Mack, 2012, p. 289).

fixed penalties in some instances, but most provisions state the minimum and maximum ranges regulating all applicable punishments. The judge may then decide the punishment, based on the degree of guilt and harm caused by the criminal act. Accordingly, the code leaves *Hudood* and *Qisas* to be dealt with by Islamic jurisprudence.³⁰

Imprisonment is a significant type of punishment recommended by the code, and various reformatory measures are attached to different forms of imprisonment.³¹ However, the code does not explicitly mention rehabilitation as a universal objective of imprisonment. The code's silence regarding rehabilitation appears to be linked to the historical context of rehabilitation, because the timing of the development process for the law coincides with the peak of the 'Nothing Works' debates about the effectiveness of rehabilitation (see 1.1.3 above and 5.2 below). Perhaps the lawmaker was influenced by the contemporary debates and opted to omit rehabilitation.

Meanwhile, despite being partly dormant during the Civil War and Taliban regime, the code applied until 2019. The law was passed as a result of a major codification programme, right at the end of a historical period known as the 'golden era'. For this reason, it is believed that both the content of and manner in which the code was developed have contributed to its endurance, completeness, and accuracy in describing crimes and punishments (Una *et al.*, 2009, p. 12). As a result, even when specific regimes suppressed the code, none replaced it with a completely new Penal Code, so it automatically and fully returned to force when a subsequent regime took over.

The 1976 Penal Code was specifically listed as a reform priority in several reform plans and policy documents, including the Afghanistan

30 *Hudud*, *Qisas*, and *Tazeer* are concepts related to three types of punishments defined by the Sharia.

Hudud, which means 'limit' or 'restriction', is a concept of punishment determined by God, and is not subject to change. It is imposed upon a limited number of crimes, such as adultery, *Qadaf* (e.g. accusing someone of illicit sexual relations but failing to provide four eyewitnesses to the incident), intoxication, apostasy, rebellion against the legitimate Caliph, and theft.

Qisas literally means 'retaliation' and is a concept of punishment that allows equal or similar treatment for harmful conduct. Punishment for certain types of physical harm, such as murder, bodily injury, or property damage, falls under this category, and victims or their relatives have the right to retaliate under certain circumstances. For example, a murder victim's nearest relative or legal guardian has the right either to take the life of the killer or to forgive him/her in exchange for a set sum of blood money called *Deya*.

Tazeer refers to punishments for offences that do not qualify for *Hudud* or *Qisas*. The limits of *Tazeer* are determined by either a judge or the ruler of the state. However, the punishment must still adhere to the general instructions of the Quran and Hadith, as well as to the statutory laws.

31 In the Penal Code 1976, imprisonment accounts for two-thirds of the main punishments and includes four categories: continued imprisonment (16-20 years), long imprisonment (5-15 years), medium imprisonment (1-5 years), and short imprisonment (24 hours 1 year).

Compact in 2006.³² Yet, it was only in early 2008 that the president of Afghanistan assigned the CLRWG – consisting of government officials, Islamic scholars, and international experts – to revise the Penal Code. The group received its mandate in 2008, began work in 2012, and produced the new Penal Code in 2017. Reform advocates cited the need to comply with the 2004 Constitution and the incorporation of Afghanistan's international obligations as reasons for changing the 1976 Penal Code.

However, the most cited and perhaps also the most important reason for changing the 1976 Penal Code was to consolidate the free standing and ad hoc criminal provisions that existed and applied in parallel with the 1976 Penal Code. Altogether, 17 de facto criminal laws, 50 laws with substantive penal provisions, and 17 laws indirectly leading to penal provisions came into existence over the course of the first few years of post-2001 reform intervention.³³ The abundance of legislative products, which may at best be defined as self-centered and conflicting, have primarily been due to poorly formulated priorities inspired by interventions such as the ICG reports, discussed above.

The reform process for the 1976 Penal Code provides an interesting example of the mistaken priorities and processes which were common to post-2001 reform intervention. It demonstrates how opportunities were repeatedly missed by focussing too much attention on relatively easy areas of reform – in this case, the Criminal Procedure Code instead of the Penal Code – for too long, consequently delaying the substantive issues of reform to the point of no return. At the same time, it represents an example of the changing attitude towards a somewhat institutional approach to law reform using the CLRWG, discussed in (see 3.2.6.3 above).

With that arrangement, the new Penal Code became a special MoJ project rather than a routine task for its Taqrin department. In return, the project was supported by technical and financial assistance from the donor community, which allowed for consultants to be hired and training to be conducted, along with workshops and study visits to other countries, such as Malaysia in October 2012 and the United Arab Emirates in October 2013. However, after nine years of drafting work, from 2008 to 2017, no public consultations had been conducted, and following completion of the draft it was decreed and even published before being introduced to the National

32 The Afghanistan Compact, Annex I, Benchmarks for Governance, Rule of Law and Human Rights, provides that “by the end of 2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public” (UN Security Council, 2006, p. 7).

33 I will name a few of the laws as examples only: the counter-narcotics law, the counter-terrorism law, the anti-money laundering law, the juvenile code, the law on environmental protection, the law on elimination of violence against women, the procurement laws, etc. These often conflicting and contradictory laws have caused enormous discrepancies during the enforcement phase.

Assembly for approval; exactly the same process as for all the other criminal justice laws.³⁴

The long delay in the drafting process, the lack of public consultation, and the use of presidential decree to adopt the code are amongst the challenges that can be attributed to the 'fallback methodologies' discussed in (1.1.2 above). However, in terms of its contents the 2017 Penal Code closely follows its predecessor, particularly with regard to its areas of applicability and recognition of Sharia, as well as internationally accepted norms, such as the principle of legality and the non-retroactivity of crime and punishment (Ministry of Justice, 1976, Art 1, 2017b, Art 2.1). Yet, there are some areas in which the new code has been updated with newly emerging crimes and concepts. For example, the code embraces international crimes, cybercrimes, environmental crimes, and modern criminal justice concepts, such as alternatives to imprisonment, rehabilitation, parole, and conditional release.³⁵

In the meantime, there are slight differences between the two codes, with the most significant difference being rehabilitation and alternatives to imprisonment. As mentioned earlier, the 1976 Code has been silent about rehabilitation and has only linked different types of imprisonment with a mandatory work requirement in prison.³⁶ However, under the 2017 Code it is clearly an objective of punishment to 'discipline and rehabilitate' criminals.³⁷

4.3.5 The Prisons and Detention Centres Law (2005, 2007, and 2020)

As of 2005 a new prison law took effect, replacing its predecessor – a 1982 law issued by the PDP that was reintroduced by the Taliban government in 2000 – by changing its name and general ideology, but leaving its substance

34 See Decree dated April 4th 2017, published in Official Gazette Number 1260, dated 15 May 2017.

35 Afghanistan's accession to the Rome Statute, and the inclusion of International Crimes which were not incorporated in the 1976 Penal Code, have been cited as the most significant reasons for the revision. The Penal Code 2017 incorporates all crimes outlined under the Rome Statute, including war crimes, crimes against humanity, genocide, and crimes of aggression (see arts. 335-341), as well as the criminal liability of civilian leaders and military commanders who fail to prevent or punish subordinates accused of committing these crimes. These changes can be traced in an Amnesty International (2003) report recommending that "Afghanistan must ensure that it incorporates crimes set out under Articles 6, 7 and 8 of the Rome Statute as crimes under Afghan law. Genocide, war crimes and crimes against humanity must be clearly defined as criminal offences in Afghanistan in order to ensure that the Afghan courts have jurisdiction to prosecute such crimes. In addition, the principles of criminal responsibility in national legislation for crimes under international law must be consistent with customary international law." (Amnesty International, 2003c, p. 51)

36 See articles 100.2, 101.3, 102.3, and 161 of the 1976 Code.

37 See Article 3 of the 2017 Code.

intact.³⁸ Although it was the first prison law to result from the post-2001 reforms, it is the fifth of its kind in prison legislation history.³⁹ In terms of the development process, two international consultants working for the United Nations Office for Drugs and Crime drafted the 2005 law, allegedly without the consultation or engagement of any domestic actors. The Law Reform Working Group reviewed the draft and provided a final version to the MoJ.⁴⁰

According to the MoJ, “the draft was reviewed at the Taqin department. As it contained many technical proposals and details, it was genuinely beyond the scope and technical capabilities of Taqin to analyse, and the relevant government agencies also lacked the expertise to provide anything in addition to what the UNODC consultants had recommended. In the meantime, the law was a condition for generating funds for the prison reform project, which was sponsored by Austria, Canada, and Italy. As such, it was a donor requirement as well. Therefore, as soon as we received the draft, we prepared a legislative decree and immediately put it into effect.”⁴¹

However, the UNODC claims that “the Penitentiary Law and Prison Regulation was drafted at the request of the [MoJ] by UNODC, in coordination with key international and national stakeholders. The Penitentiary Law was adopted in 2005. UNODC was requested by the Legislative Department of the MoJ to help draft penitentiary regulations as a secondary legislative

38 See Official Gazette Number 852 of May 2005.

39 In 1923, the first law of prisons was adopted under the name *Nezam Nama-e-Tawqeef Khanaha wa Mahboos Khanaha*. Given the chaotic conditions at the time, the law’s most significant innovations consisted of reducing the number of prisons and detention centres and banning their unconditional use.

In 1950, the second law of prisons was enacted under the name *Osol Nama-e-Tawqeef Khanaha wa Habs Khanaha*. Considering the shortcomings of its predecessor, it was a slightly modified version of the previous laws.

In 1982, the third law of prisons was introduced under the name *Qanon Tatbeeq Majazat Habs dar Mahaabis wa Tawqeef Khanaha*; literally meaning the Law of Application of Punishment in Prisons and Detention Centers. According to the law, the rehabilitation of inmates was the primary objective of imprisonment.

In 2000 the fourth law of prisons was enacted by the Taliban’s first government. Its official name was the Law of Application of Punishment in Prisons and Detention Centers, and like its name, all of its contents were identical to those of its predecessor. By replacing the government’s name with the Islamic Emirate of Afghanistan, the Taliban added conditions pertaining to the application and observance of Sharia to most of the provisions.

In 2005 the fifth law of prisons was enacted through a legislative decree. The decreed law was later modified and adopted by the National Assembly in 2007. Although, amended two times (in 2011 and 2018) the 2007 version of the law has been the governing law of prisons and detention centers until 2020.

In 2020 the sixth law of prison was enacted through a presidential decree. The new law introduced a civilian administration to replace the mixed civil-military prison administration of prisons and provided the new civilian prison administration with extensive authorities and independence to manage prison affairs (see the epilogue below).

40 Personal interview with the Criminal Law Section at the Taqin Department, MoJ - August 2016.

41 Ibid, August 2016.

source, in order to implement the principles stipulated in the Penitentiary Law (primary source) issued under Presidential Decree in May 2005. UNODC, with support from UNIFEM (now UN Women) and UNAMA/HR, worked through and with The Prison Working Group (PWG), to work in accord with the ANDS and to ensure that the regulations [complied] with SMR" (Ron Renard *et al.*, 2013, p. 64).

As a side note, I would like to draw attention to a slight difference between the MoJ account and that of the UNODC, regarding the initial request to draft the 2005 prison law. The difference is mainly due to the manner in which donors and UN agencies tend to package their work to seem more like a government initiative and less like a direct donor approach. In reality, almost all development initiatives, including lawmaking, are tied to broader donor programmes' available funds and the scope of their projects. If the development initiative is not in the donors' programme, there is no funding and hence no projects, even if the issue in question is given the highest government priority.

In terms of its contents as a whole, it is obvious that the 2005 law is a modern and comprehensive piece of legislation, since it contains provisions on the accepted international standards for prison management, human rights, and the rights and privileges of those incarcerated. However, unlike its predecessor, which was called the 'Law on the Application of Punishment in Prisons' and had the self-evident purpose of providing a punishment centric arrangement, the new law is called the 'Prisons and Detention Centers Law'. Another obvious and major change at first glance is the elimination of solitary confinement as a necessary form of imprisonment.

The first article of the 2005 law focuses on rehabilitation, stating that "the government imposes imprisonment only to prepare and correct prisoners for adherence to laws, observation of social and moral standards, and participation in beneficial social activities, as well as to prevent recidivism." Thus, in accordance with the law, the purpose of imprisonment is merely to rehabilitate prisoners and help them develop a respect for the law, common behavioural standards, and society's ethical norms, as well as to prepare them for useful work in the community, and help them not to repeat their crimes.

Considering arguments about the role of the drafter in the lawmaking process (Makgetla and Seidman, 1987; Seidman, Seidman and Abeyesekere, 2001), I could not ignore the statement provided by the MoJ's criminal law department, which argued that the MoJ (as primary actor) was not technically capable of critically assessing (and, if necessary, changing) the work of the two international consultants who provided the draft. This did seem like the 'original sin' of misguided reform, and for this reason further and careful examination of archival records related to the drafting and review processes of the 2005 law might be useful.

However, no archival data on the 2005 prison law existed at the MoJ or at the cabinet secretariat. Neither was data available at the UNODC office in Kabul. Therefore, the next destination was the National Assembly, where

I could find some data that would not only shed light on the motionless approval process for National Assembly members reviewing and approving a decreed law, but would also reveal that the word '*Islah*' (i.e. a Dari term with Arabic roots that means rehabilitation) existed neither in the draft prepared by UNODC consultants nor in the decreed law.

According to a verbatim report retrieved from the National Assembly archive, the legislative committee of the Upper House added the term '*Islah*' whilst the decreed law was already in its implementation phase. The additions were made as a consequence of consultations with a separate team of national and international advisors from the USAID-assisted project that supported development of the Afghan parliament. The project was called Assistance to Legislative Bodies of Afghanistan (ALBA). In the meantime, it is evident from the next relevant manoeuvre by the committee that the promoters of this concept probably did not understand the concept of rehabilitation and could not comprehend that merely adding the word '*Islah*' calls for a drastic change in direction for the prison system, see Chapters 6, 7, and 8, below.⁴²

The committee suggested long-term programmes, such as school education, as part of rehabilitation in all detention centres. Since detention centres are temporary in nature and cannot provide long-term services, the suggestion clearly demonstrates conceptual confusion at the time of revising the draft. However, the emphasis on education indicates that the legislator viewed education as a necessary component of rehabilitation and expected it to be provided by the prison system in all situations.

The same factors also point to the problematic relationship between international actors of different backgrounds. As the initial drafters, UNODC consultants had considered the existing legal frameworks, including the Penal Code of 1976. Nevertheless, ALBA's consultants advocated for rehabilitation to be an explicit goal of imprisonment. The most logical explanation for this difference might be the fact that the latter was a US funding channel and its consultants were apparently influenced or inspired by the United States' penitentiary, and the relevant literature.

Since its adoption in 2005, the Prisons and Detention Centers Law has been amended four times, and enforced by decrees every time. The first amendment was enacted in 2007, and three new provisions were added

42 I tried hard to find some members of the Upper House (i.e. senators) who had been involved in the process of adopting the Prisons and Detention Centers Law, to ask them what they meant by the term '*Islah*' and how they expected it to be applied during implementation of the law. However, I failed to find any of them, because almost all the senate positions had been changed a couple of times since the law was passed. Some of the senators had passed away, and others had moved to the provinces (which are insecure and hard to reach). I was not even able to reach them by telephone, because the Taliban forced telecommunication companies to keep their services very limited in insecure areas. However, as already mentioned, the changes proposed in other articles of the law relating to rehabilitation indicate that there has been a lack of a clear conceptual intention behind the change.

to the law. The new provisions relaxed access to prisons and prisoners for journalists, simplified children's visits to their imprisoned parents, and guaranteed certain rights and access to better health services for pregnant prisoners (particularly at times of delivery and in cases of other gynaecological problems). Furthermore, according to some authors, fixing the 'discriminatory condition of prisons towards women' was a funding condition by the Austrian government, and the law was amended to ensure that there was a legal base for guaranteeing the donor requirement (UNODC, 2007).

The second amendment was enacted in 2012, and it dealt with the transfer of prison management from the MoJ to the MoI. The JRC suggested the transfer.⁴³ The third amendment was in 2018, when Article 38.2 of the law was revised to allow members of the anti-torture committee access to the entire prison system, without prior notification of the prison authority.⁴⁴ This amendment was part of the donor conditionality and requirements of Afghanistan's access to the United Nations convention against torture and its optional protocols.

The fourth and last amendment was made in 2020, and this impacted prison governance in a dramatic manner.⁴⁵ The amendment transferred prisons' authority from the MoI to a newly established civilian institution that reported directly to the president (see the epilogue, below). The amendment addressed a few of the coordination shortfalls with regard to prison management. For example, it provided for one broad institution to manage everything concerning prisons, which in theory could eliminate issues related to the division of labor between state agencies, such as health, education, and security.

When the new amendment was implemented, the institutional history and hierarchy of the existing prison system was entirely removed, and a new civilian administration was implemented that was based on a presidential decree. However, it was viewed with great suspicion within the legal community, as well as by the public. The suspicion was due to the fact that drastic changes were being introduced at a time when insecurity was at its height and broader peace negotiations had already started. Many thought that prisons needed more security, and that the government had many other priorities before prison system reform. The suspicion intensified further when the peace talks between the Taliban and the international community made some progress, and there were media reports about a prisoner exchange scheme between the Taliban and the Afghan government – also highly controversial and viewed with suspicion by the public (see the epilogue, below).

43 This amendment was published in Official Gazette Number 1068, of December 2011. It dealt with Arts. 12, 13, 14, 15, 17, 18, 19, 21, 23, 24, 30, 38, 45, 52, 53, and 54 of the law, and in all the provisions 'MoJ' has been replaced by 'MoI'.

44 This amendment was published in Official Gazette Number 1321, of October 2018.

45 The final amendment was published in Official Gazette Number 1375, of April 2020.

4.4 CONCLUSION

This chapter builds on conclusions drawn about the institutional landscape described in Chapter Three, using three case studies of criminal justice laws that were created and amended throughout the post-2001 overhaul. In general, the case studies reveal that certain issues are common to almost all phases of the reform process. These include a serious lack of capacity within domestic lawmaking institutions, leading to the employment of temporary and donor-imposed institutions to cover the work; the excessive use of shortcut methods, such as legislative decrees, benchmarking, and project laws (instead of following the normal lawmaking processes); an overcrowded landscape of domestic and international actors; and, the '*trias politica*', which isolates and sidelines the general public from lawmaking processes.

One can argue that many of the issues have primarily been due to the perpetuation of mistaken approaches to lawmaking and the use of 'fall-back methodologies'. The six steps in the standard lawmaking process, as defined in the Law on the Manner of Processing, Publishing, and Enforcing Legislative Documents, serve as a good foundation for society-specific laws. However, in practice laws are not always drafted according to predefined procedures, and those which are tend to meet with several challenges, due to the lack of resources and capacity at the drafting agency, as well as to time constraints and political pressure.

In almost all cases, the approval process has been bypassed and the drafting and scrutiny processes have not been straightforward. The ultimate result has been legislation intended to formalise specific modes of operation within the criminal justice institutions, rather than contents that are sensitive to the problematic behaviours and needs of those institutions. In other words, the lawmaking process was intended to prepare state institutions to rule more by law than by the rule of law. However, in different periods of the post-2001 intervention this seems to have affected different laws, in different ways.

In the three case studies, I analysed the procedures and contents of laws passed over the course of the Bonn Process (i.e. the Interim Criminal Procedure Code of 2004 and the Prison and Detention Centers Law of 2005), in contrast with the Post-Bonn Process (i.e. the Prison and Detention Centers Law 2007 and 2011; the Criminal Procedure Code 2014, and the Penal Code 2014). It is safe to conclude that laws passed during the latter period embraced relatively inclusive processes and actors. In contrast, those enacted during the former period, tended to rely on single consultants or projects, at best.

However, neither approach resulted in better laws, because neither seemed to address the existing social issues, seeking instead to formalise the state's and donors' recommended approaches to governing the relevant criminal justice institutions. Moreover, the 2020 amendment to the Prison and Detention Centers Law illustrates the continuity of a flawed lawmaking

habit and practice, right up until the end of the reform period, even when things were almost entirely domestic in nature. Finally, it appears that the War on Terror has been more of a focus for most of the criminal justice laws than ordinary crimes and ordinary criminals have been.

In the meantime, the Prison and Detention Centers Law 2020 is yet another illustration of how legislation has been used to reinforce certain modes of operation that appear to be bureaucratic and technically correct, but in essence are controversial and unpopular. Thus, the result remains out of touch with reality, since its design does not fully embrace all the relevant social problems. In addition, it brings to life a defective cycle of reform and restructuring that cannot be sustained at any cost, and which usually becomes a legitimacy challenge in the rule of law and state-building process.

5.1 INTRODUCTION

Taking into account the broad historical context of state-building, law reform, and criminal justice (Chapter 2), the institutional arrangements of the post-2001 international overhaul (Chapter 3), and the case study of the legislative processes and products resulting from post-2001 reform and international intervention (Chapter 4), this chapter explains how the combination of factors and processes led to a legal mandate for the prison system. More specifically, the chapter explores the meaning of rehabilitation in the Afghan prison system as an objective of imprisonment, as well as how this has been regulated and programmed.

In other words, this chapter is mainly an effort to (a) deduct the legal mandate for prisons from a range of policy and legislative texts; (b) describe the content of the mandate; and, (c) analyse the mandate's main features. First, it introduces the concept of rehabilitation as an objective of imprisonment, from the point at which Chapter 1 finished. Afterwards, a brief description is provided of the legal and policy foundations for imprisonment which resulted from the post-2001 overhaul. The final section deals with domestic actors' perceptions and understanding of the legal mandate for prisons, and the legal and conceptual underpinnings concerned.

5.2 THE CONCEPT OF REHABILITATION

The concept of prison-based rehabilitation originally evolved from the United States' penitentiary system of the nineteenth century, where rehabilitation was viewed as an automatic function and prisoners were responsible for their own rehabilitation process. There was an initial belief that keeping felons isolated would enable them to reflect on their sins and develop a more commendable character (Rotman, 1990; Cullen and Gendreau, 2000). With the emergence of scientific disciplines like criminology, psychology and psychiatry, rehabilitation was transformed into a method of treatment that used a variety of deliberate interventions, including medical care.

However, it is important to note that prison-based rehabilitation has been seriously contested for a long time, and it is still the subject of heated debates. For instance, Sykes (1958), the classic influencer of prison studies, contends that "attempting to reform criminals by placing them in prison is based on a fallacy" (1958, p. PVII). Likewise, Robert Martinson (1974) argued

that, “with few and isolated exceptions, the rehabilitative efforts that have been undertaken so far have not had a favorable effect on recidivism” (1974, p. 25). In support of Martinson’s argument, some empirical studies have shown that costly treatment programmes are no more effective than simply incarcerating offenders (Bean and Nemitz, 2004; Brown, Wienckowski and Stolz, 2004; Farabee, 2005; Sherman, 2007; Listwan *et al.*, 2013). Consequently, during the 1970s and 1980s, criminal justice systems paid more attention to punitive measures as the most effective means of addressing crimes, and almost all rehabilitation strategies, including education, vocational training, and counselling, were considered to be doomed to failure (Tarling, 1979; Hollin, 2002).

Whilst prison-based rehabilitation is still arguably doubtful and debatable, some studies emphasise the importance of rehabilitation and suggest that some types may yield better results than others. For instance, Garland (2003) believes that the culture of punishment is now based on utility, rationality, rights, and the rule of law. Accordingly, punishment must ensure maximum effect, with minimum suffering. Garland’s contention implies that punishment should be used carefully, and that its results should be enhanced by adapting its corrective measures to individual offenders, and specific issues and situations.

Further, scholars such as (Rothman, 1971; Cullen, 2013; Carrabine *et al.*, 2014) examine the notion that the majority of criminal conduct is influenced by socio-economic structures, individual circumstances, and psychological factors. They claim that these factors inevitably affect the free will of the offender and prevent them from adhering to certain rules. Thus, criminal justice sanctions must focus on rehabilitation through methods that can transform offenders and prepare them for reintegration into society.

Other scholars provide insight into what constitutes an effective rehabilitation programme, prescribing numerous modules to describe the conditions and characteristics of effective rehabilitation programmes. From amongst these, I chose to discuss the ‘differential intervention and treatment amenability perspective’, also known as the ‘Something Works’ doctrine, proposed in Ted Palmer (1992, 1995). This perspective offers a framework for an effective prison-based rehabilitation programme. It also proposes an analytical strategy that focusses on successful intervention. It assesses what works, for which categories, and under which conditions, rather than examining what works as a whole.

According to the Something Works perspective, the following two considerations are essential to the success of a prison-based rehabilitation programme: a) A differential intervention position, suggesting that some interventions may sometimes work under some circumstances, for some people; b) A treatment amenability perspective, maintaining that specific participants will respond to treatment interventions. In contrast, others may show a lesser degree of improvement, or may not respond to the intervention at all. The two considerations are further elaborated into four principles (i.e. the risk, the need, the responsivity, and the integrity principles).

As per the risk principle, all prisoners with a medium to high risk of recidivism should be selected for comprehensive and intensive treatment. The need principle means that it is necessary to distinguish between criminogenic and non-criminogenic prisoners. It follows that effective practice should target criminogenic needs, in order to reduce reoffending. The responsivity principle refers to the need for service delivery in a manner that will engage offenders. For example, it suggests sensitivity to the gender, culture, and other circumstances of offenders. Finally, according to the integrity principle, achieving high levels of treatment success requires high levels of institutional integrity. Managers are therefore expected to ensure that appropriately trained staff deliver treatment programmes, and that they are correctly supervised and provided with adequate resources (Palmer, 1992).

The empirical evidence built around these principles suggests that strengthening both the programmatic and institutional aspects of prison systems is essential to successful rehabilitation programmes. As providers, prisons must therefore embrace cognitive, behavioural, and multi-modal rehabilitation programmes (Landenberger and Lipsey, 2005; Mackenzie, 2005). On the institutional side, a supportive atmosphere in prisons, as well as competent and capable staff who are engaged in delivering services, are also crucial to the success of such programmes (Palmer, 1983; Wilson and Davis, 2006).

To put it simply, an effective rehabilitation programme includes a high level of treatment integrity, a cognitive approach to behavioural change, and a focus on changing the factors that are most strongly associated with reoffending. Further, the programme should be structured around specific targets for change, and it should focus on developing skills that will enable offenders to either find a job in the public sector or compete in the free market upon their release. These are also stressed in the United Nations Standard Minimum Rules for the Treatment of Prisoners (United Nations, 2015b) and the Doha Declaration (United Nations, 2015a).¹

In line with the said UN resolutions, progressive and hopeful ideas about rehabilitation have actively been disseminated and promoted by the UN in collaboration with member states, including those in Asia and Central Asia in particular.² For example, a five-year UN led global programme (from 2016 to 2021) triggered by the Doha Declaration claims to have impacted “more than 2.5 million people from over 190 countries. This figure includes over 112,000 stakeholders that benefited from direct capacity-

1 The Nelson Mandela Rules are a revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The decision was adopted by the General Assembly through Resolution A/RES/70/175. In honor of the late president of South Africa, Nelson Mandela, these rules have been designated the ‘Nelson Mandela Rules’.

2 See for example: https://www.unodc.org/dohadeclaration/en/news/2018/10/strengthening-offender-reintegration-in-asia_-unodc-and-singapore-conduct-regional-training-workshop-on-correctional-rehabilitation.html, and <https://www.penalreform.org/where-we-work/central-asia/programmes/>

building activities, and more than 2.1 million reached through post-activity impact and the use of knowledge tools and materials, including 1.5 million students" (UNODC, 2021, p. 1).

In a similar vein, targeted intervention programmes claimed to have shown positive results, even amongst hardline ideologists in Yemen. For example, Hamood Al-Hitar, a High Court Judge from Sanaa, Yemen, devised an "intellectual surgery" method aimed explicitly at Islamic hardliners (Eaves, 2004).³ Al-Hitar's technique involved face-to-face meetings with a target group of 104 prisoners in Sanaa jail. The judge presented the prisoners with a series of questions and suggested that they discuss them only in the light of the Quran and Hadith. "His first question was: Is Yemen an Islamic country? The prisoners answered no; Al-Hitar said yes. He gave them copies of Yemen's constitution and legal Code and volunteered to change anything they could find that was un-Islamic. [The inmates] came up with nothing." (Eaves, 2004).

As part of this process, however, the government of Yemen released 182 Islamist militants from its prisons, and no recidivism has been recorded. In the meantime, the 104 prisoners involved in the experimental programme were persuaded to accept Yemen's legitimacy. This is not to suggest that this method would work everywhere. Nevertheless, the situation illustrates the 'differential intervention and treatment amenability perspective' in a less popular setting. As argued in Eaves (2004), "there is an appeal to Yemeni tribalism in all this ... [and] the government is the right one, and a disaffected young zealot might take you seriously." However, this could be more difficult to accomplish in other regions of the Middle East and Asia, particularly in cases of more extensive and complex networks, such as the Haqqanis operating in Pakistan and Afghanistan.

In addition, broader literature about 'rehabilitation in the Muslim world' focusses partly on Islamic extremists and partly on Muslim prisoners in the Global North countries (Boucek Christopher, 2009; Spearit, 2012; Awan, 2014; Bin Hassan, 2015). There is also general literature about 'prisons and Islam', which contains elaborated views on prisons, according to pre-classical and classical Islamic jurists (Schneider, 1995). Moreover, there are debates which argue that Islam and its principles and norms have never promoted imprisonment as a punishment (Zulfiqar, 2020). Thus, prison-based rehabilitation in Afghanistan, an Islamic and Asian country with a checkered history that is characterised by widely divergent political

3 As background matter it is important to indicate that issues of Islamic fanaticism apparently relate to the return of active Yemeni fundamentalists, who took part in the Afghan jihad against the Soviet Union in the 1980s. The fundamentalists became a growing problem for Yemen, as they were allegedly involved in religious violence, kidnapping, and deadly operations after the formation of the insurgent Aden Abyan Army in Yemen. By 2002, hundreds of these people were in prisons and the government of Yemen did not know what to do with them (Eaves, 2004).

ideologies, and which is still undergoing fundamental reform as a result of post-2001 international interventions, is a blend of the above, as well as some traditional notions of rehabilitation.

As this broad (and admittedly vague) overview suggests, rehabilitation is an ongoing and evolving area of criminal justice policy that is complex and multifaceted. It is at best difficult to achieve, because it not only requires a wide array of contextual and institutional preparedness, but also needs specific prison-based programmes and resources. In the absence of adequate resources and a conducive institutional and programmatic readiness, rehabilitation would remain a label only (see 1.2 above). Thus, policy-makers and practitioners shall ensure ways to improve the effectiveness of prison institutions and better support offenders as they try to reintegrate into society. That is because when the law and the policy requires an institution to perform a specific function, that is what must occur in practice. In the event that this does not occur, either the mandate or the institution, or both should be changed. It is probably precisely for this reason that rehabilitation is not the sole mandate of the prison system, but an important one, in Afghanistan. If not, burdening an unprepared system with such a large workload would probably have been erroneous and counter-productive.

5.3 THE POLICY AND LEGAL BASIS FOR THE PRISON SYSTEM MANDATE

In Chapter 4, I presented three laws closely related to the prison system, as a case study of how the post-2001 reform dealt with criminal justice legislation; the chapter also briefly referred to the emergence of the legal mandate for prisons. It is important to note that there is also an extensive web of policy and legal products that have either evolved from, or served as a basis for, these laws. In their entirety, the web of legislative and policy products prescribes and defines various aspects of the prison system which constitute the system's legal mandate. This section also examines the policy and legal bases for the prison system, in contrast with the standard conceptual understanding of rehabilitation as a prison mandate, in order to draw out the key areas of conformity, contradiction and conflict existing in the overall body of laws.

5.4 THE PRISON SYSTEM'S LEGAL AND POLICY FOUNDATIONS

As discussed in Chapter 2, some of the complexities associated with the legal and policy foundations of the Afghan prison system date back to pre-2001, and they continued into the post-2001 era (see 2.9 above). The major policy documents produced after 2001 do not explicitly define the prison system and its overall strategic direction. For example, due to its high-level objectives, the NJSS leaves the documents open to interpretation. According to the strategy, "the Government's vision for justice is of an Islamic society

in which an impartial, fair and accessible justice system delivers safety and security for life, religion, property, family and reputation; with respect for liberty, equality before the law and access to justice for all.” (GIROA – ANDS, 2008c, p. 13)

In essence, this vision calls for a liberal, rights-based model of justice that is compatible with Islamic standards, allowing for a blend of Islamic and Western principles to govern the criminal justice system. This is an ideal representation of the 2004 Constitution, which recommends an internationally recognised criminal justice system that is reconcilable with an Islamic Republic. However, a closer look at specific parts of the criminal justice sector (for example, prisons) reveals the real challenge of using the Islamic and Western blend, along with traditional schemes, which lies at the core of such high-level objectives. As operationalising these objectives is complex on a practical level, they were usually overlooked during the design of the post-2001 reform process, resulting in a vacuum of policy directions in that specific area. Perhaps this is why there is no single policy document giving clear directions to the prison system in light of the high-level goals of the criminal justice sector, leaving the prison system to cope with a crowded (and often confusing) set of rules and norms.

In this regard, the group of laws dealing with issues of imprisonment includes the Penal Code 1976, the Constitution 2004, the Prisons and Detention Centers Bylaw 2007, the Criminal Procedure Code 2014, the Penal Code 2017, the Law on Alternatives to Imprisonment 2018, and the Prisons and Detention Centers Law 2020.⁴ In addition, a group of guidelines that are not law, but which effectively regulate both the practical and normative aspects of the prison system, include presidential decrees, cabinet decisions, international agreements, and the principles of Sharia. The latter has a limited role in technical matters of imprisonment, but policymakers often mandate prison institutions to follow certain conditions, based on the general principles of Sharia, as the overarching normative framework for the system’s daily operation.⁵

Presidential Decrees and Cabinet Decisions deal directly with issues such as pardons or adjustments of punishment, as well as with prison management issues such as catering, food, and prisoners’ accommodation. However, international treaties – such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules 2015),

4 A number of other regulations contribute to the prison system in a relatively indirect way, including the Law of Organization and Authorities of Judiciary (2013), the Police Law (2009), the Law Against Kidnapping and Smuggling of Humans (2008), the Law Against Financing Terrorism (2014), the Law Against Money Laundering (2014), the Juvenile Detention Centers Law (2009), the Counter-Narcotic Law (2018), and 35 other laws, or provisions within laws, that were annulled by Article 916 of the Penal Code (2017).

5 Per Article 23 of the Prison and Detention Centre’s Law (2020) “prison and detention centre operations are based on Islamic values and the UN’s norms and standards.”

the Doha Declaration (2015), the International Covenant on Civil and Political Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1990) – deal with both normative and operational matters.

The Nelson Mandela Rules (United Nations, 2015b) document is more relevant and widely used for specific recommendations about prison conditions and prison programmes. For instance, it requires the prison administration and other competent authorities “to offer education, vocational training, and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sport-based nature. All such programs, activities, and services should be delivered in line with the individual treatment needs of prisoners.”

Likewise, the Doha Declaration and 13th United Nations Congress on Crime Prevention and Criminal Justice is another specifically relevant theme. The declaration reiterates the integration of crime prevention and criminal justice into the wider United Nations agenda, to address social and economic challenges and promote the rule of law at national and international levels.⁶ The declaration also reiterates on the Nelson Mandela Rules with specific focus on the need for more robust prison-based rehabilitation programs as means of crime prevention and social reintegration of prisoners.

5.4.1 Substantive issues within the prison system’s legal framework

At this point, I would like to illustrate a few brief examples of contradictions and complexities arising from the legal frameworks of imprisonment. According to the 2004 Constitution, the criminal justice system is governed by fundamental principles, including the legality of crime and punishment, the presumption of innocence, and the non-retroactive nature of punishments. For example, articles 24-27 and 29 of the constitution set out the basic

6 The Congress on Crime Prevention and Criminal Justice also aimed to find ways to best integrate crime prevention and criminal justice into the UN agenda. It also focussed on links between security, justice and the rule of law, and the attainment of a better, more equitable world (United Nations, 2015a).

principles governing the application of punishments.⁷ These provisions establish a legal basis for the deprivation of freedom, whilst prohibiting the use of punishments that are deemed inappropriate or inhumane.

Accordingly, there is a constitutional guarantee that an individual's conduct cannot be regarded as a crime unless expressly defined as such by the law enacted prior to that act being committed. Further, all individuals, including those who are accused of crimes, are innocent until proven guilty by a competent court, and in accordance with the due process of law. In spite of this, the constitution contains unclear and disputable provisions, which limit the effectiveness of these principles. For example, while Article 27 of the constitution lays down *nullum crimen sine lege*, or the concept of the legality of crime and punishment as the guiding principle for disciplinary action for criminal justice, Article 130 provides a framework that allows the application of Sharia in the absence of express provisions regarding the criminal nature of certain conduct, which could contradict the principle of legality (see 5.4.1 above). The Sharia becomes particularly strong in instances where the new laws are perceived as transplanted and inapplicable.

According to a leading member of the AIBA, Article 130 of the constitution was used excessively over the past 20 years, because many judges believe that new laws are neither Islamic nor relevant to the country's situation.⁸ Hence, they prefer to use Islamic law instead. Several examples include the famous case of Assadullah Sarwari, a prominent member of the Soviet-backed PDP regime tried in 2006 for war crimes and murder. Sarwari's case clearly fell under Article 394 of the 1976 Penal Code; however, he was sentenced to death, following Sharia, by referring to Article 130 of the constitution.

Other examples include the case of Parviz Kambakhsh, Ahmed Ghouse Zalmi and Abdul Rahman, who were tried under the provisions of Article 130 of the constitution. All three defendants were accused of apostasy and

7 Article 24 of the 2004 Constitution provides that "[L]iberty is the natural right of human beings. This right has no limits, unless the freedom of others is affected as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable." Article 25 provides that "[I]nnocence is the original assumption. The accused shall be innocent until proven guilty by the final decision of a competent court." Article 26 provides that "[P]ersecution, arrest and detention of an accused, as well as penalty execution, shall not extend to another person." Article 27 provides that "no deed shall be considered a crime, unless ruled by a law promulgated prior to commitment of the offence. No-one shall be pursued, arrested, or detained without due process of law, and no-one shall be punished without the decision of an authoritative court, taken in accordance with the provisions of the law, in effect prior to commitment of the offence." Article 29 provides that "[P]ersecution of human beings is forbidden. No-one shall be allowed to order torture, even to discover the truth from another individual who is under investigation, arrest, detention, or has been convicted to be punished. Punishment contrary to human dignity shall be prohibited."

8 Personal interview with AIBA member - August 2016.

sentenced to death following Sharia. Whilst the international community opposed these decisions, which resulted in no death penalty being imposed, the courts' persistent approach was a source of great controversy and heated debate within the legal community.

5.4.2 Operational issues within the prison system's legal framework

Another aspect of the complexity of the prison system's legal framework involves its mission and objectives. Unlike countries that recognise rehabilitation as a constitutional right for prisoners, the Afghan constitution indicates its general commitment to social justice, human rights law and international treaties.⁹ However, it does not explicitly mention the prison system or its objectives, including rehabilitation. As a result, rehabilitation cannot be considered a constitutional right for prisoners under the Afghan criminal justice system.¹⁰ Nevertheless, the legislation that directly concerns punishment and imprisonment, including the Prisons and Detention Centers Law of 2020, the Penal Code of 2017, the Criminal Procedure Code of 2014, and the Prisons and Detention Centers Bylaw of 2007, all contain specific provisions in this regard.

The 2017 Penal Code defines rehabilitation as one of the main objectives of punishment (see 4.3.4 above).¹¹ The code also provides general guidance and organises punishments into three categories. The categories include principal, consequential, and complementary punishments. Principal pun-

9 According to Article 6 of the 2004 Constitution, "[T]he state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, and attainment of national unity, as well as equality between all ethnic groups and tribes, and balanced development in all areas of the country." According to Article 7, "[T]he state shall observe the United Nations Charter, interstate agreements, and international treaties which Afghanistan has signed, as well as the Universal Declaration of Human Rights. The state shall prevent all terrorist activities, the cultivation and smuggling of narcotics, and the production and use of intoxicants."

10 Some countries recognise rehabilitation as a constitutional right for prisoners and the main objective of a criminal justice system. These countries include Italy, Spain, Germany, Argentina, and some parts of the United States of America (Rotman, 1990, pp. 71–78).

11 Article 3 of the Penal Code 2017 provides for the following ten objectives [translation]: "to regulate the general principles, rules and provisions related to Tazeer crimes and penalties; to guarantee the observance of provisions of the constitution and other laws; to ensure criminal justice and to maintain order and security; to safeguard the independence, national sovereignty, and integrity of the country; to fight and prevent the commission of crime, to combat crime, and to rehabilitate and reform the perpetrators of crime; to guarantee observance of human rights and fundamental freedoms of individuals; to ensure that the corporeal and incorporeal properties of individuals are protected; to increase the level of accountability; and to compensate for the loss caused by commission of a crime."

ishment is further divided into capital punishment, financial penalties, and imprisonment. Article 145 of the Penal Code defines imprisonment as “the state of being physically incarcerated or confined in a prison facility that the government allocates for confinement.” According to articles 146 and 147 of the code, imprisonment is categorised into the following five types: Short-term imprisonment (3-12 months); Medium-term imprisonment (1-5 years); Long-term imprisonment (5-15 years); Continued imprisonment, grade-two (16-20 years); and Continued imprisonment, grade-one (20-30 years).

The Criminal Procedure Code 2014 contains procedural guidance for applying punishment standards and incarceration measures, as well as for defining the fundamental principles of judicial fairness and the protection of human rights (see 4.3.1 above). For example, according to Article 2 of the code, one of the nine objectives of punishment is the rehabilitation and reintegration of criminals into society.¹² In addition to serving as the foundation for criminal justice, these provisions require that the prison system applies various standards and modes of treatment, appropriate to each category of punishment.

Similarly, the Prison and Detention Centers Law 2020 and the Prisons and Detention Centers Bylaw 2007 provide general rules about the prison system, including its technical aspects, such as prison-based intervention programmes, education, personnel matters, and the practical features of prison management, such as food menus and catering. These laws establish a relatively specific mandate for the prison system, focussing on the objective that the application of punishment must fulfil. Although the laws do

12 Article 2 of the Criminal Procedure Code 2014 provides that the purpose of this law is [translation] “... retraining criminals to obey the provisions of Sharia and the enacted laws, to respect religious beliefs, and to observe morality, manners and rules, in order to live peacefully in society”. The remaining eight objectives of the law include: quick and comprehensive detection of crime, and identification, arrest and prosecution of the suspect or accused person; investigation of the crime using technical tools and professional methods; initiating claims against the accused person, based on incriminating evidence; a fair trial, so that no innocent person is punished and no criminal is exempt from prosecution; to safeguard the individual rights of the suspect, accused person, convict, and victim, and to protect the rights of society whilst executing investigation and prosecution; to protect and respect the rights, personality and human dignity of victims, suspects, accused persons, and convicts; to safeguard public order, security, and the rule of law in the country; and prevention of crime and violations of law.

not restrict imprisonment to rehabilitation alone, they mention it specifically as one of the main functions of the prison system (see 5.5 below).¹³

5.5 MANDATE EMERGING FROM THE BODY OF LAWS

If we consider imprisonment as the main policy for executing punishments, the relevant laws and policies (taken together) regard rehabilitation as a key objective for the execution of punishment and hence one of the main tasks of the prison system. Nevertheless, safeguarding public order, securing the rule of law, maintaining order and security, preventing crime, and combating crimes are the other ‘actionable’ objectives of punishment outlined in the Penal Code 2017 and Criminal Procedure Code 2014. Therefore, the prison system must also serve as an incapacitation and deterrence mechanism and should fulfill those tasks in addition to rehabilitation. To this end, despite the overall confusion and inconsistency discussed above, the relevant laws maintain clear (albeit challenging) objectives for the prison system.

5.5.1 Rehabilitation as an important legal mandate

In view of the fact that rehabilitation is one of the primary objectives of the prison system, the Prisons and Detention Centres Law 2007 refers to ‘education’ and ‘work and vocational training’ as the main rehabilitation methods of the system.¹⁴ Articles 28, 32, and 33 of the law suggest that education,

13 Article 2.7 of the Criminal Procedure Code 2014 provides that [translation] “the purpose of this law includes retraining criminals to create an ideology to obey the provisions of Sharia and the enacted laws, to respect religious beliefs, and to observe the morality, manners, and rules to live peacefully in society.”

Article 2.1 of the Prison and Detention Centers Law 2020 provides that [translation] “the management and organisation of programmes, including educational, rehabilitation, vocational training, and employment for prisoners and minors in custody”, are amongst the key objectives of the law.

Article 2.4 of the Prisons and Detention Centers Bylaw 2007 provides that [translation] “the purpose of the Bylaw includes educating prisoners and detainees, so that they reintegrate into society as healthy, law-abiding citizens.”

Likewise, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules 2015) reiterate similar objectives. The Nelson Mandela Rules provide that “the purposes of imprisonment or similar measures are primarily to protect society against crime and to reduce recidivism. [These] can be achieved if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life” (2015b, Rule 4.1).

14 Article 1.2 of the law provides that [translation] “sentence to imprisonment is only enforced to correct prisoners. Also, to prepare them to abide by the laws and social and moral standards of living; to partake in beneficial social work, and to prevent recidivism.”

work and vocational training programmes shall be designed and operated in all prisons across the country.¹⁵ To that end, all prison institutions are responsible for the management and organisation of rehabilitation programmes, through educational and vocational training, and employment for prisoners and minors in custody.¹⁶

Further details of the two major programmes can be found in the Prisons and Detention Centres Bylaw (2007),¹⁷ the Charter of Prisons Industrial Programs (2006), and several narrowly detailed guidelines known as ‘directives’. It is necessary to clarify that ‘directives’ are derived from a mix of civil and military management cultures in the context of prisons. However, directives are generally considered part of the legal and policy framework, including guidelines developed during programme implementation. In prison administration, these are typically specific instructions provided by senior management, and are indisputably applicable throughout the system.

15 Article 28 provides that [translation] “the prisons and detention centres administration is required to set up well-equipped libraries and make it easy for detainees and prisoners to access study, worship, education, vocational training, recreation, and cultural activities, as well as providing the necessary facilities”. According to Article 32, “the prison administration is required to open and organise educational and vocational training centres at primary and high levels, in line with the educational programmes approved by the MoE.” As per Article 33.1, “the prison administration shall arrange for industrial hand-craft workmanship and agricultural activities in their respective prisons, either via the use of public funds or via private partnership...”

16 Provision of prison-based education is also backed by the 2004 Constitution, which recognises education as a fundamental right of all citizens, including prisoners. Article 43 of the Afghan Constitution (2004) is the origin of this mandate. It provides that, “education is the right of all citizens of Afghanistan, and it shall be offered up to bachelor level. [The service shall be provided by] the state educational institutions, free of charge. To expand the opportunity of equal educational chances, as well as to provide mandatory intermediate education throughout Afghanistan, the state shall devise and implement effective programmes and prepare the ground for teaching in native languages, in areas where these are spoken.”

17 Article 21 of the bylaw, for instance, provides for a set of instructing and mentoring programmes aimed at helping convicts understand the social damage caused by an act of crime, and at strengthening their sense of responsibility, social discipline, humanitarian values, respect for others, and respect for cultural norms and values. Article 22 defines the right inmates have to spend time in the prison library and subscribe to magazines, periodicals, and newspapers. The prison administration, along with other state and non-government agencies, are mandated to set up libraries in all prisons and detention centres, and to furnish them with a sufficient number of novels and magazines, as well as scientific, religious, professional, and vocational books. Article 23 provides that prisoners who actively participate in educational and training activities shall be encouraged and granted exceptional prerogatives. Article 24 provides for the right inmates have to employment, and mandates the prison administration to arrange for industrial, agricultural, and other professional activities and employment opportunities for prisoners, according to their professional and educational background.

Directives are therefore commonly reactive and needs-based, and are endorsed by senior management or the relevant minister; yet, some directives are also proactive.¹⁸ Most of the directives developed by project staff and international interventions are of the second type. During the prison observation, I came across more than 100 written and specific operational directives that had been developed by donor-funded projects.¹⁹ These documents included detailed design and implementation instructions, typically endorsed by the prison management. For example, operational directives 7.4 and 7.11 clearly outline the details necessary for designing and implementing prison-based educational and vocational training programmes.²⁰ Operational directive 7.11 outlines a clear roadmap for the Prison Administration to consider a range of options for engaging prisoners in industrial, agricultural, or vocational activities. It requires all prisoners to enroll in a basic skills course and attend one of the working sessions for at least 12 hours a week. In accordance with the said directive, prisoners are not to be limited to one programme; they must be permitted to participate in various educational, vocational, and employment-related activities. Therefore, it is recommended that the educational and vocational training programmes are organised into separate terms of reference, and managed by the educational service administrator. The directive also summarises technical issues, such as academic and vocational education plans, including an annual analysis of programme needs and the development of state-wide service delivery

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- 18 According to Article 3 of the Law on the Manner of Processing, Publishing, and Enforcing Legislative Documents (2017a), directives form part of the legislative documents that set standards for key functions of the concerned programmes. Smaller operational procedures, or operational manuals that are used to describe directives, are part of internal administrative procedures and are therefore part of internal regulations. Typically, directives are endorsed by ministers, as the final approving authority of the relevant ministry, and the thematic areas covered by the directive are inspired by parent legislation, in this case by the Prisons and Detention Centers Law.
- 19 The directives were developed by international staff, as part of a programme funded by the INL. The Corrections System Support Program (CSSP) engaged in mentoring and advising activities between American and Afghan corrections professionals. A US-based contractor, PAE, implemented a project that has been in the process of being scaled back since 2017; the plan is to completely withdraw it by 2020.
- 20 Both directives are based on the Prisons and Detention Centers Law and Prisons and Detention Centers Bylaw (2007). More specifically, articles 20 & 21 of the Prisons and Detention Centers Bylaw (2007) provides for further details on work and education. Art. 20 provides that [translation] “vocational education and literacy courses shall be established and facilitate future employment, in order to strengthen the development process for prisoners and detainees. The task shall be accomplished in collaboration with the Ministry of Liberal and Social Affairs, Martyrs and Disables [Martyrs and Disabled People], Education, and other governmental and non-governmental organisations. A separate directive shall be prepared to regulate further details of these programmes.” Art. 21 provides that [translation] “the prison administration shall provide for educational and vocational training programmes aimed at helping convicted criminals understand the social damage caused by an act of crime, and at strengthening their sense of responsibility, social discipline, humanitarian values, respect for others, and respect for cultural norms and values.”

plans, ways to coordinate with the education system and community partners, as well as reviewing certification, licensing, prisoners' educational histories, educational staff, and case managers (OD-7.11, section A.2). However, none of the above directives were used, nor were they known to the staff, at least in the prisons that I visited.

5.6 DOMESTIC ACTORS' PERCEPTIONS OF REHABILITATION

Before discussing the implementation of this mandate in Afghanistan's largest prison, Pul-e-charkhi, in the next chapter, I would like to pay attention to how relevant domestic actors have perceived and understood rehabilitation. This is because their understanding is crucial to the development of prison based-rehabilitation programmes that are customised for Afghan prisoners. In this regard, three levels of conceptualisation are involved: the understanding of legislators, the understanding of criminal justice actors, and the understanding of prison administrators.

At the lawmaker's level, the essence of the rehabilitation concept is rooted in the term *Islah*, which was added to the 2005 decreed law by the Upper House's legislative Commission and its international advisors (see 4.3.5 above). The term *Islah* was added as an objective of the Prison and Detention Centres Law, and was thus the mandate of the prison system at a time when adequate knowledge about rehabilitation programmes in prison settings was arguably lacking. Therefore, the law also lacks programmatic details, constituting the serious discount of an important concept and leaving the scene open for individual interpretation to decide what qualifies as rehabilitation. It was clear that the term *Islah* was also being used as a campaign slogan, demonstrating the intention to provide more meaningful operation and programme delivery in future.

Similarly, at the criminal justice actors' level, judges and prosecutors used rehabilitation as a slogan, whilst maintaining a deep-rooted belief that a sentence for imprisonment should in fact accomplish retribution and incapacitation. In this regard, a review of several court decisions, along with interviews with criminal justice actors, judges, and members of the Supreme Court, revealed that almost all criminal justice actors (particularly judges and prosecutors) believe that rehabilitation is a difficult task. Almost all the other respondents also noted that it was unrealistic to expect the Afghan prison system to deliver on its rehabilitation objective, mainly due to a lack of resources.

Many judges and prosecutors believed that rehabilitation was a far-fetched dream that could not be achieved in the foreseeable future, because it required specialised personnel, institutions, and resources that could not be built overnight. Similarly, other key actors maintained that "even during the development process for the prison law, we knew that *Islah* would be difficult to enact within the Afghan prison system, as rehabilitation programmes that are geared towards *Islah* require particular conditions that do

not exist in our prison system. Therefore, the idea was to keep rehabilitation as the ultimate objective, with a future-oriented perspective that would also make the law and the prison system attractive to donors.”²¹

The scepticism of criminal justice actors towards rehabilitation can also be observed in their daily routine. When rendering a verdict, it is common to use the following template in criminal courts: “You [the name of the convict] son/daughter of [father name] are sentenced to [the volume of the sentence] so that it is a lesson for you and caution for others.”²² The prosecutors use this exact wording in their indictment, whilst asking the court “to apply [such and such sentences] so that there is a lesson for the defendant and a warning for others.”

This way of looking at punishment synergises with the Penal Code of 1976, as the code’s approach to the objective of punishment sometimes inclines towards retribution, and sometimes supports rehabilitation (see 4.3.4 above). In fact, the code leaves substantial discretion for judges to decide what kind of punishment is appropriate for justice and order. For example, while the code provides for a set of fixed punishments in certain cases, the majority of its provisions state minimum and maximum ranges (e.g. it regulates punishments in either ‘not less than’ or ‘not more than’ certain ranges of sentences).

Provided that the sole purpose of the code was explicitly defined as the rehabilitation of offenders, which was not the case, it would have been possible to argue that setting maximum and minimum ranges for punishment could work to optimise punishment for the rehabilitation of offenders, by way of choosing a punishment that best reflects the personality of the offender, as well as the harm caused by their criminal conduct. However, the code is silent on rehabilitation, hence setting a range of punishments and leaving judges with discretion to determine them cannot solely be interpreted as a technique for optimising punishment to ensure better rehabilitation results.

It is therefore safe to argue that retribution is embedded not only in the minds of criminal justice actors but also in some of the laws. In this regard, most actors in the criminal justice system, particularly prosecutors and judges, are reluctant to rely exclusively on rehabilitation as the primary purpose for imprisonment. Interestingly, when some judges were asked why their verdict template emphasised retribution more than rehabilitation, their response was that “courts did not intend to call for retribution by punishing criminals”. In their view, the court only determines guilt and its punishment; the prison institution is responsible for providing rehabilitation.

21 Personal interview with Mr. Halim (a lead government official involved in developing the Prisons and Detention Centers Law), in August 2016.

22 The verdicts use the Dari words *Pand* and *Ebrat*, which I have translated as ‘lesson’ and ‘caution’.

Essentially, there are two reasons for the difference between what the judges and prosecutors say and what they actually do. First, the difference reveals an apparent conceptual misunderstanding. The actors concerned are apparently less aware of the fact that it is common to use moral theories, either by combining them and using them interchangeably, by using them to distinguish between the objective of punishment and its application, or by using them to justify a punishment (see 1.1.3 above). Second, the difference represents a deep understanding of the traditional mindset regarding the limitations of the prison system. Whilst trying to embrace possibilities, the judges and prosecutors also wanted to remain politically correct, by incorporating modern concepts into the laws.

At the prison administration level, rehabilitation was generally better understood than in the previous two groups. Here, rehabilitation was defined as 'actions and processes that restore a criminal to being a law-abiding citizen'. According to people who were working at this level, prisoners should be transformed into individuals with higher moral values who are equipped with the necessary skills and attitudes to assist themselves to survive without committing crimes after their release. In spite of this, none of the prison staff interviewed knew about specific rehabilitation and prison-based interventions to an adequate level of technical detail.

Most people at the prison administration level believed that the concept known as *Kaar-e-sharafatmand* had worked best. The term *Kaar-e-sharafatmand* literally means 'constructive and honorable work'. It is a localised version of what sociological theories refer to as Protestant ethics (Weber and Parsons, 2003). An age-old idea, *Kaar-e-sharafatmand*, aims at restoring the social and economic skills necessary for the offender to lead a productive, meaningful, and law-abiding life after release. With the above discussion in mind, the three levels of conceptualisation can be summarised as follows:

The Lawmakers added the term *Islah* at the suggestion of foreign consultants, but they had little understanding of what they were referring to, or (more accurately) they lacked knowledge about the programmatic consequences of rehabilitation. Judges and prosecutors strongly believed that retribution and incapacitation are more achievable, and they should therefore be the primary objective of imprisonment. Although none denied rehabilitation as an objective for punishment, they also argued that it was hardly attainable under conditions at the time.

Prison administrators were better aware of the general idea and purpose behind rehabilitation, including the basic concept, although it went by a different name (i.e. *Kaar-e-sharaftamand*). They were also supportive of the concept, but they lacked concrete ideas about programmes and implementation. To that end, it is safe to conclude that, whilst international blueprints have been used to mandate the prison system with modern criminal justice concepts, domestic actors have not fully embraced them, due to financial and technical issues.

In addition, there seems to be a connection between the heterogeneous and overlapping nature of norms and institutions in Afghanistan, leading to

widespread ambiguity and a lack of consensus vis-à-vis national law, policies and institutions in general. Although these, as Fred Riggs (1964) argues, combined with a serious lack of resources and technical expertise, are common in most developing countries, Afghanistan is an extreme example of the overlap and the consequent institutional ambiguities.

5.7 CONCLUSION

First and foremost, there is an evident lack of stable consensus amongst academics and policy makers, worldwide, about the effectiveness of rehabilitation as a prison-based programme, although proponents persist amongst policy makers and academics, and within the UN. In this respect, there is some consensus regarding the programmatic and institutional conditions for successful prison-based rehabilitation, particularly when based on the *something works framework* and the *treatment amenability criteria*.

However, the types of conditions and amenities recommended are less likely in most developing countries, particularly in Afghanistan. There are examples of some successful cases in the Muslim world, including in the Middle East (particularly Yemen) and in some central Asian countries. Although, the situations in these locations are very different from the situation in Afghanistan, approaches adopted in those places seem also to be applicable in most Afghan prisons, particularly when it comes to the concept of Madrasa, which is used as a prison-based education programme (see 8.4.4 below).

It is important to note that the legal and policy mandates for the Afghan prison system, particularly regarding rehabilitation, date back to the pre-2001 period. The mandates grew and became clearer as post-2001 criminal justice regulations objectives. Whilst there are some conflicting provisions in the constitution (e.g. articles 27 and 130), which complicate some aspects of criminal justice, the Penal Code 2017, the Prison and Detention Centers Law 2007, and lower level regulations (in particular, the relevant directives) provide specific details for prison-based rehabilitation, which are (in theory) generally in compliance with international standards. However, as there is scepticism amongst domestic actors about achieving rehabilitation in Afghan prisons, there is a tendency to rely more on incapacitation as a primary objective.

There was also a similar degree of scepticism amongst other actors involved in the lawmaking process. This scepticism was concerned with the fact that there was either pre-existing knowledge of or a mismatch between the actual conditions of prison institutions and expectations (regarding prison conditions) in the relevant legislation. It almost seems that domestic actors were hypnotised by the proliferation of conceptual ideas and international standards during the lawmaking process, because there was no sign of any pushback, despite the evident lack of belief in modern concepts such as rehabilitation.

As an alternative perspective, Allott's theory of 'law as a program' (1980) may partly explain why domestic actors did not challenge the unrealistic legislation. It can be argued that political elites, influenced by the transnational flows of ideas, have pushed to enact over-ambitious policies and legislation. Additionally, Afghanistan has overdosed on foreign projects and consultants, making the gap between law in the books and law in action even bigger. As a result there are evident mismatches, suggesting that reform efforts have been concentrating on one track, whilst domestic understanding and the institutional realities in prisons have been evolving along another.

However, from the account presented above, it is not yet clear how and to what extent prison-based rehabilitation is being implemented within Pul-e-charkhi, and if that can tell us something about the prospect of rehabilitation in Afghanistan as a whole. In light of specific contextual and institutional factors, in the next chapter we will explore how realistic and feasible it has been to achieve rehabilitation at Pul-e-charkhi, and to what extent and how the prison has implemented its legal mandate, as an institution. Ultimately and undoubtedly, this will lead to further questions, such as: How do prisoners cope with prison life? How do prisoners pass their time in prison? And, What do prisoners' stories tell us about the prospect of rehabilitation in the prison system? The latter questions will be examined in Chapter Seven, where I continue exploring stories from behind the Black Door.

6.1 INTRODUCTION

Whilst the preceding four chapters dealt with the first part of the main research question, throughout the remainder of this work I will examine the second part of the question (i.e. How and to what extent has the mandate been implemented in the country's largest prison, Pul-e-charkhi, with special reference to rehabilitation?). To do this, I use the institution-building model, which suggests an assessment of three distinct categories of factors (i.e. contextual factors, institutional factors, and target group factors) to understand the (in)effectiveness of institutions and programmes (see 1.1.4 above). Each of these factors will be assessed in a separate chapter, in order to examine the implementation of the prison system legal mandate, but more specifically to explore the application of prison-based rehabilitation programmes at Pul-e-charkhi.

In this regard, I view Pul-e-charkhi as an institution, and its rehabilitation programme as a task within that institution. Thus, further to the arguments presented in Chapters 2 and 3 above, which deal with the overall context of state-building and the criminal justice system, the current chapter presents a specific historical review of Pul-e-charkhi, followed by an assessment of the broader socio-political context, concerning the operation of prisons in the post-2001 era. Further, an assessment of the social and economic context is provided. The chapter ends with a review of the technological factors that affect the prison's operation and (more specifically) rehabilitation programmes.

Examining the contextual factors is both important and relevant, because prison institutions cannot function as standalone entities. In the same way as any other institution, prisons are influenced by several aspects – historical, political and economic – that shape and affect them in different ways, until they become a functional part of the criminal justice system.

6.2 THE HISTORICAL CONTEXT OF PUL-E-CHARKHI

As discussed previously, this is the first dissertation to address the prison institution; therefore, it will strive to fill the gap in the literature as much as possible (see 1.2 above). Whilst analysing the historical context, this section goes beyond mere contextual analysis and provides a fairly detailed account of Pul-e-charkhi's history. To that end, the contextual analysis and history of the institution has been framed in four historical periods, begin-

ning with the birth of Pul-e-charkhi prison (1974-1978), followed by the era of the People's Democratic Republic (1978-1991), then the Mujahidin's Islamic State (1991-1996), and finally the Taliban's first Islamic Emirate (1996-2001).

6.2.1 The birth of Pul-e-charkhi (the prison project)

Muhammad Hashim, a pseudo-dictator, who served as prime minister from 1933 to 1964, (see 2.5 above) initially proposed the idea of building a prison, with the capacity to house 6,000 prisoners, in the Pul-e-charkhi area. The idea remained a mere plan, even after it was revisited by Mohammed Daoud during his term as a prime minister, from 1953 to 1963. Later, Mohammad Nur Ahmad Etemadi, who served as prime minister from 1967 to 1971, also attempted to build a prison based on the revised plan, but construction could not begin. All these attempts most likely failed because of financial constraints, although the lack of strong determination on the part of the leaders and institutional politics should not be overlooked either.

In 1974, when Mohammad Daoud became president, he finally initiated the project shortly after assuming office. Although Pul-e-charkhi was the first modern prison in Afghanistan, people still see it as one of the most controversial institutions of its kind, with an unpleasant historical background, because of the way it operated under different regimes. This is intensified by the fact that most accounts about the prison are confined to stories about experiences of prison life after 1978, and are admittedly from a category of Afghans (and others) who oppose the PDP regime. Thus, opinions about the prison project remain highly politicised and controversial.

Some authors have also discussed the internal dynamics of the then government, concerning the prison project. In their view, Daoud required more space to suppress a large number of his domestic enemies, for which the existing central prison in Kabul (i.e. the Dehmazang prison) was not a suitable option. Therefore, Daoud embarked upon construction of Pul-e-charkhi, which horrified people even at the time. The same authors argue further that the country's political history had taught Daoud some hard lessons that he could not ignore; hence, he was determined to start the prison project right after he came to power (Farhang, 2000).

As I explored the prison project, I had to disregard many viewpoints, both so as not to overlook the heinous human atrocities committed there, and because the viewpoints were highly unrealistic. For example, several authors focussed their attention on Mohammad Daoud's intentions, and reasons why he commenced a prison project shortly after taking power. It has been suggested that the prison project was part of an overall programme to upgrade security (Rostar, 1990; Patman, 1991). Other authors relate the prison project to the Cold War era and former Soviet Union plans for their post-1978 invasion of Afghanistan (Haripoor, 1989; Ghaznawi,

2010; Abultaqi, 2013).¹ According to further authors, the prison was the only large-scale construction project that the president undertook during his administration, although several other public facilities, including a Loya Jirga convention hall, were also urgently needed at the time (Ghaznawi, 2010, p. 232).²

Amongst all the above views, the only author stating that the project aimed to improve oppressive prison conditions in the country was Hamdil, a former member of the Afghan Police Academy. He believes that the prison played a significant role in improving prison conditions, which contributes to Afghanistan's international reputation, even today (Hamdil, 2015). However, personal interviews with top officials at the prison, and those who remained employed there, revealed a mixed pattern.

For example, General Sultani, an expert in prison management who was educated in the former Soviet Union and served as warden of Pul-e-charkhi from 1990 to 1991, provided a different account of the prison project. According to him, Pul-e-charkhi had everything a prison would require; there were no issues with the design, or the intentions of those who built it. He added that Pul-e-charkhi was handed over to him in 1990, when he had completed his education. "The prison, as you may have heard or read, was in poor condition. The food, water, and hygiene were inferior, and ordinary criminals and political prisoners were kept together. Nevertheless, the mess was cleaned up when I rolled up my sleeves."

The second respondent, another General from the ANP, who supervised Pul-e-charkhi from 1993 to 1995, held the position of Director of Court Liaison for the Prison Administration at the time of my interview. According to him, "despite improvements to the physical structure of the prison, there is no evidence that it is better than previous prisons. The prison lacks facilities for education and rehabilitation programmes, as well as for daily living; these are insufficient even for 6,000 prisoners (i.e. the prison's original capacity). In addition, it does not have an adequate number of

1 These authors hold that Mohammad Daoud did not have any plans for judicial reform, and that the prison project was influenced by the Russian government. Additionally, as Mohammad Daoud was an avid supporter of development projects, and he had conflicts with some influential figures in the PDP, his reign was the best opportunity for the former Soviet Union (the architect of the prison) to gain support for their invasion of Afghanistan. According to Haripoor (1989), who supports this claim, "Daoud the assassin built this unpleasant place [Pul-e-charkhi] based on the orders of his Soviet masters." (1989, p. 48).

2 In my opinion this is not accurate, since other large-scale construction projects were in fact underway at the same time. Mohamed Daoud was known for his weakness for development projects, and he implemented a number of other construction projects as part of his three- and five-year development plans. For example, the Military Medical Academy of Afghanistan – a modern military hospital with 400 beds, currently known as Sardar Daoud Khan's Military Hospital – was also constructed during his reign, and is thus named in his honor. Nevertheless, the fact that the president prioritised the building of a prison, even though renovating Dehmazang would have sufficed for the purpose, could be an area worth exploring further.

restrooms, and daylight hardly enters the cells". To him, these were flaws that appeared to be indicative of a haphazardly designed and implemented project that was undertaken (perhaps) for reasons other than improving the conditions in prisons generally.

Although both respondents worked in prison management, the former was the last to manage Pul-e-charkhi under the PDP (see 2.7 above), whereas the latter was the first to do so under the Mujahidin's government (see 2.8 above). They may not have been far apart in terms of time, but their views diverged to the extent that they did not agree on any aspect of the prison. The former was specifically trained in prison management and believed that one could set an example by applying one's knowledge and working hard to make the most of what is readily available. The latter, who came from a Mujahidin background without any relevant training, viewed the matter as being intertwined with many other factors, including the origins of the prison project. In an interesting twist, both respondents came from schools of thought which had nothing in common with either Mohammad Daoud's ideology or his social and political background.

Furthermore, the literature cited above indicates that those without a direct and relevant background in prison studies tend to associate the prison project with many other factors that are marginally related. However, those *with* relevant backgrounds, including officials like Sultani and academics like Hamdil (2015), tend to see a 'glass half full', by focussing on the relevant technical details and their knowledge of overall prison conditions around the world. Hence, it can be concluded that views about Pul-e-charkhi and Mohammad Daoud's intentions for its construction are shaped by personal experience and individual analysis, rather than by facts or empirical evidence.

In summary, there are many negative stories about the prison and its birth, which are generally political criticisms of its founder, president Mohamed Daoud, who is pictured as being very oppressive and preparing the ground for pro-Soviet regimes. Others, however, see the prison primarily as a project aiming to improve prison conditions. In my view, the fact that Pul-e-charkhi was born during an era of important legislative events, including the implementation of the country's first Penal Code in 1976, supports the contentions of those who viewed the prison project positively.

No written records are available which prove the prison's original purpose when it was proposed as a government project. Most of the important figures involved in policy level discussions about the prison were assassinated after Mohammad Daoud's government was overthrown by the PDP, which was also prior to the project's completion. Furthermore, since it began operating, no comprehensive academic study on the prison has been conducted; therefore, there is very little information available about even existing details. In any case, the prison was planned as the biggest prison in the country, and for almost half a century it has remained as such. Although the current study seeks to bridge a portion of this information gap, more research, and a closer examination of the budgetary and administrative

arrangements (as well as contemporary documents), is needed in order to establish a stronger understanding of the original purpose of Pul-e-charkhi.

6.2.2 Pul-e-charkhi under the People's Democratic Party (1978-1991)

Against the backdrop of the history of the PDP discussed in (2.7 above), it is unquestionable that the prison operated in an extra-judicial manner and as a facility for intimidation, obstruction, and torture. The prison was particularly brutal between 1978 and 1979, with its typical target being anyone who opposed communist ideology, irrespective of gender, age, social status, or tribal affiliation (Ghobar, 1978; Kakar, 1995; Ghaznawi, 2010). It was a time when the prison conjured an atrocious image in the public psyche.

Throughout this period many Afghans suffered directly from the atrocities, or knew about them through family members, friends, and allies being held in Pul-e-charkhi. In addition, stories about prison conditions were circulated in the media, and some authors suggest that the government spread stories about the horrific nature of Pul-e-charkhi throughout the city, to terrorise citizens (Rostar, 1990). Meanwhile, Afghans who lived in Pul-e-charkhi as political prisoners also wrote about their experiences. Several international researchers and authors have provided official statistics that clarify domestic authors' claims regarding torture, obstruction, and extra-judicial mass executions.

Reports and articles indicate that extra-judicial executions occurred as a result of extreme overcrowding in the prison. For example, a Dutch prosecutor, Thijs Berger, provided information regarding the execution of 5,000 people, and suggested that the prison served as a death station and slaughterhouse for many others. Berger obtained the list and related information when investigating cases related to six prominent members of the PDP, including Abdul Razaq Arif (who held key positions at Pul-e-charkhi) and Amanullah Osman (who served as the head of interrogation) resulting from the proceedings for their application for asylum to the Netherlands.³

Similarly, according to Kaplan (2001), the prison was more an execution site than a prison, as within the two initial years of the PDP, "around 27,000 political prisoners were executed in Pul-e-charkhi prison" (2001, p. 76). Husainkhail (2013) reports that, in 1979, the intelligence agency rounded up 100 residents of Ghazni province and directed them to the prison. Although the prison administration had received an imprisonment order from intel-

3 In 2014, Thijs Berger published a list of 5,000 political prisoners executed by the PDP at Pul-e-charkhi. Further information is available at: <https://www.om.nl/onderwerpen/internationale/death-lists> and <http://www.bbc.com/news/magazine-28645671>. Also see: <https://www.afghanistan-analysts.org/en/reports/rights-freedom/afghan-war-crimes-trials-in-the-netherlands-who-are-the-suspects-and-what-have-been-the-outcomes/> (Last accessed in October 2022).

ligence, it refused to accommodate additions, due to severe overcrowding, officially declaring that Pul-e-charkhi did not have sufficient space to accommodate additional prisoners. In response, the intelligence service issued another order saying “polygon all of them”. According to Husainkhail, the polygons are slaughtering areas, so this order meant “execute all of them”, and there must have been an inconceivable number of these orders (Husainkhail, 2013, p. 81).⁴

The above account provides a glimpse into extra-judicial treatment in the Afghan criminal justice system, including the prison system under the PDP. A related concern is the quality of life within prisons, for which it is helpful to explain the history of the organisational culture that post-2001 reform intervention tried to change (see 7.4 below). In written accounts by authors who lived in the prisons, individual and general accommodation are both portrayed as being horrifically overcrowded. For example, a solitary room designed for one person was crammed with as many as six people, and each cell was kept wet and dirty, in order to maintain an uneasy atmosphere.

Moreover, similar to the solitary rooms, the general rooms (where many prisoners had to live) were filthy. Prisoners were provided only 150 x 50 cm of space to conduct their daily activities, including eating, praying, and sleeping. The number of prisoners in each room was typically 120-130, and this number would increase as Islamic resistance against the Soviet invasion increased. At times, when the resistance was at its peak, between 250 and 600 people were housed in larger prison rooms (Haripoor, 1989, p. 22; Rostar, 1990, p. 93).

The government provided free food, but it was of poor quality. The prisoners were entitled to a loaf of low-quality bread each, as well as half a bucket of boiled carrot, eggplant, or pumpkin water as their main course. According to the menu for the day, ten prisoners received one bucket of food, consisting of five carrots, two eggplants, or half a kilogram of pumpkin. Occasionally, rice was on the menu, but it was never enough, and it was of poor quality as well. In general, the food contained dead insects, such as flies, cockroaches, and bugs. It was easy for cooks to remove this from the top of any liquid food, and they would do this in front of prisoners. However, if the menu consisted of rice, the prisoners were required to find

4 Polygon is the name of a desert-like area situated near Pul-e-charkhi prison, where political prisoners were subjected to extrajudicial executions. It has been reported that thousands of prisoners were killed here between 1978 and 1979. “When Amnesty International visited Kabul in 1980, reports of the killing of thousands in detention, and the systematic use of torture were widespread. The conditions of detention imposed extreme hardship, deliberately created in some cases, but also brought on because of acute overcrowding and other inadequacies in longer term prison conditions” (Amnesty International, 2003b, p. 4).

and pick off insects themselves (Haripoor, 1989, p. 56; Rostar, 1990, pp. 113-119; Abdulrahimzai, 2009, p. 123; Habib, 2015, p. 57).⁵

Female prisoners lived in the same compound, but on a separate wing, which was relatively clean and less crowded, and the prison clinic was located in the same building. Nevertheless, they received the same quality food and faced similar living conditions as the men. Haripoor (1989) asserts that some Soviet advisors and senior prison administration officials lived in the female wing, and they used to abuse, rape, and torture the female prisoners. Haripoor quotes a 17-year-old female prisoner, named Maliha, who claims that many female prisoners were suffering from gynaecological problems, due to being frequently abused by Russian advisors and prison staff. He also quotes Maliha as saying, "when the government freed me from Pul-e-charkhi in 1988, it also freed five other women. All of them suffered from severe health problems, and one was pregnant – she committed suicide the evening she was set free" (1989, pp. 15-17).

In another account, some authors argue that the suppression of criminal justice and the suffocating prison environment were the same under all four PDP presidents (i.e. Noor Mohammad Taraki, Hafizullah Amin, Babrak Karmal, and Mohammad Najibullah), peaking between 1978 and 1991. Nevertheless, improvements were also noted during the last year of the party's rule, when peace talks and the national reconciliation process were underway (Rostar, 1990; Kakar, 1995).

Based on the stories and accounts cited above, one can contend that under the PDP Pul-e-charkhi went through the darkest era in its institutional history. There was some improvement in latter part of the party's time, which was possibly more a result of peace and the overall change of government policy towards the ongoing war, than a true improvement in the criminal justice system. Meanwhile, many PDP associates who had travelled abroad for special education (such as prison management) had returned, and they were being assigned to various government organisations. For example, General Sultani (cited earlier) earned his master's degree in prison management in the former Soviet Union. He was appointed warden of the Pul-e-charkhi prison upon his return to Afghanistan in 1990. A third factor, in this regard, is the general level of experience of the PDP. Perhaps because the PDP were initially inexperienced, prisons were primarily used for terror, torture, elimination, and the incapacitation of political

5 Paradoxically, inmates on death row received substantial food allowances for the last six months or so of their sentence. A special menu, called 'seven dishes', was offered to these prisoners twice a week. Soviet medical advisors also provided them with special care, such as good medical care and other therapies, on a regular basis. The government propagated and justified these services as human rights for the prisoners. In reality, however, the government intended to purify and stabilise the health conditions of death row inmates, since they needed their blood. As a result of the ongoing war, many government soldiers were becoming casualties who needed blood from stable prisoners on death row (Haripoor, 1989, p. 27).

opponents. That tendency gradually changed as the PDP gained more experience in using other strategies, such as political favouring, resettlement of opponents, and target killing.

Ironically, this period was also marked by a boom in criminal justice legislation, including the enforcement of the third Prisons and Detention Centres Law in 1982. The law defines the reformation of prisoners as its primary purpose and the goal of imprisonment. However, its official title reads as, "Law on the Application of Punishment in Prisons and Detention Centers", indicating that it focussed more on punishments than on rehabilitation.

6.2.3 Pul-e-charkhi under the Mujahidin (1991-1996)

As discussed above, the Mujahidin were already highly factionalised before they took control of the country in 1992, when they faced a multitude of economic, military and social upheavals. In keeping with their manifesto, calling for an end to foreign invasion and the restoration of Islamic values, they denounced the entire body of laws enacted during the PDP's rule and before, but failed to introduce any new laws. In the meantime, the regime also lacked a viable central government, which resulted in warlordism, human rights abuses, and widespread criminal activity in many parts of the country.

Accordingly, the country was quickly engulfed in conflict, including fighting over the control of regions and areas to which armed groups felt ethnically or geographically tied. Kabul, the capital city of Afghanistan, was of particular interest to all groups, and was thus divided along ethnic, political, and economic lines. Hizb-e-Islami and Harakat Enqlab-e-Islami took over the Pul-e-charkhi area of Kabul, including Pul-e-charkhi prison, as the Mujahidin entered the city in 1992.⁶ They ruled over the area and blocked others from accessing it, and soon became at odds with the ruling faction (i.e. Jamiat-e-Islami) which controlled the central parts of Kabul.⁷

As discussed before, every Mujahidin faction operated autonomously, with an independent jurisdiction and system of governance. In addition, those who asserted authority often displayed reckless behaviour and committed serious human rights abuses. Thus, the judicial system of the country was further exposed to uncertainty, where judges were plagued by the uncertain environment and therefore outcomes of court rulings became unpredictable. The complete absence of the rule of law and the chaotic situation were aggravated by the ongoing armed conflict.

6 For information about Hizb-e-Islami and Harakat Enqlab-e-Islami (see footnote 27, in 2.8 above).

7 For information about Jamiat-e-Islami (see footnote 27, in 2.8 above).

During the interview process for this work, a few respondents who had lived through those turbulent days in Pul-e-charkhi as managers, or who had resided there, shared their personal stories. These first-hand experiences demonstrate how the concept of law and governance is vulnerable in times of conflict, and how negative synergies are built around lawlessness and disorder, in order to compromise people's and systems' behaviours. The former Director General of Prisons and Detention Centres for the Mujahidin regime, provided some insight into the way prisons were operated during the Mujahidin regime. He said that prisons almost ceased to be operated by the government: "Nearly all Mujahidin commanders were allowed to maintain private prisons throughout the country. Since the facilities were private, they could operate independently of state laws and anyone else's control."⁸

According to him, Hizb-e-Islami and Harakat Enqlab-e-Islami were in control of Pul-e-charkhi prison and its surroundings. Although the prison was primarily used as a military base, some prisoners were also kept there. However, the General did not know a number of other details regarding those kept in prison, because his relations with Hizb-e-Islami were not friendly:

"The ruling party was not allowed access to Pul-e-charkhi. Therefore, except when peace talks between Jamiat-e-Islami and Hizb-e-Islami took place inside the Pul-e-charkhi prison, I never went there or exchanged any information with the prison... Jamiat-e-Islami, as the ruling party, would use the detention centres of the National Security Department, located in areas under our control in Kabul. Although small, these were used for many purposes, including housing prisoners and executing other court orders, such as capital punishment."⁹

This General's predecessor, General Sultani, served as Commander of Pul-e-charkhi under the PDP, witnessing the fall of the prison to the Mujahidin. As a result of opening the doors of the high-security prison to the Mujahidin, he referred to the subsequent release of all prisoners, including serious criminals, as an 'invasion of criminals' which was yet another rupture, but in the area of criminal justice. I would like to quote a relatively detailed part of the interview, because it is part of the prison history that is not recorded anywhere else:

"Within the first months of my appointment as Commander of Pul-e-charkhi, I had completed the separation of political prisoners from general criminals. Then, after a few months, I was instructed to release all political prisoners. The instruction was unusual, but I complied with it. I had to obey, in the first place because it was an order, and in the second place because I had observed (during my segregation efforts) that most political prisoners did not have a clearly defined criminal case. So, in a way, I was happy to let them go."

8 Personal interview with the Director General – August 2016.

9 Ibid – August 2016.

As I contended earlier, the peace talks between the PDP and Mujahidin factions in Pakistan resulted in the release of political prisoners. This was viewed, by the General and his staff, as a positive step in terms of peace and reconciliation, as well as bringing about a decrease in the prison population which allowed for prison space and facilities to be better managed:

“Several days after the release of the political prisoners, I attended a dinner with a few colleagues in a nearby restaurant. Around 8.00 p.m, just as we were about to finish our dinner, I noticed people walking through the area with piles of belongings on their backs – not just one or two, but many – and they appeared to be coming from the direction of the prison. Upon contacting the prison, I learned that orders had been given for specific categories of prisoners to be released. I also learned that some people who identified themselves as Mujahidin had arrived at the prison and were attempting to release all the other prisoners as well.

Based on my military experience and a quick assessment of the situation, I determined that my best course of action was not to return to prison immediately. Even though there were several things to worry about, I decided to leave the area quietly and return home. In the morning of the following day, I went to the prison dressed in a civilian outfit. I was shocked by what I saw. The prison doors were broken and wide open. Although I was terrified without guards, I still had to enter the prison to observe what was happening. As I entered the prison, I noticed the body of a police officer hanging in the courtyard. The body was the commander responsible for the zone’s security. On seeing the body, the broken doors, and the empty high-security prison, I did not proceed any further. Instead, I returned home and left Afghanistan the same day.”

The testimonies of two other respondents who were eyewitnesses to that same transition period, especially the first 24 hours, offered similar accounts. I have cited them in the footnote below, as their accounts fill in some of the gaps in General Sultani’s story. The testimonies were made by Lieutenant Abdul Ahad Mudaber, affiliated with the Military University of Afghanistan, and Commander Rahmatullah, a resident of Pul-e-charkhi and an affiliated member of Hizb-e-Islami.¹⁰

10 According to Lieutenant Mudaber: “In the evening of 7th Saur, 1371 (1992), militia appeared in the Pul-e-charki area. They presented themselves as Mujahidin, and they asked us to evacuate the buildings and surrender to them, along with our weapons. Areas around the prison, such as the polygons, parts of the military academy, and the 4th division of heavy armour and artillery forces, had already been handed over to unknown groups. However, the prison itself was handed over to the Mujahidin of Hizb Islami (the Mawlawi Khalis faction) and Harakt Enqlab Islami, under the supervision of Commander Abdulhaq of Mawlawi Khalis, Commander Azimullah, and Mawlawi Shafiullah. They were assisted by locals, some of whom had already entered the prison under the name of Mujahidin. The first militia group – I do not know if it was Hizb-e-Islami or Harakat-e-Islami – were relatively hostile and used force to free certain inmates. The second group, however, did not look for specific people, nor were they hostile. They said that henceforth they would be responsible for government affairs, and they wanted to free everyone from the prison.” ➡

In summary, the Mujahidin operated a faction-specific criminal justice system and maintained private prisons. The party's influence determined the capacity of these prisons; for example, the higher the rank of the leader/ commander, the larger the prison. As for Pul-e-charkhi, the prison was used partly as a military base, and partly for torture and extra-judicial treatment (Amnesty International, 2003b, p. 5). To that end, the Mujahidin were not only unable to maintain a national-level prison, they were also unable to establish a single, nationwide justice system.

The Mujahidin era was also a major rupture in the criminal justice system and in prison institutions. The rupture also brought in a culture of using prison institutions for purposes other than mere imprisonment, even using them as tools to elevate state power via coercion. The misuse of prison institutions got worse to the level of faction politics, as later prisons were used as military base and stronghold to retreat from attacks by the enemy. The Hizb-e-Islami Mujahidin operated in parts of the facility, using it as a fortress and headquarters for managing their faction's internal fights. As a result, the prison's infrastructure sustained great damage, due to improper use and fights, and because (due to its military function) it became the target of many assaults.

Additionally, some of the former prisoners of Pul-e-charkhi became wardens, as they were amongst the few trusted individuals with active experience.¹¹ However, these individuals did not have a basic understanding of how prison institutions function within a broader criminal justice system. As a result, they not only ruled aggressively and treated prisoners inhumanely, they also served as role models for future recruits in the prison system, by relying more on loyalty and patronage than on education. As the new wardens had experienced the inhumane treatment of prisoners during the PDP period, instituted a severe punitive and retaliatory culture in prisons, which continued to grow until the Taliban took control of the country in 1996.

⇒ Commander Rahmatullah said: "When we [Mujahidin] arrived at Pul-e-charki, it was midnight on 7th of Saur. There was nobody there, and portions of the prison had already been robbed. People were presenting themselves as Mujahidin, but we did not know all of them. I think this presented an opportunity for strangers to steal prison property. To avoid further stealing, and to base ourselves in a good location strategically, Mawlawi Shafiullah decided to establish his headquarters in the prison building... In terms of inmates, under the Mujahidin government we held only a few people in prison – mostly those suspected of being spies, people arrested on the street for doing something wrong, and some people with foreign nationality."

11 After the Mujahidin took over Kabul a wave of 'brain drain' began, because of the fear of retaliation, economic considerations, and declining living standards.

6.2.4 Pul-e-charkhi under the Taliban (1996 to 2001)

As the Taliban came to power (in 1996) following several years of internal conflict, insecurity, and disorder under (and amongst) the Mujahidin, it attempted to fill the gaps with its harsh criminal justice system (see 2.8 above). As Barfield (2008) maintains, the Taliban proved to be as keen as “the PDP in using state power to enforce an alien worldview on the Afghan population. The movement’s religious orientation was strongly influenced by conservative Salafi sect of Islam ... and the local [customary system known as] Pashtunwali. The influence of the latter was only indirect because, as a movement led by clerics, the Taliban were opposed to the tribal system as well as customary law” (2008, p. 367).

During the Taliban’s rule many religious figures, and even militiamen, worked as judges and prosecutors, or were involved in other parts of the system, including as prison guards and prison managers. In addition to using inhumane investigative techniques, such as beating and torturing suspects and bypassing court procedures, these figures rendered judicial decisions on the spot, based only on their assessment of the situation. The consequence was often brutal punishment, particularly when the criminal or suspect was caught red-handed. To this end, the Taliban did not need to rely on prisons.

Imprisonment was used in rare instances, usually for hostage prisoners, those awaiting punishment, and those convicted of minor offences. The Taliban’s religious police dealt primarily with those in the latter category, and they were often held in prison for brief periods.¹² As stipulated by the religious police, individuals who committed minor offences were initially detained in a small jail. For example, those arrested for not knowing enough about basic things, such as the correct way to conduct prayers or oblations, had to receive training for seven days. At the end of the seven days, they were required to pass a test on these topics; if they failed, they would remain imprisoned for another seven days. Others were arrested for shaving or cutting their beards, and these people would remain in prison until their beards grew long enough.

In all cases, if the religious police determined that an individual should remain in custody for more than seven days, he would have been sent to

12 Under the Taliban certain normal conduct would count as a crime, even if an explicit punishment for it did not exist. For example, it was compulsory for all men to grow a beard, wear a hat or a turban, and pray in joint sessions. Praying was always to be conducted immediately after the call for prayer. Thus, not wearing a hat, cutting or shaving a beard, and/or not attending prayer on time were all crimes. Likewise, women were not allowed to go out unless fully covered and accompanied by a *Mahram* (a close male family member). The Taliban’s religious police later extended bans on music, dance, films, flying kites, football, volleyball, boxing, playing chess, card games, and other forms of entertainment.

The religious police were part of a predatory establishment called the Ministry of Vice and Virtue, which forced people to pray, and they would whistle-blow on any men and women who were violating Taliban rules.

Pul-e-charkhi. However, some reports maintain that, whilst Pul-e-charkhi was being kept relatively quiet, the Taliban used other prisons excessively. According to Amnesty International, "[The Taliban] arrested many political prisoners from 1996 to 2001... Political prisoners or military combatants were reportedly held in Kandahar, a prison allegedly holding several thousand prisoners. Prisoners were reportedly forced to labour... some died of exhaustion or from beatings by prison guards. Food was reportedly inadequate, and prisoners faced starvation if they could not afford to buy additional food ..." (Amnesty International, 2003b, p. 5).

It should be noted that, irrespective of the extent to which the Taliban used prison institutions, they were no better than the Mujahidin, because in addition to their peculiar system of governance, the country experienced a continuation of the brain drain that had started under the Mujahidin. As a result, the Taliban were also forced to rely on unprofessional people to run its prisons. The Taliban's religious police is reminiscent of a backwards and distorted version of the role played by Quakers in English prisons in early 1800, who believed that prisoners would be reformed if they were forced to read the Bible and remain in a prison cell for long enough (Cooper, 1979).

Two major conclusions can be drawn from the overall historical account of the Pul-e-charkhi prison, throughout all three of the periods discussed above. First, discussions concerning the aims and objectives of Pul-e-charkhi and Mohammad Daoud's intentions for constructing the prison have been based more on personal experiences and individual evaluations, than on factual and empirical evidence. However, the fact that the birth of the Pul-e-charkhi as a criminal justice system institution coincided with the enactment of the comprehensive 1976 Penal Code indicates that the prison project was intended to be more than a mere tool for suppressing the regime's political opponents.

Secondly, in practice the institution had not only inherited a bad reputation from its own history, it had also introduced a tradition of distrust, authoritarianism, and individualism, as a consequence of the widespread use of oppression and extra-judicial measures throughout that history. Most of the negative traditions have gradually become embedded in the unwritten codes of prison management because, as a result of successive ruptures and regime changes, the prisoners of previous regimes have become key figures of the new system; they often became prison administrators. The new administrators are generally novices, have a retaliatory attitude (and are hence predatory in nature), and are inclined to perpetuate many of the unethical practices of the past.

6.3 THE POLITICAL CONTEXT – POST-2001

The post-2001 political landscape in Afghanistan may be best described as a newly born democracy, characterized by a pervasive lack of government control over the territory. In addition to the outcomes of the longstanding

instability discussed above, and the struggle to establish a viable state alongside the ongoing turmoil of the War on Terror, many other factors have contributed to the issue of government control and legitimacy. In the area of criminal justice, three major factors have had a particular influence on the evolution of the existing prison system: the type and direction of international investment in the police and prison system; unclear government policy regarding (for instance) terrorists, warlords, and drug traffickers; and systemic issues, such as the independence of the judiciary and that of the prison system.

6.3.1 Controversial international investments and the prison system

As discussed before, many of the investments made in the justice system have leaned towards achieving War on Terror goals. In that regard, numerous international engagements have invested heavily in building 'special' units and institutions, including special counter-terrorism courts and special units dealing with drug trafficking, money laundering, corruption and similar crimes, all of which mainly focussed on insurgency and its related activities. These units seldom dealt with ordinary crimes, so special prisons and detention centres, such as the Bagram prison and National Security detention facilities (see 3.4 above), hosted the ultimate products and clients of these institutions.

These institutions usually operated as military bases which were heavily guarded and, when moving around, personnel (including judges, prosecutors, and other staff) were escorted by close protection and armored vehicles. The majority of judges and prosecutors were particularly harsh with certain types of defendant; as a result, they needed guards and heavily armored vehicles to protect themselves from retaliation and suicides. In addition to working within these special units, the personnel had to maintain both vertical and horizontal relationships with other criminal justice institutions, due to the nature of criminal investigation and case processing.

Thus, it was not uncommon for people in other parts of the judiciary to fantasise about obtaining some of those expensive protective measures, and they subsequently went out of their way to enforce unusually harsh punishments in every case they were assigned to investigate.¹³ As a result, prison institutions were not only filled with national security cases, they also imposed broader damages on the criminal justice system, to the extent

13 One specific category of judges imposed sentences of 16-20 years on almost all the cases they reviewed. These judges were given the code name '1620', which is also the name of a gigantic trailer truck famous for its capacity to transport large amounts of goods in one go. The analogy was to the length of the sentence, which was commonly perceived to be unfair, but it also corresponded to the judges' decision to remove big criminals and notorious characters in one go, which was significant.

that 'the Taliban form of justice tended to prevail in some areas' (Wardak and Braithwaite, 2013).

More in general, due to post-2001 state-building efforts, some powerful warlords were able not only to return to government, but also to hold powerful positions (see 2.9 above). In specific sectors (such as the police force) warlords, especially the so-called 'Northern Alliance', grew into a powerful patronage network. Although they were apparently 'less trusted' by the international community, they were still much needed for the War on Terror, and hence they were empowered primarily within the security sector (SIGAR, 2022). As part of the police force, the prison system was primarily under the control of this alliance. There was a significant dynamic to this capture, not only because of the serious nepotism and patronage hierarchy within the prison system, but also because the system lacked professional resources and still carried baggage inherited from the wartime period, including reckless conduct, misuse of authority, and corruption.

6.3.2 Controversial state policies and the prison system

The second concern was political will and determination when the government ended. The government used to play a hide-and-seek game, particularly regarding the following three categories of criminals: terrorists, warlords, and drug traffickers. For example, the Taliban and its affiliates were referred to one day as 'brothers' and the next as 'terrorists and the enemy' (Tarzi Amin, 2005; Christia Fotini and Semple Michael, 2009; Tellis, 2009). Meanwhile, notorious warlords and drug mafias were not only shielded from prosecution, they also held positions of authority in the government and National Assembly. They were also enabled to establish their patrimonial networks by infiltrating government bureaucracies (Onishi Norimitsu, 2001; Chandra, 2006; Mukhopadhyay, 2009; Mehran Weeda, 2018). The challenge these factors posed for the criminal justice system was twofold.

First, policy ambiguities caused a general sense of confusion and insecurity for domestic criminal justice actors. Judges and prosecutors did not wish to touch someone who might be considered a brother of the system in which they worked, nor did they wish to influence the warlords, who were powerful to the extent that they had the authority to determine the faith of judges and prosecutors and decide whether or not they could remain in their work. In addition, uncertainty around policy led to irreversible mistakes, including the formation of patrimonial networks that later formed governments within the government, and even degrading reversals of justice. The most famous example of the latter is the Law on National Reconciliation, which was adopted by a National Assembly made up of

major warlords, in response to the government's 2005 Transitional Justice Action Plan.¹⁴

The law provided legal immunity to two types of alleged perpetrators: those involved in hostilities before establishment of the interim administration in 2001; and those who remained in opposition to the Afghan government. According to the law, the latter category was not supposed to be held responsible for crimes committed in the past, if they "join the national reconciliation process" and "adhere to Afghanistan's constitution and other laws".¹⁵ In essence, therefore, blanket legal immunity was granted to all the criminals of past, present, and even future conflicts.

However, the opposite was true in case of the foot soldiers and others accused of national security crimes. Almost all those imprisoned as a result of national security allegations were either arrested on the battlefield or (because they were suspected of participating in anti-government activities or actions) considered a terrorist. These proceedings usually involve similar prosecutions and similar punishments. This loose definition of guilt and the open-ended authority afforded to government actors allowed influential people, including politicians, to manipulate the criminal justice system and fill prisons with people who opposed them (and other people they did not like).

This brings us to the second set of challenges due to the ambiguity of policy. Whilst the policy commonly discouraged criminal justice actors from taking decisive measures, it also provided an opportunity for some politicians to polarise the prison system. Mohammad Ashraf Ghani, the former president who fled Afghanistan just before the Taliban's takeover in 2021, once stated to the media 'that 98% of all national security crime prisoners belonged to a single tribal group'. In fact, because of the intensity of war in the eastern and southern areas, many people were arrested and prosecuted for national security-related crimes, so the president was right in that context. Later, however, it was argued that many other prisoners had been penalised due to political connections and the bitter rivalry between powerful elites.

As a result, the National Assembly and National Security Council ordered the prison administration to develop a detailed report, including demographic and other relevant information on the prison population. A complete set of information was not available prior to the implementation of this order in 2020, which reportedly revealed a number of controversies. The data suggested that people in positions of power had used the criminal justice and prison system extensively to suppress their opponents, includ-

14 The Law on National Reconciliation, General Amnesty and National Stability was adopted by the National Assembly in 2007 and came into effect in 2008. The law is published in Official Gazette No. 965-2008.

For a digital copy of the Action Plan: Peace, Reconciliation and Justice in Afghanistan, see (GIROA, 2005).

15 Art. 3.2, Law on National Reconciliation, General Amnesty and National Stability.

ing those within their own constituency. It was prohibited to publish this data, but a prison official confirmed it to the current author in an interview after the fall of the republic in 2021.

6.3.3 Issues of institutional independence and the prison system

Systemic issues concerning the independence of the judiciary have been linked to the misuse of criminal institutions by political elites and internationals alike. In a recent report, the Afghanistan Analysts Network evaluated the status and future direction of four institutions, including the Supreme Court, the Senate, provincial councils, and the Independent Commission for Overseeing the Implementation of the Constitution. The report concludes that, “there has been a withering of these institutions and a sapping of their authority. ... The effects of this are most clearly seen in the Supreme Court ... and the [Independent Commission for Overseeing the Implementation of the Constitution’s] set up to consider Constitutional questions. Both have been prone to manipulation by the legislative, but especially the executive” (Adili, Soroush and Sadat, 2021).

In this way, despite the Afghan constitution’s separation of powers framework, the executive branch consistently subverted the judiciary. As a result, the government functioned as an authoritarian regime, not just reinforcing the prevalent culture of impunity (particularly amongst powerful individuals), but also offering a chance for powerful elites to misuse the criminal justice system.¹⁶ The National Assembly was another big contributor to this dilemma, as its members also tried to take advantage of the situation instead of giving a helping hand to reform. According to many such members, everything (including disparities in the prison system) was acceptable, as long as the essential components of the prison system were managed by ministers, who needed a vote of confidence and were accountable to the National Assembly.

Members of the National Assembly were therefore known to have heavily influenced the government’s criminal justice reform plan, including the police and prisons, through which they helped criminal networks and released insurgents and other criminals. In the long run, this led to an overall poor state of the rule of law, a weak criminal justice system, and a culture of impunity.

16 In January 2021, SIGAR published a report entitled ‘Hamid Karzai International Airport: Despite Improvements, Controls to Detect Cash Smuggling Still Need Strengthening’. The report claims that, despite endemic corruption in the country, powerful individuals continue to escape even basic oversight. For instance, in the case of examining cash smuggling in Afghanistan, ordinary Afghans who had nothing to do with smuggling have to pass through checkpoints and inspections at Kabul airport, whilst VIP passengers who are potential cash smuggling suspects bypass all security measures and proceed directly to the planes (SIGAR, 2021).

In addition, and on a more technical level, the different functions of the prison system were divided between several government agencies, such as the MoI, the MoJ, the AGO, the Ministry of Health, the Ministry of Education (MoE), the Ministry of Culture, the Ministry of Islamic Affairs, the Ministry of Commerce, the Ministry of Finance (MoF), and others. As these government agencies were officially responsible for their own portfolios, they were also responsible for delivering services in their respective areas, across all sectors. In theory, they had the staff, budget, and legitimate interest in delivering these functions within the prison system as well, but the reality was that they had far less resources than were required and were therefore unable to provide satisfactory services.

As a result, there used to be two possible options for the prison system, either to accept a dull, motionless contribution from state agencies, or to take the initiative on its own. When it came to prison-based education, for instance, the prison system was a victim of power politics in both scenarios, but more so if it showed or demanded any action. This is because, in response to such demands, powerful ministers would be forced to defend the interests of their own ministry, and this was costly to the prison system.¹⁷ Many state agencies adhered to the bureaucratic mindset of never giving up on their departmental portfolio, especially in protected institutions such as prisons. This is because state agencies' involvement in the prison system entailed more staff, more funding, greater authority, and more opportunities for corruption and favoritism. Ergo, whenever there was a plan for reform, it was interrupted in some way (see the epilogue, below).

In summary, there has long been a lack of clear political foundations for the prison system to flourish and serve as a meaningful institution that is committed to changing behaviour and reducing recidivism. Considering the political context, it appears that the Afghan government was looking forward to establishing the prison system as a place of incapacitation, intimidation, and coercion, rather than as an institution aiming to reduce recidivism and rehabilitate prisoners. This mirrors the way that its international partners invested in the system (i.e. as a means of fighting the War on Terror).

6.4 THE SOCIO-ECONOMIC CONTEXT

In examining the broader social context of prison institutions, one is reminded of the features that are unique to the Afghan social fabric, and how these features relate to the criminal justice system. Historically, no government has been able to provide an official justice system that extends

17 It was costly for the prison system, because the system was usually represented by a General Director who was one level below the ministers, and hence had less power to influence decisions, build allies, and win arguments against ministers.

to all the rural areas. Thus, people are not only less concerned with criminal justice institutions, but also do not accept the assumption that the state has exclusive jurisdiction over criminal matters. In contrast, family, clan, and kinship have greater significance in many areas, including criminal justice. In many cases, the role of kinship extends beyond reserving the right to seek revenge or compensation, when a member of kin is harmed. It may include (for example) extended bloodshed, as damage to one member of kin threatens not only *their* honour, but also the honour of the entire kinship.

Prison institutions have experienced both positive and negative consequences, as a result of such social dynamics. One of the positive impacts is that prisoners are not subjected to as much extreme isolation as one would expect in a Western society. In most cases, people take matters into their own hands, by mobilising immediate relatives and larger kinship groups to help its members. A prisoner may receive assistance in the form of regular visits, food supplies, and other resources, particularly in situations where the prison institution is unable to provide what the prisoner requires. On the other hand, there are negative consequences for the rule of law, and for state-building in general, because a large proportion of the population are enabled not only to oppose institutions such as prisons, but also to view them as a form of state imposition, which in turn reinforces the belief that individual treatment can replace official justice.

Over the course of Afghanistan's history, different regimes have tried to control this situation by introducing laws and implementing a variety of state ideologies, but some forms of opposition have persisted, and in rural areas things have hardly changed at all. That is partly due to the social fabric and the fact that people developed their own 'informal' institutions for regulating behaviour and resolving problems, but it is more due to the fact that Afghan people have had hardly any input into creating the laws and the system of government. The people were instead asked to accept something they did not know, and even something they viewed as a product of foreign influence, which violated their cultural traditions. Historically, this sparked rebellions and civil wars, as discussed in the case of King Amanullah and the later PDP reforms in Chapter 2, above.

A similar trend continued post-2001, where debate was needed about issues such as: Who has the right to seek justice? Does the state have priority over individuals, when it comes to delivering punishment? What are the boundaries of family support and calls for justice? However, these questions did not have an audience within the international community assisting with the reform process. This was due both to the apparently self-evident nature of the answers to the questions, and to the beliefs of the so-called domestic elite, who also thought such debates were not valid. The elite regard formal justice as automatically good and acceptable, because in societies with a long history of formal justice and a viable state all citizens tend to support the state's administration of justice.

With regard to the economic context, despite Afghanistan's abundance of natural resources, it has long been one of the world's poorest nations due to long-term conflict and instability. As discussed in Chapter 2, historically the primary source of government revenue was foreign assistance. During most of the 19th and 20th centuries the system survived, initially, on British subsidies, and later on subsidies from the United States and Soviet Union. There was occasional scope for specific private sector engagement, mainly in the trade and manufacture of small-scale and basic consumer goods. This activity was normally owned and managed by either government officials or members/associates of the royal family, which created a minority upper feudal and capitalist class and a majority lower working class (Nyrop and Seekins, 1986).

The First Republic in 1973 and the rise of the PDP (which was comprised of many members from an aspiring middle class) were both responses to those considered feudalistic and capitalist. In particular, as soon as the PDP came to power in 1978, it expanded the role of the state based on socialist ideology, aiming to transform rural peasants into industrial workers, despite the country's weak industrial base. In the meantime, in order to gain favor in urban areas, the state expanded its social services and provided subsidies for consumer goods. One of the most visible examples of such a subsidy was the coupon system, under which the state provided wheat, cooking oil, and other essential commodities to employees in the public sector. However, the majority of people living in rural areas and those who did not work in the public sector were ineligible for the coupons.

Although it was never booming or particularly prosperous in the first place, the system gave general direction to an economy that gradually declined into nothing more than short-term trading, due to wars and long-term instability. In particular, during the Mujahidin and Taliban eras, the economy was extremely turbulent, and it would be more accurate to describe the economy then "as loot and plunder under the Mujahidin and neglect under the Taliban. During [which], institutions and infrastructure continued to decay or be stripped for sale in Pakistan" (Fishstein and Amiryar, 2016, p. 3). Against this backdrop, the pre-2001 economic system of Afghanistan may be best described as the Soviet model (or socialist orientation).

Following the post-2001 reform, the government adopted a market economy, which was first outlined in the National Development Framework 2002 (see 3.2 above). A provision of the 2004 Constitution formally codifies this position, providing that "the state shall promote, protect, and ensure the safety of capital investment and private enterprises in accordance with the provisions of the law and the market economy." The ANDS 2008 states that the government should seek to create an environment "that encourages the private sector to play a central role in the country's economic development [and where] the government is the policy maker and regulator of the economy, not its competition" (see 3.3 above).

To that end, Afghanistan shifted from a somewhat Soviet and socialist-oriented economy to a market economy, which remained largely unsatisfactory until the republic ended in 2021. Many believe that “support for the market economy was undermined by hasty implementation when the political, institutional, and legal environment was not ready for it. The privatization of state-owned enterprises was especially unpopular because many were sold to associates of high officials in a nontransparent way... Free trade is considered to have been harmful to Afghanistan because predatory neighbors and the lack of government protection are seen to have led to the destruction of the country’s few industries” (Fishstein and Amiryar, 2016, p. 1).

The hasty shift in the system caused disparity in the overall economic situation, which gradually led to a number of major issues, such as a lack of justice and equity, a boom in the illegal economy and the mafia’s rule over it, and the capture of benefits by a small group of corrupt individuals who were tied to big warlords and powerful elites. The problem was further exacerbated by the flow of funds and contracts related to the war, resulting in a separate war economy that affected almost all sectors, including prison institutions.

This explains why people charged with crimes related to war and the economic mafia, including drugs crimes, money laundering, corruption, and other crimes, constitute the largest segment of the prison population, after those who are associated with National Security. As Sykes (1958) argued with regard to the adaptation and importation of prisoner behaviours, people charged with war and mafia-related crimes import new behaviours and social trends into the prison environment. A few examples of these behaviours, and their impact on prison management and programmes are discussed in Chapters 7 and 8, below.

In the specific case of Pul-e-charkhi, the privatisation of economic activities has infiltrated prison services and prison-based programmes such as rehabilitation. Due to the lack of resources, the prison administration leased industrial shops to prisoners who possessed certain technical skills to run a shop, as well as the capital to compete in open competitions (see 8.4.6 below). Consequently, the prisoner would be in charge of the shop and the programme and would be able to determine (or significantly influence) the programmes, including the admission process, scale, and participants.

In summary therefore, prison institutions used to operate in a social context where people hardly believed in the state’s authority to deliver justice. This was due both to the absence of formal criminal justice institutions and to strong familial and kinship ties across society. Thus, prison institutions have generally been viewed as instruments of state authority, coercion, and control at the hands of powerful (and often corrupt) officials who consider themselves part of elite society. Similarly, in terms of the economic context, if we look at the social construct of prisons as discussed in Chapter 1, Pul-e-charkhi contained just over half the total number of national secu-

rity prisoners (partly a result of the illegal drug economy) in all 33 prisons.¹⁸ In addition, the second largest category of prisoners were the poor and uneducated, who were a result of the poorly integrated economic systems.

Considering the specific features of these two groups, one could argue that a high percentage of the prisoners was neither eligible for standard rehabilitation programmes nor considered particularly amenable to rehabilitation (see 5.2 above 1.1.3 above. Particularly, the vast majority of prisoners who come from national security or illegal economic backgrounds generally require incapacitation, rather than rehabilitation. Hence, the prison system and its programmes are also shaped in that direction.

Additionally, because these prisoners come from powerful social, religious, and economic backgrounds, they bring several levels of social hierarchy to the prison, which are detrimental not only to the social fabric of the prison, but also to the entire prison system and environment. Powerful Taliban members, and those with religious backgrounds (for example), are able to influence an extensive prison wing and sometimes an entire block, by making all the prisoners follow their rules (see 8.2 below). The drugs mafia, those affiliated with powerful elites, and corrupt officials who end up in prison, tend to corrupt the prison system with their ability to purchase anything at any time.

6.5 TECHNOLOGIES

In 2005, a case management system was rolled out, with financial assistance from the United States Bureau of International Narcotics and Law Enforcement Affairs (INL) and technical assistance from the JSSP. The project involved the establishment of an online database to track criminal cases from the point of arrest through to the incarceration process, thereby reducing the potential for corruption and denial of individual constitutional rights. This multi-million dollar project had an estimated 550 offices, outnumbering the number of active prisons across the country, and it took 15 years to complete.

The database was nonetheless developed, with a number of design and implementation flaws. It could not accommodate all the data in local languages, like Pashtu and Dari, at the same time. In addition, its entry system was very open, so that a data entry clerk could alter certain fields and escape others, which led to bad data collection. Moreover, data such

18 In this context, it is important to note that most National Security inmates have a similar background: they are arrested on the battlefield and are often accused of engaging in anti-government activity, including financing terrorism through drugs and other illegal businesses, or in conduct classified as a terrorist act. Interestingly, these inmates undergo similar prosecution processes, resulting in similar punishments. Perhaps because of these similarities, most members of this group tend to stick together within the prison, adhering to their own internal code of conduct.

as dates of birth, places of birth, names, and family names have always proved problematic, resulting in unmanageable difficulties with searching and reporting functions. Although the project had hired a lot of staff, it lacked layers such as quality assurance and verification, which meant that it could not decrease the number of prisoners over-serving their sentences, inaccurate information was still common, and seized assets were frequently misplaced (SIGAR, 2020).

Consequently, the prison system was left with paper-based records of prisoners. At Pul-e-charkhi, the prison administration collected necessary information about prisoners using forms and personal files. These files contained three separate folders in red, blue, and white: the red folder contains legal matters, including information about the case, arrest details, the prosecution's claim, the defence, and all court decisions. In general, criminal justice officials add to this file at various points during the investigation and trial process, but it may not ever be fully complete.

The blue folder contains personal, psychological, and behavioural information. The prison administration must compile a new dataset for the blue folder, because perpetrators' behavioural characteristics, threat levels, work and educational needs are only partially assessed and recorded during their prosecution and trial. Since the blue folder initially consists of limited or no information, the necessary data is collected via forms containing questions about almost everything relating to personal information and behaviour. Individuals are required to answer all the questions. As long as the responsible officers collect the data correctly, the file should provide enough information for the prison to make informed decisions about the prisoner, at various points in the incarceration process.

Finally, the white folder contains medical records, beginning with a summary of the prisoner's medical history. An assessment of the prisoner's current physical and psychological status, as well as any potential health risks, is included in this file. As with the blue folder, a new dataset must be compiled, and the collection process and quality are equally important. With information management being the most technology-oriented, and perhaps also technologically demanding, area of the institution, every other aspect of the prison, including, security, searches, and other aspects of prison management, runs via a manual operation system.

In summary, in addition to the lack of infrastructure and widespread corruption, issues relating to capacity and other technical factors were also at play during the post-2001 reform intervention, which hindered the success of modern technologies in Pul-e-charkhi. However, the fact that the prisons are not equipped with any technology (apart from a limited number of security cameras) is probably one of the most intelligent decisions made during the post-2001 reform, because over 90% of all prisons lack the necessary infrastructure for this – even an ordinary electricity connection can be problematic.

6.6 SOME COMPARATIVE OBSERVATIONS REGARDING BALKH PRISON

The city of Balkh is located in Mazar-e-Sharif, a key province and economic hub for the northern part of the country, which shares borders with three Central Asian countries (i.e. Uzbekistan, Tajikistan, and Turkmenistan). In addition, Balkh serves as the judicial hub and hosts the main prison in northern Afghanistan. As with Pul-e-charkhi and other prison institutions in Afghanistan, Balkh prison has been affected by the general historical, socio-economic, technological, and political context in much the same way as other prison institutions.

Although the city of Balkh has a rich intellectual background, with famous writers, poets, theologians, and mystics such as Jalal al din Balkhi (Mawlana) having been born there, the historical context, particularly most of the consecutive political ruptures and regime changes discussed in Chapter 2, has affected Balkh prison in a similar way to other prison institutions. More specifically, at least three of the four historical periods discussed in (6.2 above) have influenced Balkh prison in a broad but similar way to Pul-e-charkhi. The Taliban's first government reached the northern parts of Afghanistan towards the end of its rule, however, so it had less of an impact on Balkh prison.

As mentioned before, the city of Balkh is the birthplace of 'Zahak', but Balkh prison did not inherit Zahak prison's horrific features, discussed in (see footnote 5, in 2.3 above). Yet admittedly, the prison is not much better either. Life in the prison cells is unbearable during the hot summers and harsh winters in Afghanistan (see 7.6.2 below). This is because the prison hardly uses any technology; it does not even have a heating and cooling system. Still, compared to Pul-e-Charkhi, Balkh prison seems to have a softer and friendlier mode of operation. The latter prison deals with a blend of criminals, mostly from the northern provinces, who share a similar background in terms of ethnicity and language.

Compared to Pul-e-charkhi, Balkh prison seems to have experienced less institutional fluctuation under the Taliban's first government, and with regard to its contextual characteristics, including the historical and socio-cultural contexts. It is perhaps due in part to the broader contextual features of the prison that it promotes a sense of hospitality, embracing a friendlier environment that is more conducive to cooperation, not only between the prisoners themselves, but also between the prisoners and prison management.

6.7 CONCLUSION

This chapter examined four key contextual factors related to the prison system: historical, political, socio-economic, and technological. Against the backdrop of these factors, one can contend that there appears to have been an insufficient social, political, economic, and technological foundation

for prison-based rehabilitation programmes comparable to the 'something works' framework, or any other feasible framework for prison-based intervention. Consequently, any mandate arising from a regulation or otherwise may be less contextually sound and more likely to be a result of wholesale legal transplant.

Pul-e-charkhi prison (despite many views to the contrary) is the first prison with a modern structure, and its construction coincided with important legal developments, such as the implementation of the first modern Penal Code in 1976. Prior to the post-2001 reforms, the prison had undergone three consecutive periods of unconventional management, which affected not only its reputation within society, but also its physical structures, organisational culture, and institutional ability to function as an establishment that was fully committed to changing behaviour and reducing recidivism.

Although the post-2001 reform incorporated certain mandates, including rehabilitation, into the system, there appears to have been a lack of financial means, social support, and (more importantly) political will for the system to carry that mandate. The political elites gave higher priority to issues related to their own personal preferences, government stability, and national unity, than to the criminal justice and prisons legal mandate. In theory, rehabilitation was an important legal mandate of the prison system, but the incapacitating aspects of the system tended to predominate, because the latter also served as a coercive mechanism, enabling the political elites to meet their priorities.

An additional complication was caused by the flawed investments made during post-2001 reform, which changed the direction of the prison system to serve more as a weapon of the War on Terror and less as a system to fight street crime and reform prisoners. A particular instance of this problem occurred at Pul-e-charkhi, which was overcrowded with national security prisoners and ran programmes which were subject to the power politics of other state agencies. These instances are particular examples that illustrate the lack of political support for rehabilitation programmes from the government and how flawed international investments altered the direction of the prison system.

As far as the contrast between the Pul-e-charkhi and Balkh prisons is concerned, although the contextual factors influenced both prisons, they shaped them in different ways. For instance, unlike Pul-e-charkhi, which inherited a rigid and formalistic mode of operation, the socio-cultural and historical contexts seem to have made Balkh prison a relatively relaxed and friendly institution.

7.1 INTRODUCTION

The present chapter focusses on the institutional aspect of the prison system, which is a key component of the institution-building model and involves assessments of internal structures, leadership, and resources (see 1.1.4 above), with specific emphasis on Pul-e-charkhi. A quick look at the institutional setting of the prison system makes it clear that all the institutional factors can be assessed at three different levels:

1. The prison system in its entirety: including national prison administration, the relevant laws, the system's legal mandate, strategy, and policy;
2. The individual prison institution: Pul-e-charkhi prison (in the first instance) and Balkh prison (for comparative purposes), focussing on their tasks, and institutional features; and
3. Actual rehabilitation programmes, conducted by individual prisons as one of their tasks.¹

Whilst I have examined the relevant dynamics and conducted interviews with major actors at each of the three levels, in the following sections I will focus primarily on the second and third layers, with only brief references to the first layer. The chapter begins by discussing the major institutional changes in the prison system since 2001, not only to provide a logical transition from the institutional context discussed in Chapter 6, but also to introduce national prison administration and the role of other crucial and

1 Over and above these three layers, historically, one or several ministries have been responsible for managing the prison system's policy direction and connections with the broader state structure. As discussed within the prison system's political context, the ministries' internal structures, relationships, and linkages cultivated during interactions are of great importance. More specifically, the interactions are identical to the enabling, normative, and functional linkages discussed in Esman (1972). In spite of their significance, however, the broader policy level structure, its relevant administrative layers, and its linkages were not investigated in this study, due to my research limitations and the impacts of the prison reform implemented in 2020.

relevant institutions, such as the Supreme Council for Prisons, the MoJ, and the Prison Police (or Ministry of the Interior).²

7.2 MAJOR INSTITUTIONAL CHANGES IN THE PRISON SYSTEM SINCE 2001

In addition to the internal management and leadership dynamics discussed below, the prison system was affected by four pivotal moments of change between 2001 and 2020. The changes shaped most of the institutional factors that were key to the prison system in general, and to Pul-e-charkhi in particular. An understanding of the four moments of change would therefore not only aid in understanding the deeper dynamics of the prison system's operation during the post-2001 reform process, but also in understanding the institutional factors, such as structures, leadership, and resources.

7.2.1 The evolution of militarised prison management

In 2001, in the aftermath of the Taliban's first government, a section of the police traditionally responsible for overseeing prisons under the PDP regime was reconstructed as the Prison Administration. In addition to changes in the structure and personnel of the department, its name was changed from Central Prisons Directorate (CPD) to GDPDC. However, the directorate remained part of the Ministry of the Interior, so the prison system also became a component of the Afghan National Police (ANP), which was undergoing radical reforms of its own (Jalali, 2006; Skinner, 2008; Pashtoon, 2017).

Consequently, the first product was a prison system led and managed by a military leadership, which had yet to establish its core values, internal structure, resources, and societal and political status. In addition, the system remained low priority for the ANP, because it was more concerned with counter-insurgency and reform of its own security and public order wing, than with prisons (Robert, 2009; Giustozzi and Isaqzadeh, 2014; SIGAR, 2022). Thus, even essential areas, such as the legal framework for the prison, could not attract adequate attention; for example, the laws which governed the prison system for about four years after the fall of the Taliban emanated from the Taliban's regime itself.³

2 The ANSF is also referred to as the Afghan National Defence and Security Force. It consists of: the Afghan National Army, led by the Ministry of Defence; the Afghan National Police, led by the Ministry of the Interior; and National Intelligence, led by the General Directorate of National Security. All of the three institutions are military in nature, with civilian senior leadership – for example, Minister of the Interior is a civilian position, but the police force (including prison police) is military. For more information about the ANSF, particularly the police and its challenges, see (Robert, 2009; Jalali, 2016; SIGAR, 2022).

3 The Taliban's Law for the Application of Imprisonment in Prisons (Ministry of Justice, 2000) had the exact same name and similar technical details as the PDP's Law of Prisons (Ministry of Justice, 1983).

In view of the low priority given to the prison system, the police not only considered prison issues secondary and relatively minor, it also paid less attention to various other aspects of prison management, leading to a deterioration in the condition of human rights and the general living condition of prisoners, due to a lack of close and careful supervision. It was due to this aspect of the prison and police dilemma that the JRC recommended (in 2003) transferring prison management from the MoI to the MoJ. Furthermore, the commission recommended that investigative and custodial functions be separated, in order to ensure fair trials, enhance rehabilitation opportunities for prisoners, and decrease the risk of inhumane treatment within prison institutions.⁴

Initially the commission's proposal met with some opposition, due to the typical power dynamics within the Ministry of the Interior, where some viewed prisons as a source of authority. The resistance reportedly diminished, following the appointment of Ali Ahmad Jalali as the Minister of Interior, who transferred responsibility for prisons entirely to the MoJ (Amnesty International, 2003c). This is testament to the fact that the senior leadership of the police was not interested in prisons and saw them as a liability to be dispensed with, rather than an asset to be retained.

7.2.2 Partial demilitarisation, substantive reform, and new problems

The MoI, in collaboration with the MoJ, formed a transition committee with "three international experts, including a correctional advisor from UNAMA, a penal reform expert from the UNODC, and an expert hired by the Italian government" (Amnesty International, 2003c, p. 6). In March 2003, the committee produced a transition proposal which was ultimately approved by the president. As a result, the GDPDC, along with its budget, personnel, and property were passed to the MoJ.⁵

According to the UNODC evaluation report of the prison reform project, the Prison Working Group developed organisational structures and a scope of work for the GDPDC (see 3.2.6.3 above) for more information about the working group concept). The project proposed two options as a possible structure for the GDPDC, "the first and preferred option was civilian and the

4 Several detention observation reports indicate that cases of torture continued to dominate practice during this time. The UNAMA "found compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan" (UNAMA, 2011, p. 2).

5 See the Presidential Decree on the Transfer of Prisons, issued in 2003 (Decree Number 3, dated 1382/1/10). Article 1 of the decree reads [translation], "The central and provincial prisons and detention centers, as well as their structures, budgets, and staff, shall be separated from the MoI and shall be integrated into the MoJ."

second was a combination of military and civilian. The latter was adopted by the President... Given the high priority assigned to the completion of the Priority Restructuring Reform (PRR) ..., UNODC participated in the Technical Working Group meetings held twice a week to [finalise] all the 38 organizational charts and terms of reference for the associated positions... A total of 2,680 staff (1,499 line officers and 1,181 sergeants) passed the exam and were then evaluated and assigned to their respective jobs" (Ron Renard *et al.*, 2013, p. 64).

The transition from a 'security first' approach to a mixed civilian and military system was a fundamental move towards ensuring the human rights of prisoners. Thus, humanitarian organisations such as AIHRC, as well as the civil society, the legal community, and UNAMA, have all expressed their support for the process. However, many of these organisations also expressed concern that a hasty shift in responsibility for such a large operation could lead to irreversible consequences, owing to the lack of adequate technical capacity and experience at the MoJ. Therefore, the government was presented with a counter-proposal for transferring responsibilities, as well as for building capacity in phases. In the end, the MoI declined to make any commitment to a long-term process, resulting in a poorly coordinated and hasty transfer of prison authority to the MoJ.

According to Amnesty International (2003), this was a historic but extremely challenging process. For instance, "no coherent strategy [existed] for this transfer or the long-term prison administration.... The full practical implications of this transfer remain unknown, and it is not clear who is taking responsibility for its implementation across the country. Outside Kabul, there is little if any knowledge of the transfer. For example, in early May 2003, the prison commander of one prison in central Afghanistan did not know about the move and said that they had received no message informing them that their reporting lines had changed" (2003c, p. 6).

The transition process also proved to be a point of tension between the conflicting management style of the previous military leadership and the new mix of civil and military management. In view of the practical challenges, the unfavourable institutional history of prisons, and the lack of resources and capacity within the system, the MoJ faced a daunting task. It was challenged in terms of security management, leadership, and transformation from an institutional mentality, which required an influx of financial and human resources. It seemed that the MoJ was planning to address its shortcomings by enforcing a new Prison and Detention Centres Law, which sought to mandate other state institutions to cooperate with the prison system.

In a sense, this was the start of restricting prison administration to safeguarding prisoners only, leaving all other issues, such as rehabilitation (including the delivery of work and educational programmes), to other state agencies. In the areas of prison leadership and prison supervision, for instance, the law proposed the formation of the Prisons and Detention

Centres Supreme Council (PDCSC).⁶ The council provided policy-level leadership for the prison system, independent of its administrative functions, to ensure that it could run efficiently and remain impartial whilst utilising resources from other state agencies. The council had to meet once every three months, under normal circumstances, but in emergency cases it could convene as and when necessary.

In theory, the collaboration of state agencies with the prison system, by assigning employees such as teachers, health care workers, and social workers, could provide a valuable opportunity in many areas, including developing rehabilitation policies and participation in rehabilitation intervention which shares responsibility between the relevant ministries and civil society organisations. However, due to the lack of an active leadership at the MoJ, council members remained unconvinced about contributing adequate resources and technical capacity towards implementation of the mandate.⁷

On the positive side, however, the new legal framework enabled the MoJ to successfully transform the GDPDC from an entirely military organisation into a mixed military and civilian institution. Thus, personnel

6 According to Article 14 of the Prison and Detention Centres Law (2007) [translation] “the Supreme Council of Prisons and Detention Centres holds a supervisory role, leading all affairs for prisons and detention centres across the country.” Whilst this provision puts the prison council at the highest level of decision-making, Article 16 of the law further strengthens its power. Article 16 authorises the council to propose amendments to the law, new bills, and regulations, to enact procedures, and to issue directives regulating the operation of prisons.

The Minister of Justice chaired the Supreme Council, and representatives from other government and non-government institutions participated as members of the council. The members included the Deputy Attorney General (as Deputy Chairman), a representative of the Supreme Court, the Deputy Interior Minister, the Deputy Public Health Minister, the Deputy Education Minister, the Deputy Minister of Labour and Social Affairs, the Deputy Minister of Women’s Affairs, the Deputy Head of the National Security Department, a representative from the AIHRC, a representative from the civil society, and the Director General of Prisons and Detention Centres (as council secretary).

7 In addition, the MoJ failed to establish adequate mechanisms for overseeing and coordinating the contributions of powerful institutions, such as the Supreme Court, the AGO, the MoJ, the MoE, and others. The supreme council lacked adequate institutional stability, and although the head of the council was a minister, he had limited administrative power over members who represented their own agencies outside of his administrative jurisdiction. In the meantime, although the law identified a number of state agencies (and certain positions within those agencies) as mandate holders, it lacked internal mechanisms for guiding the selection of other mandate holders from inside the institutions to participate in meetings. Having this kind of mechanism was very important, because mandate holders were extremely busy individuals who had ultimately to excuse themselves from attending meetings outside of their own organisation, often leading to the appointment of someone else to attend on their behalf. Many council meetings would therefore take place without the main mandate holder being represented, or only very low-level officials would represent institutions. Due to this issue, decision making was sometimes problematic, since low-level officials did not usually have the authority to make decisions on the spot. They were often so insignificant in the hierarchy that they were not given the opportunity to report directly to the mandate holder.

and structural adjustments were one area of progress amidst the troubled reform process. In addition, several prison programmes and routines were reformed and improved, in order to accommodate more rehabilitation activities, including work, recreation, and family visits. However, in general, the MoJ's success was hindered by inadequate resources and poor conditions, as well as a poor leadership (see 7.4 below).

The leadership deficit is obvious, when practical reform areas (such as security, infrastructure, and human resources) are compared with the development of laws and regulations. As the primary law making body, the MoJ moved swiftly in revising the legal framework, yet it consistently failed to make tangible progress in building proper security and infrastructure, as is echoed in several reports. According to a 2009 annual AIHRC report, "the situation of detention centres and prisons is not good, and the majority of detention centres and prisons do not meet the basic standards necessary for the rehabilitation of prisoners. The Afghan government has also not paid adequate attention to this issue; it has allocated few financial resources for constructing, managing, controlling and rehabilitating detention centres and prisons" (AIHRC, 2009, p. 18).

The biggest burden on the MoJ has been maintaining proper security in prisons. Over time, and with the escalation of insurgency around the country, the number of prison breaks, riots, and instances of disorder in provincial prisons continued to increase. Ultimately, following the notorious Sarposa prison break in April 2011 (which led to the release of 500 national security prisoners allegedly involved in terrorist action and anti-government activities), the MoJ proved itself incapable of controlling the frequent occurrence of security-related incidents in prisons.⁸ Accordingly, security sector officials proposed shifting responsibility for prisons and detention centres back to the Ministry for the Interior.

8 Sarposa Prison is located on the outskirts of Kandahar. It is where suspected Taliban members, who were detained by Canadian military personnel and handed over to Afghan officials, are held. An estimated one million dollars was spent by the Canadian military on improvements to the facility, including new cell blocks and new windows. Consequently, the Canadians have repeatedly resisted changing the location of the prison, under threat of such attacks, in order to preserve investment made in the existing location. For more information, please refer to (French, 2008; Luke Mongelson, 2012).

The list of prison breaks which took place during MoJ custody include:

- October 2003: 41 Taliban prisoners escaped through a tunnel which they dug underneath the Sarposa Prison complex.
- January 2006: 7 imprisoned Taliban fighters escaped from Pul-e-Charki prison.
- June 2008: 1,100 prisoners escaped from Sarposa Prison after a suicide bomber blasted open the gates.
- November 2009: 12 prisoners escaped after tunnelling out from their cells in a jail in Farah province.
- July 2010: 19 prisoners escaped after a blast at a prison in Farah province.
- April 2011: 470 prisoners escaped from a Kandahar jail, through a 360 m (1,180 ft) tunnel which was dug from the outside.

In its position paper, the MoJ claimed that a severe lack of resources was responsible for these shortcomings, which could not be resolved by transferring authority to another ministry. In addition, it stated that shifting the prison back to military-style management would be detrimental to the prison system's social, cultural, and rehabilitation functions. The ministry also asserted that past experience showed that existing problems could potentially be mitigated, either by enabling and strengthening the existing system, or by establishing a fully independent organisation that would report directly to the president. The AIHRC supported the MoJ in an official opinion dated May 2010 (21/2/1389).

Additionally, the International Committee of the Red Cross (ICRC) issued an official statement, requesting cancellation of the plan to transition prison management responsibilities. The statement indicated that the ICRC recalled a decree issued in 2004, which transferred prison authority to the MoJ over concerns regarding human rights violations. The decree also sought to ensure that court orders strengthening prisoners' rights were being implemented effectively. The ICRC stressed that all previous concerns remained relevant, and that if prisons remained under the MoJ, the ICRC would "continue to advocate for adequate funding in accordance with the requirements of maintaining and improving the country's prisons through multilateral discussions within the existing organisational framework."

7.2.3 Reinstating a 'security first' approach to prison management

Despite strong opposition from the MoJ, the AIHRC, the ICRC, the UNAMA, and international donors (including Canada and Italy), the cabinet approved the transfer of prison authority to the MoI in 2011.⁹ In particular, it instructed the Ministry for the Interior to ensure prison security and order, something that the MoJ had failed to do for the past seven years. The shift marked the third fundamental change to the prison system.

As this change took place after the failure of a mixed civil-military prison system, it also marked the turning point for the system, including Pul-e-charkhi, towards being a set of static and hierarchical institutions based on full military management principles. The shift was critical, because the government decided to reintroduce a 'security first' approach,

9 The shift is authorised in Decision Number 6 of the Cabinet of the Islamic Republic of Afghanistan, dated 2011 [29/2/1390]. Also, on December 17th 2011 (26 Qaws 1390), President Karzai signed a decree that would transfer the control of prisons from the MoJ back to the MoI, effective from January 10th 2012 (20 Jadi 1390).

in response to dynamics that went beyond prisons and the justice system.¹⁰ Following this shift, a full-scale military structure was implemented, which would be led by the MoI and police force. The immediate consequence of shifting to a security-centric management approach was an escalation in security measures and restructuring of the GDPDC.

As a result, the prison security situation improved, but the human rights and rehabilitation-oriented routines and procedures were adversely affected. For instance, limitations were applied to prisoners' free movement within prisons for work, recreation, and education. Additionally, family visits, leave, and the transfer of prisoners to provincial prisons were subject to more restrictions and scrutiny. These changes also adversely affected donor-prison system relationships. Consequently, most donor-funded initiatives, including those funded by the United States and Italy, started planning their exit strategies.

In assessing the impact of the new leadership, a few words from Andrew Coyle (2002) are relevant to the Pul-e-charkhi situation and the prison system in general. He states that, "in the prison cliché, when I tell you [the prisoner] to jump, you should not ask why?, you should ask how high?" (2002, p. 11). In the case of the Afghan prison system, this cliché included prisoners and staff alike. As a result, there were no horizontal lines of communication, only vertical. Even the vertical lines pointed downward rather than upward, and frequently they were adapted from Bagram Detention Centre's management style (see 3.4 above).

With regard to prison conditions and human rights situations, the AIHRC keeps a wealth of information and prison monitoring records as part of its annual and special reports. Almost all the reports illustrate different levels of poor leadership, at different layers of prison management. For example, AIHRC's Annual reports (2012b, 2013, 2014, 2015a, 2019) and a few of its prison system-specific reports (AIHRC, 2012c, 2012a, 2015b) maintain that, after the transition of prison administration to the MoI, provincial prisons continued to operate across the country, but most of them reportedly continued to remain sub-standard, malfunctioning, and located in rented properties.

10 As a member of the Afghan bureaucracy, I could appreciate the government's perspective on this matter, as it was very clear that it wanted to demonstrate its ability to take care of prisons independently, including those run by international military forces. In fact, the administration had long urged the International Military Forces to cease operating private prisons and immediately hand them over to the Afghan authorities. Of particular concern was the Bagram Detention Centre, which the International Military Forces allegedly misused. However, the International Military Forces denied the allegations, arguing that maintaining the facilities was in the interest of the so-called War on Terror. Further, they felt that the government was unable to provide adequate security and ensure proper operation of the missions concerned.

In addition, following the migration of prisons to the MoI and reinstatement of the security first approach, cases involving illegal imprisonment increased. In 2014, the AIHRC documented close to 400 cases of illegal imprisonment (AIHRC, 2014, p. 42). The report noted that most of the cases stemmed from insurgency-related backgrounds, based on which the government imprisons individuals under broad anti-terrorism laws, allowing them to remain in prison almost indefinitely.

Therefore, prisons filled up quickly with convicted insurgents, including fighters captured on the battlefield, individuals arbitrarily detained during covert operations, and individuals suspected of indirectly supporting insurgency (notably, via vaguely substantiated allegations), such as providing material support to suspected institutions.¹¹ An overwhelming number of these prisoners were not eligible for any of the standard rehabilitation schemes discussed under the amenability criteria. However, they were received by the prisons, only to remain isolated and incapacitated.

Furthermore, as part of the police force, the prison staff tended to be more rigid towards prisoners incarcerated for insurgency crimes, since the police constantly lost comrades to the ongoing rebellion. These dynamics lead me to believe that tensions resulting from the ongoing war between prison staff and national security prisoners played a significant role in the fourth and final change in prison management, which was prompted by the peace and reconciliation process (see the epilogue, below).

7.3 THE PRISON SYSTEMS' INTERNAL STRUCTURE

It has been mentioned previously that all elements of the institutional factors, including the internal structure, can be assessed on three levels. As a result, the following three sub-sections address internal structures at the national prison administration level, prison level (Pul-e-charkhi), and rehabilitation programme(s) level.

7.3.1 Internal structure – national Prison Administration

As per Article 17 of the Prison and Detention Centres Law, the GDPDC (as part of the ANP and Ministry for the Interior) serves as the national prison

11 See Human Rights Watch's report of November 15th 2015, *Afghanistan: Reject Indefinite Detention Without Trial*, (Last accessed in October 2021).

It is worth mentioning that Doha talks and engagements with the Taliban were not a new phenomena, as various efforts were aimed at political reconciliation in Afghanistan in the past, starting with an attempt by Hamid Karzai to establish the Peace and Reconciliation Commission (the *Shora-e-Tahkim-e-Solh*) in 2005. For further details on the history of peace talks and complexities of the Doha peace process see (Behuria, Ul Hassan and Saroha, 2019, pp. 129–133; Junaid, 2021).

administration (see 7.2.1 above).¹² It is primarily a military establishment, with a few low-ranking civil servants working as clerks and support personnel. According to its official organisational structure, the GDPDC had 6,506 military and 1,278 civil service employees in 2019 (NSIA, 2019). The directorate is headed by a General Director, who is assisted by two deputies, one of whom is responsible for security and the other for technical and administrative matters.

Apart from the three most senior management positions, all other middle management and lower management positions are military in nature, and hence are occupied by police personnel. Most of the prison personnel are hired either by the GDPDC or directly by the Ministry for the Interior. There are no specific provisions in the Prisons and Detention Centres Law regarding staffing and custodianship of the management positions at the national prison administration. Thus, almost anyone who is a member of the ANP, or who is qualified to join the police force, can become a prison officer.¹³

During my fieldwork, almost all the management steps within the GDPDC insisted on the need for a broader internal structure to support all its functions. However, as a result of increasing police responsibilities in dealing with security issues and the cap imposed on the total number of police in the immediate aftermath of the 2001 reform, the requested expansion was not possible (Jalali, 2006; Wilder, 2007; Robert, 2009; Giustozzi and Isaqzadeh, 2011). The role of the GDPDC remained limited to providing security and general operational support to the prison system (see 7.2.2 above). The system continued to rely on the PDCSC and other state agencies, for policy-level guidance, and for technical, legal, and programmatic needs, including health, education, and rehabilitation.

The GDPDC itself has two directorates for prison-based rehabilitation, including one for education and one for industrial programmes. The two directorates have a very small internal structure, consisting of the director and three to four clerical positions, tasked with the overwhelming responsibility of not only coordinating and overseeing programmes that operate with the help of other government institutions (such as the MoE and the

12 According to Article 17.1 of the Prison and Detention Centres Law 2007 [translation] “the GDPDC is the central administration for all affairs concerning prisons and detention centres.” This department shall supervise all prison organisations, their installations, and their buildings. As per Article 17.2. [translation] “the GDPDC performs its duties in line with the provisions of the law, and the regulations, procedures, relevant bills and instructions of the Supreme Council of Prisons and Detention Centres.”

13 Although traditionally the Police Academy of Afghanistan (and more specifically the Prison Police Department) is known to be the source of recruitment for the national prison administration, most of prison recruits come from other branches. The Prison Police Department reportedly trained its students in a variety of technical, legal, and criminal justice subjects. The department itself is alleged to attract low quality students, because almost everyone admitted to the academy wishes to study criminal investigation, security, or law. Some professors and students of the Police Academy, who I interviewed for a different purpose, reported that when they were unable to study one of their favorite subjects, students would either transfer to the Prison Police Department or leave the academy.

Directorate of Vocational Training), but also with contributing and participating in formulating overarching strategies for prison-based rehabilitation programmes.¹⁴

The national prison administration therefore consists of a military-oriented internal structure that depends on the MoI. Thus, staff generally rely on the instructions of their immediate supervisors and those of senior management, even when their instructions are not exactly in line with the pertinent legal frameworks. In order to maintain the prison system's integrity throughout the country, a similar division of tasks and internal structure is used at the level of individual prisons as well. To this end, in most prisons, including Pul-e-charkhi, the internal structure itself leads to a serious lack of dynamism and innovative approaches in prison management, particularly in terms of implementation of the legal mandate for prisons.

7.3.2 Internal structure – Pul-e-charkhi

Inspired by the GDPDC's internal structure, Pul-e-charkhi is headed by a director who also serves as prison commander. The director is, in principle, responsible for overseeing all prison functions, including administration and security, as well as the prison's external relations. However, the GDPDC generally handles all inter-agency and inter-governmental relations, as well as hiring and budgetary matters for the prison system, so there is no room for the prison director to carry out those duties.

In terms of the prison management routines and other duties, the director is assisted by two deputies, one for administrative affairs and one for security. The deputy positions are military in nature, and hence the duties are satisfied by two police generals. Each of them lead subordinate structures that help to implement their responsibilities, in accordance with the prison's legal mandate. The deputy for administrative affairs is responsible for general administration, including design and administrative support for the intake process and prison regimes, as well as prison-based rehabilitation programmes, such as education, recreation, sports, and industrial activities.

Below the deputy for administrative affairs are specific divisions that are responsible for direct implementation of these tasks. For example, there are two separate divisions responsible for prison-based rehabilitation programmes. The education and recreation divisions are solely responsible for anything related to education, sports and recreation. Likewise, the industrial division is responsible for Pul-e-charkhi's industrial programmes and vocational training, as well as canteens and any other activities that involve work and income generation.

14 After the 2020 reform, the Office of Prison Administration assumed responsibility for programmes that were previously handled by other agencies. Thus, the directorate was responsible not only for supervising and leading, but also for delivering rehabilitation programmes to over 35,000 inmates, spread across 37 institutions in 34 provinces (see the epilogue, below).

On the other hand, the deputy for security is responsible for safeguarding order within the prison, by ensuring that prisoners remain locked up within the prison and kept under control during transportation to and from courts, and by establishing security guidelines for overall prison operation. All prison programmes, including many of the routine administrative functions of the prison, are governed by parameters established by the security division.

7.3.2.1 *Management meetings*

A limited number of civil service employees have been tasked with clerical, rather than leadership, responsibilities across different divisions of the prison, including within its education and industrial programmes. However, due to the unique characteristics of Pul-e-charkhi, most of the internal affairs of the prison used to be managed and supervised in a military manner. For example, the prison's most important management platform is regular management meetings, which address the essential operational and policy needs of the prison's daily operation.

According to my observations, the management meeting was only a formality, aiming to legitimise the implementation orders of the prison's senior management (the director and his two deputies were called *Hehat Rahbari*, literally meaning 'senior management'). For instance, when there was a need to change the location of classrooms, close down classes, or change routines, a meeting was called. The meetings did not have a pre-determined agenda, there was no fixed schedule, and the participants often did not know the purpose of their gathering. Thus, it was solely a platform for senior management to issue directives and assign relevant divisions to implement its decisions.

In many instances, the meeting was dominated by irrelevant and random topics, as a result of the lack of an agenda and planning. In light of competing interests and military hierarchies, participants often jumped from one subject to another, particularly if the topic was suggested by a lower-ranking official. The topics could therefore hardly be discussed in depth, making it nearly impossible to reach a decision. However, in all cases, the prison's chief of staff, who functions as the secretary to the prison director, was responsible for taking the minutes and following up on decisions made. The chief of staff also had an important role to play in reporting between Pul-e-charki and the GDPDC.

The wide gap between the notion of a management meeting and the prison's actual organisational culture suggests that the meeting was simply an idea copied from international organisations, consultants, and the UN agencies engaged in reform of the prison system; an idea which kept repeating itself, without anyone questioning its relevance or the validity of its decisions. In itself, the meeting is a good example of how prison management deals with the prison's daily operation and substantive programmes, including those for education and other rehabilitation programmes.

7.3.2.2 The Baashees

In addition to the official internal structure of Pul-e-charkhi, there is also an unofficial system for handling, coordinating, and communicating issues within the prisoner community. This internal structure is similar to a management structure and it is based on operating procedures imposed by the prisoners themselves. Although an informal structure, it is strong enough in specific areas, such as prisoners' rights, concerns, and expectations. The hierarchy of this structure is simple but effective, as it is built around the common interests of prisoners, who elect one person as their cell leader and follow his lead in all matters.

The cell leader is called *Baashee*, literally meaning 'senior' or 'manager'. Several cell leaders within the wing select the general leader, known as *Baashee Omomi*.¹⁵ In this way, an informal hierarchy is created, in which the influence of the Baashees is proportional to the number, criminal background, and religious integrity of the individuals within the cell. Thus, Baashees representing the larger, more affluent, and more powerful cells, such as those representing national security prisoners, tend to carry more weight than those representing smaller cells.

Even though none of the Baashees represent the official structure, and they are not part of the prison system's design, they nevertheless work in parallel with official administration. Although their primary objective is to normalise social conditions within the prison, the mere existence of Baashees also creates classes, friendship groups, and parties within the prison population, because they engage in all the issues directly related to prisoners' lives. In a sense, this system serves as an effective deterrent against unfair behaviour from prison guards, restricts the possibility of mistreatment, and reduces the likelihood of dangerous situations occurring within the prison.

Just as directors and division managers in Pul-e-charkhi have official leverage over their units, the Baashees and wing leaders have informal influence within the cells. Staff and fellow prisoners must obey orders without hesitation, in both cases. Pul-e-charkhi's most notable feature is that the two streams of management complement, rather than oppose, one another,

15 The word *Baashee* has a Turkish root, but it is also commonly used in Pashtu and Dari (the two official languages of Afghanistan). *Baashee* usually has better financial and social status in prison, and thus they also have a better relationship with prison management, compared with other inmates. The *Baashee* plays a significant role in communicating the needs of inmates to prison management, and vice versa. They also have a substantial role in calming crises, setting ground rules in dangerous situations, and paying attention to general conditions, including the cleanliness of the prison, and the health and wellbeing of its inmates. In rare circumstances, the *Baashee* helps with inmates' cases and legal issues too. The *Baashee* gradually becomes the most trusted inmate, and hence they are in the front line of communication with the outside world as well. The prison management usually introduces *Baashees* to researchers, the media, members of the National Assembly, and other outsiders who want to look into prison life.

unless there is a serious violation of prisoners' rights. The Prisons and Detention Centres Laws of 2007 further reinforce this collaborative situation through specific provisions for monitoring, such as allowing regular visits by representatives of the AIHRC, the civil society, the media, and members of the National Assembly.

Involving Bashees in the informal structure of the prison ensures that there is a certain degree of pressure on the formal structure to protect prisoners' human rights, but Bashees have less to do with the legal mandate for prisons. The latter aspect is reinforced by third-party monitoring, which also plays a crucial role in bringing views and recommendations (including those of prison experts) into prisons that are usually restricted and rarely accessible.

7.3.3 Rehabilitation programmes

In addition to the administrative and security structures of Pul-e-charkhi, prison-based rehabilitation programmes (e.g. educational and industrial programmes) have their own specific internal structures. The education division, for instance, has three staff members, and it is responsible not only for overseeing the prison's official school, but also for sports and recreational activities in the prison. In the meantime, according to the law of Prisons and Detention Centres, the entire population of Pul-e-charkhi is entitled to education, sport, and recreational opportunities. As a result, the education division is specifically responsible for planning, coordinating, and supervising the educational, sports, and recreational activities carried out by the relevant state agencies.

The industrial division, on the other hand, has its own internal structure. In theory, the division qualifies as a state-owned enterprise, hence it should have only a few coordination functions within the prison's internal structure. The rest of the programme should be aligned with the State-Owned Corporations Law (2018) and the Charter of Prisons Industrial Enterprises (2006).¹⁶ However, due to several factors, including the privatisation issues discussed in (), the industrial department is fully incorporated within the prison structure.

16 The two regulations prescribe a management hierarchy of responsible institutions and individuals, to ensure the integrity, effectiveness, and financial viability of the programme. Article 10 of the Charter for Prison Industrial Enterprise (2006) provides that, "the supreme council of the prison industry shall have seven members. These include the minister of Justice as its director, representative of the minister of finance as its deputy, the General Director of Prisons and Detention Centres as a member, the production manager of prison industrial enterprise as a member, the deputy manager of prison industrial enterprise as a member, and two officers from production and administrative sections of the prison industrial enterprise as members." According to Article 14, "the executive committee includes the director and deputy director of the prison industrial enterprise."

Thus, the division operates with 12 civil service staff taking care of all six of the industrial workshops running at Pul-e-charkhi. Despite the division's relatively high visibility, as a section of the prison with several branches, it therefore operates in contradiction with its own legislation. As a result, the programme runs into problems with other state agencies. For example, the MoF decided to prevent it from accessing its own money, generated over time, and the Civil Service Commission blocked the hiring process for its civil service staff. In other words, it not only lacks the necessary features to function as a fully-fledged prison industrial enterprise, it has also become a point of tension in terms of the external relations of the prison system, leading to malpractice and corruption due to its unstructured and disorderly institutional conditions.

Overall, the general internal structure of the prison system, and that of Pul-e-charkhi in particular, seem to be more responsive to security needs. Whilst intervention programmes, such as rehabilitation, have been added to the legal mandate for the system, the relevant internal structure remains frozen; hence, the system lacks institutional support for the latter. In addition to an excessive focus on security, the predominantly military orientation, ranks, and internal structure have shaped the prison in the direction of not just ignoring, but also suppressing, potential dynamism and innovative approaches to connecting the prison system with other institutions (including non-governmental), and to mobilising the capacity and resources for prisoners' rehabilitation.

7.4 THE LEADERSHIP

From an institution-building perspective, leadership generally refers to the function of individuals, or groups of people, who are cooperating to guide a system toward specific goals (Esman, 1972, p. 22). In general, these groups and individuals can be located at different levels of bureaucracy. However, in the context of prison management in many countries, including Afghanistan, which typically involves static and hierarchical institutions, the system's operation is inspired by the highest level of authority and the most senior members of the institution.

7.4.1 General prison management and leadership

An hierarchical approach has undoubtedly been the commonplace in Pul-e-charkhi, where the role of senior leadership has been firmly limited to overseeing daily activities in the prison. Due to a restrictive and heavily centralised internal structure, the prison director is primarily responsible for overseeing the internal operations of the prison, and for communicating reports to the GDPDC (see 7.2.3 above). During the fieldwork for this study, a two-star police general, was the director of Pul-e-charkhi. He was a gradu-

ate of the police academy, with extensive experience in policing and the security sector, but he had no prison-specific education and experience.

The General was amongst a minority of prison authorities who were not strongly connected with the Northern Alliance, which predominantly controlled the prison system (see 6.3 above). Based on my observation of prison operations, the General was overly cautious in exercising leadership authority, due to both the largely centralised internal structure and his own background. He was primarily concerned with maintaining order within the prison. During several management meetings, I heard him describing Pul-e-charkhi as 'a fragile peace, made of thin glass and full of explosives'.

He consequently advised the prison police, and others, to exercise extreme caution in all aspects of their work, but particularly when dealing with prisoners. In his opinion, the 'prison laws and directives clearly outline everything regarding prison management and daily operation. The prison staff was responsible for applying the laws and directives, and there was no need for them to think beyond them and innovate, at least not in Pul-e-charkhi'. Even if the General had wanted to innovate, perhaps he would have not been able to, because the prison director has very limited authority beyond daily operation of the prison.

The director's financial role was confined to endorsing financial documents in a formalistic and ceremonial manner. In terms of human resources, key prison personnel are almost always hired by the GDPDC or directly via the MoI, leaving almost no role for the prison director in the hiring process. Nevertheless, the director does have the authority to assign personnel to different roles, and to rearrange or discipline them, when necessary. I did not witness any disciplinary measures being taken, or any reshuffling of prison personnel, during the period I was visiting Pul-e-charkhi.

Some of the prison staff also claimed they did not witness such things either, and that the director was particularly careful when dealing with prisoners and prison personnel who were connected to powerful people. I think that this may also have been because the General was a firm believer in maintaining order by avoiding conflict. In the meantime, this was definitely the type of leadership role that the prison law and prison internal structure expected him to play. During his leadership, the law specifically limited the role of the prison director to maintaining security and order within and around the prison; in all other areas, the prison leadership played a coordination role only.

The actual service delivery in many areas, including the provision of education, vocational training, and sport, was outsourced to the relevant state agencies (see 7.2.2 and footnote 6 above). In the meantime, broader and policy level decisions related to prison operation, and even management level issues, such as the food schedules and prison expenses, were decided by either the PDCSC, the Council of Ministers, or the MoI, leaving prison management with a very limited role, beyond overseeing the daily operation of the prison.

7.4.2 Management and leadership of individual programmes

As discussed before, there are basically two mainstream rehabilitation programmes running in Pul-e-charkhi (i.e. the education and industrial programmes). The education programme, which has both formal and informal components, is delivered by the MoE and prisoners, respectively. The curriculum of the formal education programme is developed and applied by professionals and specialists in the relevant field, and the teaching materials are also provided by them. Prison authorities – particularly the prison's education division – hardly play a role in preparing the substance or the delivery of the programme.

The official school is operated by individuals who are mostly recruited as teachers from within the educated prison population. These teachers, having been prisoners themselves, usually found themselves caught up in a power struggle between the MoE, which controls the contents and resources of the programme, and the prison authorities, which control everything else. Thus, often the teachers hardly show any leadership skills in terms of going beyond what is provided for them within the many restrictive boundaries of the prison.

The education division, on the other hand, is positioned almost at the bottom of the prison's administrative and military hierarchy. Its three employees and the manager are not very motivated to push educational agendas on all the available platforms. Due to their low rank, they lack the authority to enter many of the residential buildings without permission from the security department. As a result, the official educational programmes are usually far below commonly expected standards.

For example, although there are classes in almost all the residential buildings, the exact location of the classes varies from time to time, due to security restrictions and overcrowding. The majority of classes are held just around the corner, at the far end of a corridor. A curtain usually separates the class from the rest of the area, which is hardly conducive to learning as there is disturbance from other prisoners. The education division, the prison director, and even the MoE does not seem to have made tangible efforts to improve the classroom environment. A detailed yearly or six-monthly educational plan could be added to the general operational plan of prisons, to tackle most of these issues. However, the education division does not seem to have any incentives for drafting such a plan. According to the division head, it had been tried in the past and had not been successful, because of financial and security restrictions, as well as prison overcrowding.

The industrial programme, however, is larger and more resourceful than the education programme. It involves six workshops, several canteens inside residential buildings, and a number of call centres that are also located within the residential blocks. Due to the financial benefits and better living conditions it offers, the industrial programme is interesting to both the prison management and prisoners, so there is a need to exert more robust and dynamic management (see 8.4.6 below). Most importantly, the

manager of the programme was formerly a trusted member of the patronage network (see 6.3 above).

Although he came from an educational background in criminal investigation and policing, which he undertook in Ukraine and the United States, he was appointed manager of the industrial section. To that end, both because of his political connections and status within the internal structure, the industrial manager was relatively active and tended to move freely along the official and unofficial boundaries of the management. As an example, he was able to transcend the limits of his network and hire a relatively diverse team of 12 experienced individuals to assist in the management of the industrial programme.

In spite of this, the overall system is tainted with high levels of corruption and malpractice, including political favouritism, making the whole industrial programme the victim of a larger mafia network that almost completely negates the influence of programme leadership. For example, one step by the prison mafia within the GDPDC (and beyond) towards curbing leadership at programme level, was the privatisation of the prison workshops and canteens (see 8.4.6 below). Another example is when the same mafia orchestrated processes and events which lead to the closure of Pul-e-charkhi's bread factory.

The factory was a viable part of the prison's industrial programme, as it not only provided bread for the prison, it also created jobs. The closure was reportedly because the factory was marked as a threat to the security of the prison as, based on intelligence reports, there was a fear that supply trucks may transport explosives to the prison or facilitate the prisoner escapes. Based on these simple and unsubstantiated assumptions the factory was closed, which meant that the prison had to spend millions of dollars outsourcing a daily amount of at least 30,000 loaves of bread to private vendors (10,000 people, multiplied by three, per day).

According to several low-ranking officials from the industrial programme, none of those in management roles made an effort to influence these decisions. 'They hardly questioned the legitimacy of the decisions. Instead, they often extended offers of help to make such conspiracies the reality, because changes like these could create enormous revenue for corrupt officials who were not at all concerned about the prisoners and the prison system'.

7.5 RESOURCES

In general, prison resources, particularly those related to rehabilitation programmes, fall into three categories: financial, human, and infrastructure. These categories are important resource areas for the Afghan prison system, for two reasons: because they were historically lacking; and, because they have been the source of significant challenges. It is important to note that the degree and priority of the three areas differ, depending on

circumstances. For instance, in the case of Pul-e-charkhi, issues related to financial and human resources have been more prevalent than those related to infrastructure.

In the remainder of this section I will provide an outline of the financial resources within the prison system, as well as in Pul-e-charkhi, followed by a separate and more focussed account of the infrastructure and human resources at Pul-e-charkhi and within its rehabilitation programmes.

7.5.1 Financial resources

As discussed above, from the outset of the GDPDC's revival in 2002, the prison system was dependent upon the ANP for its budgetary needs and general staff functions; hence, it lacked both the financial and professional human resources to function independently. Paradoxically, international partners, who were seeking to promote the rule of law through human rights-based criminal justice and prison services, chose to establish parallel prisons and management structures outside the control of the official prison system, in precisely the same way as described in the case of temporary institutions (see Chapter 3, above).

Bagram Prison and several special counter-insurgency detention centres, in Kabul and other parts of Afghanistan, were amongst the most famous parallel structures (see 3.4 above). These facilities were specifically designed to address the counter-insurgency concerns which were central to the state's official policy, and that of its international allies. Therefore, international military forces operated these facilities either independently, or jointly with the Afghan Directorate for National Security; hence, all of them remained outside the official prison system.

The special prisons were given priority for significant international investment. Furthermore, due to the operation of these institutions, and the fact that they responded to the most pressing needs of the time, government funds were not allocated to the official prison system, resulting in it becoming under-resourced and corrupt. For example, when the prison system came under the management of the MoJ, the entire expenditure of this ministry, including for all the prisons, represented only three per cent of security sector expenditure (Atabay and English, 2008, p. xii).¹⁷

In spite of the fact that the prison's financial resources were insufficient for addressing all its operational and programmatic needs, its budget gradually increased over time. In accordance with information obtained from the MoF, the ordinary budget of Pul-e-charkhi almost doubled between 2011 and 2015 (the data shows an increase from 4.3 to 7.3 million euros [345 to 580 million Afghanis] in the ordinary budget). A growing prison population

17 For example, the monthly salary of a police officer working for the MoI was 65 euros, whereas equivalent for a prison guard working for the MoJ was 35 euros, and this was sometimes paid late, or not at all (International Center For Prison Studies, 2009, p. 19).

and the gradual development of prison institutions seem to have contributed to this trend. In addition, expanding prison infrastructures and international development projects focussing on the development of a prison system also played an important role.

Amongst such development efforts, the first prison reform project was launched in May 2003, as part of the overall security sector and criminal justice reform agenda. It was limited to helping with legislation and rebuilding Kabul's infrastructure. Known as the 'Penitentiary Reform Project', the initiative was part of the UNODC's Criminal Justice Reform Program (AFG/R41). Even with its limited scope, the project created a divide between Kabul and the provinces, as the latter were in greater need of such assistance than the city. Therefore, the UNODC initiated a follow-up project three years after its initial project, which was designed to address the disparities between the capital and the provinces.¹⁸

The efforts of the UNODC were further strengthened by a large-scale project funded by the United States Correction System Support Program (CSSP), which began in 2006.¹⁹ The scope and funding of the CSSP were substantially larger, as the project involved rebuilding infrastructure, supporting programmatic needs, and developing regulations, operating manuals, and directives. The majority of the directives, including those related to the prison-based rehabilitation programmes, were developed under this project (see 5.5.1 above). The project also contributed some machinery and equipment for prison-based vocational training programmes (see 8.4.6 below).

In summary, the prison system's budget was part of the MoI and police budget, and since the prison system was given low priority, the budget was also set low. The lack of sufficient budget exacerbated the prison system's problems on many other fronts, including human resources, due to the low financial incentives it offered. However, the prison budget gradually

18 See the UNODC AFG/R87 project for more detail. The project was a continuation of the 2003 Penitentiary System Reform Project AFG/R41. The Italian government remained the key donor to this project, but as the name implies, the focus of the reform shifted to upgrading the prison system in selected provinces. The project objectives included: a) supporting the GDPDC and the judiciary in establishing the rule of law and promotion of human rights; b) enhancing the operational capacities of penitentiary staff, and improve coordination within the criminal justice system; c) providing drug treatment during and after incarceration, and education/job training programmes for prisoners, and promote alternatives to imprisonment; d) rehabilitating prison facilities, and making infrastructure improvements; e) providing outreach to vulnerable prisoners (e.g. women with children); and f) training for corrections personnel/social workers. The project budget was about US\$ 8,530,718, and it was supported, via the UNDP, by Italy, Canada, Germany, and Spain.

19 According to official sources from the Corrections System Support Program (CSSP), the initiative involved a mentoring and advising programme, between American and Afghan corrections professionals. The INL funded the programme. The PAE, which is a US-based contractor, implemented the project, involving all aspects of prison management. From 2017 onwards, the project was in the process of scaling back its activities, in order to withdraw entirely before 2020 <https://2009-2017.state.gov/j/inl/rls/fs/189319.htm> (Last visited in August 2021).

increased over the years, because there were several well-funded prison reform projects being supported by donors. Although international funding initially went into a parallel system of high security prisons, this ultimately resulted in infrastructure being added to the system.

The new infrastructure not only housed more prisoners and meant an increase in the prison population; it also increased the prison system's need for maintenance (see 7.5.3 below). Thus, there was increased funding from the national budget as well. As an example, in 2008 the Canadian government supported the establishment of a drug treatment clinic in Pul-e-charkhi. The donor's agreement was that "the program would be jointly managed by the [GDPDC], the Ministry of Public Health, and the Ministry of Counter Narcotics. UNODC provided medication and equipment for the program" (Ron Renard *et al.*, 2013, p. 65).

7.5.2 Human resources

As discussed previously, Pul-e-charkhi inherited its core values from a Russian oriented prison system, upon the ashes of which was built a somewhat western oriented prison management system, in the aftermath of 2001. The western oriented prison system's legal mandate expanded to include human rights norms and the UN Standard Minimum Rules for the Treatment of Prisoners, and also to set up a number of specialised programmes, such as rehabilitation. As part of this mandate, several functional units, including prison-based treatment, education, employment, and vocational training, became necessary. These programmes were framed under the two rehabilitation programmes discussed below (see 8.4 below).

The programmes also required specialised human resources, including psychologists, highly skilled educators and counsellors, medical doctors, statisticians, research specialists, data management experts, and marketing professionals. However, such professionals are not usually available in most Afghan institutions, particularly within the prison system and, more specifically, in Pul-e-charkhi. The prison's education department, which is responsible for overseeing education, sports, and recreation for nearly the entire 10,000-strong prison population has only three employees who are ordinary police officers.

To that end, the prisons have no choice but to rely on the resources of other state agencies, such as the MoE, Ministry of Islamic Affairs, and Department of Vocational Trainings. Likewise, the prison's industrial programme, which is in comparatively better shape in terms of its infrastructure and is capable of accommodating up to 750 prisoners, has a problematic structure, and it runs on very few employees. The programme has only 12 employees, all of whom are not experts in the relevant industries. Whilst there are six production shops within the industrial section, it does not have a single marketing officer to promote products or to facilitate communication with customers in the free world.

On the other hand, since Pul-e-charkhi adopted its expanded legal mandate (discussed in Chapter 5, above), it has had to rely on a pool of human resources that barely meet its increasingly high demands for a professional, secure, and objective prison. The police force that dominated the prison system in the aftermath of 2001 were a mixture of former Mujahidin commonly associated with the Northern Alliance, a tiny number of educated police, and diaspora returning from the west. Amongst this number were people like Sardar Sultani, Ayoub Aseel, and others, who either had significant professional experience within the prison system, or were educated police.

The former Mujahidin gradually enhanced their grip over the system, at the cost of excluding many of the professionals. This ultimately became a significant challenge for the prison system, which was already being criticised for poor management and abusing prisoners' rights. As discussed before, the MoI established a department within the Police Academy of Afghanistan in the early aftermath of 2001, partly in response to criticism regarding the abuse of prisoners' rights and their mistreatment. Although the quality of training and calibre of students graduating from the department was controversial, attempting to deal with the shortage of professional prison guards by providing relevant university-level education was a tangible step towards meeting fundamental requirements for the prison system.

Later, in 2005, a National Training Centre for Prisons Police (NTCPP) was established. It aimed to ensure a certain level of understanding amongst prison staff who had been recruited from the Police Academy and other sources.²⁰ Despite its inability to provide all the necessary types of human resource required by the programmes, such as those trained in rehabilitation, it represented another step forwards in creating a conducive environment for rehabilitation programmes, due to the improved relationship between the prison guards and prisoners.

The trainings, alongside staff who had an university level education, undoubtedly produced some professional prison police. A great majority of them were assigned to Pul-e-charkhi, leaving most of the provincial prisons

20 According to the director of the National Training Centre for Prisons and Detention Centres' Police Force, the centre was established in 2005, to serve as a training hub for prison police. It covered both law enforcement and basic legal awareness training, as well as refreshers for police assigned to work in prisons and detention centres. As part of its curriculum, the centre offered a detailed introduction to the relevant laws, human rights standards, and military training (such as the use of weapons). A group of professional teachers was recruited as permanent employees to operate the centre. The majority of its instructors, however, worked on short-term contracts and supported the teaching process according to the approved curriculum. Training sessions ranged from four to twenty-four weeks in length, and the content ranged from refresher and crash courses to specialised training. The centre designed classes based on the type and category of employee, so trainees with the least relevant background would need to take intensive courses before they qualified as prison staff.

at a disadvantage. Also, the provincial prisons had extra difficulty attracting qualified personnel, due to personalistic ways of hiring and poor remuneration policies. To mitigate this shortage, a policy of rotating experienced prison police was initiated, which proved to be ineffective. The policy had several implementation problems, including a lack of foundational support, due to which the rotated officers usually had a hard time settling into their new post.

The policy also lacked the proper mechanisms to support initiatives by rotating staff, which were designed to modify certain organisational cultures and personnel behaviour, such as a dislike of training and reporting, and certain other behavioural issues that were common amongst prison staff. In addition, due to the four fundamental shifts in overall management of the prison system, Pul-e-charkhi's internal structure shrank and expanded several times (see 7.2 above). The changes clearly prevented the normal process of reaching some level of maturity, stability and development, and so did the prison's human resources. Therefore, full and adequate implementation of the prison's legal mandate was hindered by the lack of human resources, to the extent that in many areas it could not meet its legal mandate.

For example, whilst the law requires the segregation of all prisoners, based on their criminal history, the prison does not do that for many categories. For instance, convicted sex offenders are not segregated, because the system does not have any specialised programmes or skilled personnel to assist them. Therefore, why would they even consider dividing them, when they cannot treat them? In some cases, the offenders may even abuse each other, if segregated and put in one room together. This lack of professional human resources is evident in both the rehabilitation programmes and their relevant activities in Pul-e-charkhi.

7.5.3 Infrastructure

As discussed previously, with respect to its infrastructure Pul-e-charkhi is close to being a modern prison institution. The prison has some basic amenities, including infrastructure for prison-based rehabilitation programmes, but overcrowding has been a challenge. It is important to note that some of these facilities have been renovated during post-2001 reform and international intervention. In most cases, however, the renovation interventions have had a significantly negative impact on prison operation and the prison budget.

For example, some of the biggest reconstruction contributions in Pul-e-charkhi have been to improve security, including the UK's large-scale project to renovate the counter-narcotics section of the prison, turning it into a high security block. According to a programme evaluation report from the UNODC (2013), "the construction of places of detention has some high profile errors in planning, design and implementation; however the project

has demonstrated a process of adaptation and learning to reduce mistakes and the new [country program] identifies limits to construction activities" (Ron Renard *et al.*, 2013, p. 55).

Other similar projects have been based on flawed designs and have encountered serious implementation issues due to corruption, resulting in projects which never reached completion. However, in order to maintain such incomplete projects, the prison's human resources and budget have both grown. In a sense, this is part of a protective measure taken by Afghan bureaucrats, who are helpless to influence the project, but are well aware that they might be held responsible for not fully playing their part in a project that they saw failing.

According to the SIGAR (2014), besides a corrupt contracting and implementation process, the overall goal of one 20 million US dollar reconstruction project in Pul-e-charkhi was flawed and poorly calculated. The project aimed "to reconfigure large, undivided prisoner holding areas into smaller maximum, medium, and minimum security cells. Each cell was to have a sink and one or more eastern-style toilets depending on cell size ... [because] the prison is currently being used, but in an extremely overcrowded condition..., the security advantage of reconfiguring large prisoner holding areas into smaller cells... has been lost." (2014, pp. 1-7)

However, given that prison overcrowding is currently almost a universal problem across the world, specific prison amenities, such as the number of toilets and bathrooms, may be limited. In addition, although Pul-e-charkhi offers basic health services to its prisoners, there is not enough infrastructure to serve prisoners in need of more serious treatment. Again, it must be noted that the healthcare services in many prisons across the world have long been criticised as inadequate, under-funded, and under-staffed, so Afghanistan's case is not unique (Senior, 2012; Wehr and Aseltine, 2013).

In summary, as the prison system's mandate grew, its backbone of institutional resources remained under-developed. As a result of the scarcity and misdistribution of financial resources in the prison system in general, and in Pul-e-charkhi in particular, it has been difficult to expand the necessary infrastructure and attract professional human resources. This presents a formidable challenge for the implementation of the prison's legal mandate beyond the mere incarceration of its prisoners, which in itself has been achieved under less than optimal conditions, due to the limitation of resources.

To this end, the institutions responsible for the prison system, including the MoI and the MoJ, lacked the personnel and resources to maintain a prison system that was over-burdened with difficult mandates (particularly rehabilitation), whilst also handling their broader responsibilities (e.g. fighting insurgencies in the case of the MoI, and creating laws in the case of the MoJ).

7.6 SOME COMPARATIVE OBSERVATIONS REGARDING BALKH PRISON

In keeping with its role as a part of the Afghan prison system, the Balkh prison follows the overall institutional structure and resource pool of the system in general (7.2 and 7.3 above). However, in terms of its internal structure, resources, and leadership, the prison is different to Pul-e-charkhi in a number of ways.

7.6.1 Leadership

As already mentioned in the general case of Balkh prison's operation (see 6.6 above), the management style at Balkh is relatively relaxed. The prison director is an educated police officer, who is equipped with fairly strong managerial skills, even though he has been closely linked to the patronage network (6.3.1 above). Based on my observations, the prison director's qualities have had a great impact on the prison's day-to-day management, but the relaxed and friendly management of Balkh prison can also be attributed to its small size, its lower level of security restrictions, and its socio-cultural context (see 6.6 above).

In general, the prison management allows prisoners to receive visitors regularly (and sometimes beyond the allocated time for visits), to order their food from home or cook inside the prison without limitation, to stay in the open air all day long, and to hang out with each other throughout the day. According to the prison director, 'this approach not only helps ease the day to day management of the prison, it also has a considerable and lasting impact on the reform and rehabilitation process for the prisoners'.

The director argued that 'the spirit of justice calls for the adoption of friendly relations between the management and the prisoners'. According to him, friendly relationships in this context 'are not same as the conventional friendships that we know; this is very deep and special. Those in the free world are not likely to ever experience this type of relationship... The relationship is such that it can establish a thick layer of trust between individuals from two different levels, who have needs that are not comparable and often even contradict one another... In Balkh prison we do not convey to the inmates that we are managing them, as we do not believe we are managing them, but rather that we are serving them and are therefore more like brothers and friends'.

The prison management remind prisoners from time to time that, as long as they are not doing anything wrong, the management and guards could be like "brothers and friends" to them. These are not mere promises, as the prison management seems to carefully combine them with tangible results towards meeting the material needs of prisoners. If a prisoner wants to order food from outside, exercise for extended hours in the open air, hang out with others, and/or receive visitors, the management goes out

of its way to help; in certain circumstances, officials will even help if the prisoner's wish runs slightly contrary to prison rules.

According to another Balkh prison official, this is not just a 'carrot and stick' approach to prison management, as there is local substance to the approach being used. According to him, this targets values, such as respecting the prisoners' dignity. The official believes that 'the prison environment alone breaks people, because it is naturally harsh; hence, it softens the attitude of all prisoners. Although it cannot discipline hardcore criminals, it has a strong impact on those accused of minor crimes.'

In contrast, some of the prisoners interviewed marked this management style as ambiguous. They complained that the prison did not have a set standard for what is allowed, for whom, and under what circumstances. In their view, the apparently relaxed measures were tools for corruption, rather than for ensuring a humane environment within the prison. The main point in their arguments was that everything within the prison is based on the personal will of the prison director, and that prisoners can only benefit if they can pay for it, in either a direct or an indirect way. It should be noted, however, that the majority of prisoners in Balkh appeared happier and looked to be in better mental and physical health than those in Pul-e-charkhi.

7.6.2 Infrastructure and resources

As previously mentioned, Balkh prison is less well equipped than Pul-e-charkhi, in general. The prison's pool of human resources consists of a majority of lower grade and new police officers, who are less experienced than those at Pul-e-charkhi. Yet, about three quarters of the prison staff received formal education at the police academy, and around (80%) of them have been trained in the Prisons and Detention Centres Law and basic prison management skills, including trainings at the NTCPP in controlling prison riots and the management of disorder.

On the facilities front, almost all its amenities are sub-standard. The prison does not have a dedicated building, and it operates within a compound belonging to the Traffic Police Department of Balkh Province. The facility is a small structure of 35 rooms, each with an average dimension of about 6 x 4 metres and accommodating 25-30 prisoners. There are shared bathrooms at the far end of each corridor, which are insufficient for the number of prisoners using them.

The prison also has meeting and prayer space, classrooms, a small library, and a computer lab. There is an infirmary with a few beds, where doctors are available during the day to serve the basic needs of prisoners, and a pharmacy providing pain killers and other essential medicine. The prisoners also enjoy a tape recorder and a radio in almost every prison cell, and a few cells had satellite television with 70 active channels. The prison is provided with full-time electricity via the national/city power grid.

As part of a security upgrading plan and the so-called post-2001 renovation efforts, the surrounding walls of the compound concerned were reinforced with big concrete blocks (e.g. T-walls). All the windows were also blocked, to optimise security, leaving the compound with dark, humid, and stinky vaults to use as prison cells. Small windows were tunnelled through the ceiling across all the corridors, which now function as skylight windows that are guarded with metal bars. Balkh is a dusty, hot city in the summer and very cold in the winter; the skylight windows are thus a punishment, because they allow a constant stream of dust and heat/cold to enter the cells. Consequently, whilst natural light and fresh air are virtually excluded, the renovation has transformed the rooms into iceboxes in winter and baking cauldrons in summer.

Of course, it goes without saying that this type of environment is a breeding ground for infectious diseases. In addition, the prison shares an entire parameter wall with private houses and a shopping area, although the outer perimeter of the prison is fenced with barbed wire and guarded. The area includes a public road that has been blocked off to general traffic and turned into the prison's main entrance. All this makes the physical existence of the prison a big problem, not just for the surrounding community, but also for others who have to use the prison road.

7.7 CONCLUSION

The prison system in Afghanistan is composed of three tiers: national prison administration, individual prison administration, and programme or technical level administration. Based on the above review of institutional factors, it becomes evident that, despite a gradual expansion of the prison system's legal mandate, its institutional capacity and resources have remained insufficient across all three layers. It is also clear that amongst all the institutional factors outlined above, a lack of leadership has played the most prominent role. In view of these limitations, the prison system seems to have focused primarily on the easier parts of its legal mandate, including incapacitation and ensuring prison security. The implementation of its substantive and relatively difficult aspects (i.e. rehabilitation) has not yet been fully undertaken.

In addition, the prison system has been low priority for both the MoI and the MoJ, which have each been entrusted with their own portfolios and mandates. Therefore, in all circumstances, prison leadership has been weak and has lacked appropriate supervision at policy level, which has led to successive changes, as well as the transfer of prison authority between the two ministries. Not only has there been a lack of institutional development, but the internal structure of the system was also twisted and shrunken several times, resulting in poor management, prison officials with weakened authority, and hampering of its implementation capabilities.

In general, the prison system has been following changes in the broader political and security environment, whilst remaining enslaved to its past, and to old management and leadership methods. Together, these factors have paved the way for prisons to serve as a tool for the government and politicians to impose coercion and ruling by law, rather than the rule of law. Due to the sequence of changes and institutional issues, a patronage network has gradually dominated the prison system, blocking reforms and new resources from entering the system.

As for Pul-e-charkhi, leadership was one of the most serious problems for the prison's management and execution of its legal mandate. The problem of leadership in this case goes beyond the individual qualities of the prison's senior management; the military nature of the prison's operation and its restrictive internal structure also played a significant role. Due to its restrictive internal structure and absence of dynamic leadership, the prison's budget was mainly used to support its incapacitation and security functions, leaving little to no resources for other important aspects of its legal mandate, such as rehabilitation.

The prison's rehabilitation programmes, including work and education, were not implemented in line with any international standards, and no local standards were developed for prison-based rehabilitation. The operating prison-based programmes are poor imitations of international standards. They not only failed to produce satisfactory results, but they also become a source of tension between the prison system and other state agencies, as well as a source of corruption and the abuse of power within the prison itself. The prison's industrial programme is a good example of inter-governmental tensions and inter-agency corruption.

In addition, scrutiny of international investment in the prison system in general, and in Pul-e-charkhi in particular, reveals that most donor funds were wasted, either on flawed designs and faulty implementation, or on Kabul-centric initiatives. In areas where such contributions were successful, they mostly belonged to security upgrading and the boosting of a prison's capacity to fight the War on Terror, rather than to correction institutions serving ordinary prisoners. The large infrastructure projects funded by the international community aimed to upgrade prison security and general living conditions, but added hardly any reformatory aspects to the prison. To that end, the internal structure of the prison system, including Pul-e-charkhi, emerged as something which is more responsive to security needs.

Pul-e-charkhi always lacked institutional support for prison-based rehabilitation programmes. In addition to an excessive focus on security, its predominantly military orientation, ranks, and internal structure shaped the prison system in a direction which not only ignored but also suppressed potential dynamism and innovative approaches; approaches which could have connected the prison system with other institutions (non-governmental included), mobilising their capacity and resources towards the rehabilitation of prisoners.

Institutional problems, including the reach of the patronage network, poor resources, and failing programmes, were all clearly evident at Balkh prison as well. However, in contrast with Pul-e-charkhi, Balkh prison had a relaxed management system, and the majority of prisoners were (relatively) happier with it. The management allowed prisoners to enjoy extensive freedom in their daily activities, as well as engagement with the outside world. This was a management trick which was primarily aimed at compensating for the lack of prison-based programmes. However, it was implemented in a relatively innovative way, making the programme deficit less obvious to the prisoners themselves.

Consequently, even though the prison possessed fewer resources and institutional capacity than Pul-e-charkhi, its overall impact on prisoners was arguably more favourable. Although the prison did not offer prison-based programmes, the wellbeing and general mental condition of its inmates were much better than at Pul-e-charkhi. The majority of the negative mental effects associated with imprisonment, such as depression and anxiety, were virtually eliminated.

8.1 INTRODUCTION

This chapter introduces the prison-based rehabilitation programmes and examines to what extent and how they are actually implemented in the country's largest prison, Pul-e-charkhi. The chapter also deals with the final component of the institution-building model, or the target group for prison policies (i.e. the prisoners), to examine how active prison-based rehabilitation programmes operate and how they interact with their target groups.

In line with the institution-building explanatory framework discussed in Chapter 1, above, the target group factors under review are fourfold, including interest, access, reach, and enforcement. The first factor concerns the level of interest prisoners have in participating in certain prison activities. The second factor is about the extent to which prisoners are able to access prison goods and services. The third factor pertains to the prison's ability to reach and contact prisoners. The fourth factor is related to the prison's ability to impose planned tasks on prisoners.

These factors are also crucial from the perspective of the something works framework. As discussed earlier, the framework's 'integrity' principle implies that achieving higher levels of success in prison-based interventions requires high levels of institutional integrity. This demands not only resources, an internal structure, and an overall conducive institutional environment. It also requires the programme to communicate smoothly with its target groups. The latter is more likely if prison-based intervention is mindful of other key principles, such as 'risk', 'need', and 'responsivity' (Palmer, 1992), all of which relate to the programmes' (in this case prison-based rehabilitation programme) target groups.

8.2 PRISONER CATEGORIES AND LIVING CONDITIONS

As discussed in Chapter 1, the prison population is generally divided into three categories, including national security crime, narcotics production, trade, and trafficking crime, and general crime prisoners (see 8.2 above). In terms of size, the national security category is the largest group of prisoners, followed by general crimes, and drug trafficking crimes. Further, two distinct behavioural patterns or personality types are noticeable: the rebellious type, seeking to completely refuse the validity and legitimacy of the government, and hence the prison system, as well as pushing to change

prison routines; or, the conventional type, who plays by the rules, whilst adapting to the prison routines along with the rest of its population.

The Taliban, general fanatics, and anti-government elements (including fanatics from abroad), fall under the first type, because they are also naturally and ideologically segregated. Such prisoners almost always come from similar backgrounds, and end up in prisons through similar processes. According to most of the interviewees, national security prisoners display a high sense of self-respect and avoid conduct such as adultery, drug abuse, gambling, etc., within the prison. The group also has self-proclaimed rules and an internal code of conduct, which are derived from traditional Afghan and Islamic values. By virtue of those rules, members of the group tend to reject prison authorities and contravene certain prison rules, such as the search and seize of self-made weapons and other illicit property which are often kept in their cells.

The group's attachment to these rules is apparently so strong that prisoners within it often resort to violence to prevent others violating them. For example, drug addicts, thieves, and gamblers have been bitten by members of the group in public, for not adhering to their rules. Even so, some prisoners favour the group, because it polices and controls unconventional conduct, and because it pushes against prison authority, which is the common enemy of everyone in the prison. However, according to the prison authorities, the majority of prisoners dislike the group, because of its odd behaviour, fanaticism, and the heinous crimes.

Most inmates within the general criminal population are from low income and illiterate social groups, despite having varied criminal backgrounds.¹ The proportion adhering to particular values is comparatively low within this category of prisoners. It has been observed that some of these prisoners became drug addicts shortly after entering prison, and that they are the least disciplined and value-driven people in the prison system. Drug addicts are a burden on the rest of the prison population, since many steal public or private property to satisfy their need for drugs. Furthermore, the prisoners in this category tend to be less concerned about their health and hygiene, hence other prisoners use force to keep them away from the general cells.

Drug traffickers are (comparatively) the smallest group in the prison and, although they stick to their own way of life, they are closest to the general criminals. They are generally more passive and less affected by

1 Complete information about prisoners' educational backgrounds was missing from the official databases of the GDPDC and Pul-e-charkhi. However, based on 2017 data and statistics on inmates' educational and employment backgrounds, compiled during my fieldwork, between 18-20% of the 9,391 prisoners at Pul-e-charkhi either stated that they were educated or appeared to be so. Of those who stated they were educated, their level of education varied from unofficial education to (a small number with) bachelor's and master's degrees.

prison conditions, because they are housed in a multimillion-dollar section that was renovated specifically for drug-related crimes and offenders (see 7.5.3 above). All the prominent drug dealers (and in this case, also people accused of corruption) reside in this area, and due to their enhanced living conditions most of them remain peaceful and participate willingly in the educational and rehabilitation programmes offered by the prison.

There are sub-groups within each of the three main categories of prisoner, including economically well-off, poor, and innocent prisoners. Those who are economically well-off, usually have supporters and allies both inside and outside of the prison, and consider prison to be less incarceration and more guesthouse. Members of this category are also linked to networks that can arrange (from inside the prison) almost all types of service available in the free world. Even though the type and degree of such services may differ from prisoner to prisoner, wealthier prisoners are generally given more rights and more freedom.

A second sub-category includes the disadvantaged, drug addicts, and mentally ill people. The majority of this group have no relatives, social networks, or other means of social support. In general, other prisoners can hire them for small tasks, such as cleaning, cooking, laundry, etc. However, when hired they are paid a minimum wage, which only allows them to obtain food and meet their basic needs. Mentally ill prisoners are held in the same part of the prison as drug addicts, and are therefore the most vulnerable within the harsh conditions of the prison. There is little social assistance available to them, and their accommodation is usually deplorable.

Finally, there is a unique group of prisoners in Pul-e-charkhi that I call 'the innocent prisoners'. The majority of this group are victims of judicial errors and flawed criminal justice processes, and hence they are no different from those living in the free world. Theoretically, they do not pose any threat to society and do not require any prison-based rehabilitation programmes. In spite of this, they remain locked up because of the dominant culture of incarceration within the criminal justice system. When listening to their stories and reviewing their files, it seemed that the police, prosecutors, and judges were all committed to applying ever increasing sentences and sticking to a highly punitive institutional culture, in the case of this category of prisoner.

As the innocent prisoners category is generally missing from the literature, even though it has a significant impact on the prison's capacity to implement its legal mandate, I would like to explain how judicial errors work in practice. Following the commission of a crime, the police typically investigate the crime scene and interview witnesses. They usually enquire about the details of the incident and nominate suspect(s), by following Article 80.2 of the Criminal Procedure Code 2014, for example.

Individuals who file a complaint must provide information regarding the crime and identify any suspect(s). In many cases, nominated suspects are unemployed, illiterate street boys, or 'strange-looking' individuals who happened to be at the scene at the wrong time. According to Article 80.3

of the Criminal Procedure Code 2014, after a complaint has been filed the police must conduct an investigation and notify the prosecutor of the occurrence of the crime within 24 hours. Article 87 of the code stipulates that the police have 72 hours from the time of the arrest to decide whether to release the suspect or to file a case and refer the suspect to a prosecutor.

In many cases, the police refer the case to prosecutors within the first 24 hours, literally without having gathered sufficient evidence. This is because the police are usually also working on counter-insurgency and other military operations, leaving them with little time and resources to pursue criminal investigations. The police expect prosecutors to have more time to conduct a thorough investigation and to determine guilt or innocence. Although the code grants prosecutors greater authority at the prosecution stage, they are typically less lenient towards the accused. Several factors come into play at this stage, including willingness to demonstrate higher performance records, which is an issue that is closely connected with prosecutor corruption.

The prosecutors usually free those who can pay, and continue pursuing those who are unable to pay, even when they are not guilty. The reason for this is that the number of charges might otherwise end up being too low to justify the existence of a prosecutorial service. The prosecutors' mindset is that the police are one step closer to resolving the crime incident. Therefore, if the police determine that further investigation is necessary, the prosecutor has a reason to remain cautious. This is when ordinary cases are most likely to become entangled in the criminal justice system. The further the criminal justice process proceeds, the lower the chances are for nominated suspects to be freed, and the poorer the suspect, the greater their chances of ending up in prison.

According to a leading prosecutor:

"If someone's name is included in a criminal case, regardless of how many facts are against or in favour of them, criminal justice actors will attempt to prove them guilty. In the event that the actors cannot prove guilt, they will not typically dismiss the person from further investigation, because that is considered a personal failure of the prosecutor – our criminal justice system is designed in this manner. It is punitive".

The respondent rightly claimed that, *"interestingly, the same situation occurs at court level. The further the case proceeds through the criminal justice system, the more difficult it is for authorities to release an individual. Perhaps in such cases the court believes that all the steps involved in the prosecution process cannot be incorrect, hence they prolong the investigation, which also results in a longer detention for the accused. This consequently means that there is a backlog of court cases, which can take years to resolve."*²

2 Personal interview with an anti-corruption prosecutor – August 2016.

Many prison officials, including some within the Pul-e-charkhi management, believe that a large number of prisoners end up in prison due to faulty criminal justice policies and errors throughout the criminal justice process.

"The criminal justice system in Afghanistan is rife with pitfalls. The Law of Counter-Narcotics, for instance, stipulates the same level of punishment for individuals who trade, transport, possess, cultivate, or assist in drug trafficking. An interesting example is that of one Mullah (member of the clergy) who was sentenced to 16 years in prison for possessing opium. As you know, Mullahs are fed by society, through individual charities, and they also used to receive a percentage of the harvest from farmers. A few years ago, nearly everyone cultivated poppies in Helmand province, and the share for the district Mullah was only 2 kgs of opium, which was collected from all the villagers. The Mullah was a poor man and opted to trade the opium for wheat and rice, in order to feed his family. On his way to the bazaar the police arrested him and, ultimately, he was sentenced to 16 years in prison."

Quite a few individuals in Pul-e-charkhi are victims of judicial error. Many prisoners have raised concerns regarding the prosecutorial techniques used and punishments imposed upon them, as well as the striking and unjustifiable disparity in the punishments imposed on others for similar offences. One famous example of those concerns and judicial errors was a 35-year-old man in block four of Pul-e-charkhi. He received a sentence of 16 years in prison, because he was suspected of murdering his wife.

According to the prisoner, a murder did not occur at all. He claimed that his own in-laws did not like him, that they fabricated a case, and that they bribed the prosecutor to put him in prison. His lawyer had requested an autopsy, but the medical team and his in-laws did not allow his family to be present when the tomb was opened. After a few days, the inmate's brother opened the tomb on his own initiative and verified to the prisoner that nobody was buried there; it was empty. There were a few more cases of murder that were apparently more brutal and well-documented, compared to this case, yet they had received more lenient sentences.³

8.3 THE INTAKE PROCESS, DAILY LIFE, AND INTERESTS OF PRISONERS

Life in Pul-e-charkhi begins when prisoners pass the 'black door' and undergo a thorough screening process. The process includes collecting prisoners' personal histories, criminal records, educational backgrounds, health

3 This story was told in an exceptional interview, at which people from the prison's education division were also present and provided comparisons between this case and other similar cases. Later on, I checked some of the statistics about the types of crimes and length of sentences, which showed a variety of punishments were applied to similar crimes.

conditions, and risk assessments.⁴ The process typically occurs during the first to the seventh day of a prisoner's stay in an intake facility. Additionally, prison management gathers the information necessary to create a personal file for each prisoner during this period. Therefore, depending on the length of their stay and the overall workload, the quality and accuracy of the prisoners' files vary significantly.

At the end of the intake process, a 'classification committee' determines the prisoner's security level and accommodation at Pul-e-charkhi.⁵ In theory, the work of this committee is extremely important, because it determines the actual direction and future programmes that are made available to prisoners. Additionally, the process plays a crucial role in prison management, because proper classifications are a useful means of controlling the prison population, and ensuring the smooth implementation of programmes and an orderly prison environment (Rhodes, 2004; Carlson, 2013b).

Based on my observations of the committee's work, it comprises representatives from the security unit, the court liaison unit, the education unit, the industrial unit, a guardian of the daily duty roster, and a medical doctor. The committee meets once a week, usually on a Wednesday, to interview all prisoners gathered in the intake facility over that week. A small meeting room near the intake facility is used for holding committee meetings, and all the prisoners are asked to gather round it. A few friendly guards coordinate

4 According to Article 8 of the Prisons and Detention Centres Regulation (2007) [translation], "[A] committee of the following members shall be appointed to determine the physical, mental, and psychological condition of the prisoners and detainees at the time of intake: I. A medical doctor; II. A psychologist; III. A legal expert; and, IV. An officer from the relevant prison/detention centre, selected by the commander... The committee is responsible for considering the conditions provided in articles 6 and 7 of the regulation, during the intake process."

5 According to Article 10 of the Prisons and Detention Centres Bylaw (2007) [translation], "[A] commission with the following composition shall be formed in Kabul and other provinces of Afghanistan, to classify prisoners and detainees based on characteristics mentioned in paragraph 2 of this article: 1). An officer from the concerned prison or detention centre, selected and introduced by the chairman of that institution; 2). A doctor as a member; 3). A head of training and education unit as a member; 4). A psychologist as a member; and, 5). A prosecutor who is assigned to observing penitentiaries as a member. The commission shall classify prisoners and detainees considering to the following characteristics: 1). Age; 2). Criminal history; 3). The offence committed; 4). Duration of the sentence; 5). Drug addiction; 6). Health condition; 7). Nationality; 8). Personality and social status; and 9). Characters, behaviours, and common feeling. The commission shall consider paragraph 2 of this article during the classification of prisoners. It shall also consider the prisoners' and detainees' behaviour during their imprisonment, and keep in mind the necessary control mechanisms to classify the inmates for *maximum security*, *medium security*, or *minimum security regimes*; and prisoners can complain about their security classification on the bases of paragraphs 2 and 3 of this article. However, they shall submit a written complaint to the GDPDC. The prison administration shall study and consider their complaint, and take a necessary decision within one week."

queues, but they do not interfere with assignment, because the committee calls each prisoner in according to a predetermined order and follows the same procedure with each prisoner throughout the intake process.

When a prisoner enters the interview room, a committee member asks a few demographic questions, such as their name, age, birthplace, type of crime, etc. Afterwards, a random member examines the prisoner's appearance, from head to toe, and tries to make a judgement regarding his character. The same committee member then asks a few questions to ensure that his diagnosis is correct. In the event that a prisoner appears to be in poor health, or is showing signs of being a drug addict, the committee member's first assumption is that the prisoner is an addict.

Thus, he asks several further questions regarding the prisoner's supposed addiction, including *How frequently do you smoke? Have you ever smoked hash/crystal/heroin/marijuana? How many days can you survive without using drugs? Did you receive any joints whilst in the intake facility?* Intriguingly, most addicts tend to provide truthful answers, perhaps because they know they cannot mislead prison authorities. According to the committee members, over 95% of addicts can be identified, and there is no need for medical procedures. In spite of this, a medical doctor is always present with the committee, to double check.

In fact, the doctor sits in the corner of the interview room, where he examines each of the newcomers individually. Similar to the other members of the committee, the doctor does not use any technology, not even ordinary medical equipment, such as a stethoscope. He determines the prisoner's wellbeing, merely by looking at their physical condition, inspecting their mouth, and checking the palms of their hands. The court liaison officer then reviews a set of daily reports providing information on prison space availability and suggests a few options for the committee members to consider.

In making a final decision, the committee considers a rough combination of the prisoner's age, type of crime, length of sentence, security level, and drug addiction. At the end of the session, the committee assigns the new prisoner to a permanent facility. In total, the process takes around five minutes, and it is in no way aligned with the recommendations in the relevant legislation. Instead, it is a defective and flawed process that is at the root of several issues concerning the poor conditions of prison life.

I would like to describe a few of the main concerns related to the committee's work. The committee does not have any specific rules or standardised interview procedures; there is not even an interview guide or checklist of questions to ask and issues to consider during interviews. Additionally, the committee did not have an internal code of conduct and mechanisms for resolving differences of opinion between committee members and issues like conflict of interest. As a result, they made subjective judgements without considering the technology, data, or prison records available.

The committee did not even use medical equipment to evaluate the prisoner's health. Even though the prisoners' files are incomplete, they could be a good starting point, but the committee does not use those files.

Instead, it uses brief tabular information, including the names, crimes, and sentences of individual prisoners. Subjective decision making seems to have become the norm, and the committee members appear to have unlimited authority and discretion when classifying prisoners. The decisions of the intake committee are final, and there is no complaint procedure and no mechanism to ensure that the process is accurate.

As a result, prisoners from diverse backgrounds are allowed to mix, establish relationships, and form groups. In situations where members feel attached to genuine social bonds, such as religious groups and political parties, they form more complex and obstinate groups. The faulty and negligent process presents an excellent opportunity for criminal networks, prison mafias, terrorists and national security criminals to manipulate newly incarcerated individuals, in order to advance their own agendas. These groupings have created a severe obstacle for prison administration, and have sometimes even prevented them from carrying out prison routines such as security checks and searches.

After prisoners are assigned to a cell, they are left on their own and are free to engage in ‘anything’ and ‘everything’ that is socially acceptable within the prison community. This is because the prison does not provide a comprehensive programme encompassing all of the prisoners’ activities within a single 24-hour period. The only planned activity common to all the Pul-e-charkhi prisoners is a daily two-hour stay in an open area. The walk in the open air is called *aftawee*, meaning to ‘expose the prisoners to direct sunlight’, which is its purpose. During those two hours, prisoners can meet their peers, talk to them, walk in an open space, or enjoy sitting somewhere and getting some fresh air.

The next significant planned activity is the official rehabilitation option, including the industrial and educational programmes, which are only available to a limited number of prisoners (see 8.4 below). This leaves the prisoners free to engage in their favourite activities within the confines of their prison cells. When asked to record their daily routine, from the time they wake up until the time they go to bed, prisoners reported doing the following activities: morning prayer, beading, watching television, body building, playing chess (or domestic versions of the game, known as *Dowazda Boza and Chaka*), playing cards, (in rare cases) storytelling, and evening prayer.⁶

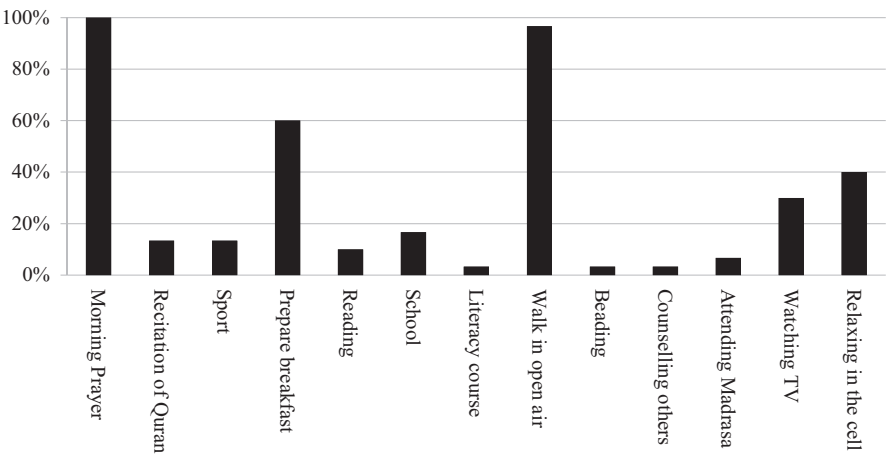
All the prisoners interviewed mentioned that they begin their day with morning prayer (100%), followed by a walk in the open air (97%). For a person adhering to a Muslim belief system, doing morning prayer and offering other prayers throughout the day could be a sign of good behaviour.

6 Beading is a kind of artwork that involves either stringing gemstones and crystal beads on a thread or thin wire using a sewing needle, or sewing them onto cloth. The material, shape, and size of the beads vary, depending on the type of art produced. Some prisoners use their time and skills to decorate personal accessories like pens and mobile phones with beadwork, to shape the beads into forms that are commonly used for jewellery, or to create other decorative items.

It could indicate a degree of rehabilitation and a likelihood of abstaining from future misconduct. Nevertheless, I could not determine whether prisoners were attending these prayers because they were taught to believe in good deeds, because they did not have an alternative activity, or because they were influenced by those with an Islamic orientation. In my opinion, the latter seems most likely.

Other activities listed by prisoners include: watching TV (30%); going to school (17%); recitation of the Quran (13%); sports (13%); reading something (10%); going to Madrasa (7%);⁷ attending a literacy course (3%); beading (3%); counselling other prisoners (3%); and other activities (7%). The figure below shows the daily engagement of prisoners in different activities, from the time they wake up until the time they go to bed, presented as taking place over the day.

Figure 3: List of common daily activities



I also asked the prisoners about activities that help them to relax and gain positive energy during the day. The participants cited sports, prayer, working, reading, walking, and schooling as helpful activities. The same question was posed to prison management, who gave equal preference to the activities preferred by prisoners. Thus, I can claim that both parties appeared to have similar values and to appreciate the same types of activities. In the prison managers' opinion, a good programme of engagement for prisoners is anything that is broad-based, accepted by all groups, does not contradict social or Islamic values, and provides moral or financial advantage to the prisoners.

7 A madrasa is a type of school mostly focussed on Islamic teaching. Whilst officially registered madrasas do exist in Afghanistan that are supported and monitored by the MoE, most other madrasahs, including those within the prison system, are not registered as official educational institutions; hence, they provide informal Islamic education to their students (see 8.4.4 below)

These characteristics were present in most of the activities prisoners reported as being beneficial to them, and they are listed in order of priority in the table below. Beading was of particular interest to prisoners and prison management alike. Perhaps this is because beading work keeps prisoners busy all the time, it does not need a workshop, it creates some financial incentives, it does not work against any values, and nobody in prison opposes it. However, the financial benefit it produces is not enough to support a family, and the supply and demand chain for beading products does not work appropriately.

Table 1: List of activities that help prisoners feel good

Types of activities that help prisoners feel good	Percentage
Sports, mainly limited to body building, morning exercise, and walking	20%
Doing five prayer sessions per day, as well as <i>Nafel</i> (supererogatory) prayers	17%
Working inside the cell and in the workshops within the industrial section	13%
Reading books, if available	10%
Walking in the open air during the Aftawee	10%
Going to school	10%
Reading and recitation of the Quran	7%
Attending the Madrasa (i.e. this takes place within the cell)	3%
Speaking with others and talking about life in and issues with the prison	3%

It is worth mentioning that the extent and degree of freedom that prisoners should have to use recreational facilities are highly debated across the globe. As a general rule, prisons offer recreational facilities such as gyms, weight lifting rooms, sports teams, games (cards, chess and bingo), arts and crafts, TV sets, and (in some cases) outdoor recreational facilities, such as intra-mural sports facilities (Hanser, 2013, p. 200). In line with this, I asked a hypothetical question about the type of recreational programme the prisoners wished to have at Pul-e-charkhi. The most favoured recreational activities listed were all sports activities, including chess, volleyball, football, body building, and wrestling. Only a small group of prisoners added the five daily prayers and reading books as their favorite recreational activities.

In practice, Pul-e-charkhi does not provide all of its prisoners with a regular 24-hour programme. Moreover, there is no recreational function, and the limited scope of rehabilitation available to some prisoners has been undermined, because of the prison’s limited resources, poor leadership, and widespread corruption. This leaves the vast majority of prisoners susceptible to harsh prison conditions. It remains to be seen how prisoners will cope with the consequences of the undesirable and adverse conditions in Pul-e-charkhi that are discussed in the next section (see 8.5 below).

8.4 REHABILITATION PROGRAMMES IN PUL-E-CHARKHI

As discussed before, the Afghan prison system generally employs two broad schemes of rehabilitation: education programmes and industrial programmes. The two forms of programme are supervised by the Prison Administration's Education, Rehabilitation and Discipline Division. Both programmes are examined more closely in the following sub-sections.

8.4.1 Prison-based education and literacy programmes

The relevant literature suggests that prison-based education plays a role in helping prisoners reorient their lives after serving time in prison (Wilson and Anne Reuss, 2000, pp. 12-15; MacKenzie, 2006; Carlson, 2013a, p. 18; UNODC, 2017, p. 2). Afghanistan's prison system has pursued educational programmes, including adult literacy and formal education, as an integral part of its rehabilitation strategy, ever since the adoption of the third Prisons and Detention Centres Law in 1983. Post-2001, the programmes have been offered according to: the general provisions of the 2004 Constitution (concerning free education for all citizens); and, specific provisions in the Prisons and Detention Centres Law 2007, and the Prisons and Detention Centres Bylaw 2007.⁸

The prison system generally offers official school and literacy programmes, as well as several unofficial forms of education, known as *Madrassa*. Whilst *Madrassa* is run solely on prisoner resources, the school and literacy programmes are part of the MoE's mandate – they are 'official' because they are supposed to be taught according to the national curriculum. In other words, the MoE is generally responsible for ensuring that prison-based educational services are provided in line with the approved national curriculum. If the ministry cannot provide the requested services due to a lack of resources (or for any other reason), it should provide technical assistance (including teaching materials) and resolve formalities, such as quality assurance and the accreditation of educational programmes, so that prisons can implement the programmes using their own human resources.

8 Article 43 of the Afghan Constitution (2004) also provides for the right to education. It states that, "education is the right of all Afghan citizens and it shall be offered up to a bachelor level. [The service shall be provided by] state educational institutions, free of charge. To expand opportunities for equal educational attainment, and to provide mandatory intermediate education throughout Afghanistan, the state shall devise and implement effective programmes and prepare the ground for teaching in native languages, in areas where these are spoken." Likewise, According to Article 21 of the Prisons and Detention Centres Bylaw 2007 [translation], "...prison administration shall provide educational and vocational training programmes that aim to help inmates understand the social damage caused by acts of crime, as well as strengthening their sense of responsibility, social discipline, humanitarian values, respect for others, and respect for cultural norms and values."

8.4.2 The official school programme

Pul-e-charkhi is served by an official school programme that is administered by the MoE. Schooling starts at secondary education level, due to the prison age distribution and general education norms.⁹ In theory, graduates of the school are entitled to receive the same certificate as students in ‘the free world’, but this specific aspect of prison-based education has been associated with problems, which intensified after the 2020 reform (see the epilogue, below).

According to the prison’s education department, in 2018 and 2019 Pul-e-charkhi prison school had 29 active classes, spanning grades 6-10.¹⁰ The classes were offered at six different locations within the prison and catered for 996 prisoners, or about 10% of the prison population. In addition to one permanent member of staff (the school principal, appointed by the MoE), the school had 41 volunteer instructors who were chosen from within the prisoner community. There were a number of security restrictions and other guidelines concerning the operation of the school, which stipulated that the majority of classrooms should be located at the end of corridors and outside the main wings.

Whilst those rules were beneficial for security and order within the prison, prisoners enrolled in the school often found learning under such conditions challenging. They had to deal with several security measures and internal rules (which varied between different parts of the prison), in order to gain access to their classrooms. Therefore, prisoners had different experiences of the education programmes, depending on the location of their classrooms, and the population and criminal backgrounds of other prisoners in the block.

The official school programme also suffered from a low rate of prisoner participation, which seemed to be for several reasons. According to my (admittedly small) survey of prisoners in Pul-e-charkhi, over one quarter of the respondents who attended the school stated that it lacked the necessary qualities and routinely repeated lessons, which made the experience boring and ineffective for many students. Due to poor connections with the MoE and a lack of resources, the school relied mostly on old educational materials, as it was not possible to obtain new ones.

Despite this negative impression, about 83% of my respondents were aware of the existence of the official school and that it was accessible to them. Although less than half of them (43%) were registered, all of them

9 The official school system in Afghanistan consists of primary, secondary (divided into grades 7-9 as lower secondary, and grades 10-12 as higher secondary), vocational, and tertiary education. There is a primary school in the female section of Pul-e-charkhi, which is for children living with their imprisoned mothers. *Madrasa*, however, is not an official programme and it therefore does not carry any formal credentials.

10 The prison school did not have any students in grades 11 and 12, so before 2019 nobody had graduated from there. In the meantime, tertiary education was not yet on the prison agenda.

were enrolled in the programme. The age distribution of those admitted was 18-30 (around 72% of the prisoners interviewed) and 31-40 (around 27% of those interviewed). The majority of prisoners new to the programme said that the school's quality was average. They based their judgements on the fact that education enriches their skills and facilitates their daily lives in prison. They said that, at the very least, the school provided them with some lessons, books, and real people, who talked to them as real teachers would.

When it comes to prisoners who did not attend the school, they were generally unwilling or unable to attend educational programmes due to a lack of interest, poor quality lessons, age, and/or limitations imposed on them by the prison regime. Some prisoners claimed that, after they had been attending the official school for three years, they were promoted to higher grades without making any effort. The following year they were taught by the same teacher, using the same books and educational materials. Some prisoners claimed to have spent eight years in prison, with seven more to go; they attended two/three grades in the official school, where they witnessed a repetitive cycle of 'poor quality and tiring school programmes and teachers. In the end, they decided to quit because it was not a wise use of their time.'

Interestingly, the school principal also questioned his own programme and his mission as principal. He admitted that the school is a 'boring programme, going in a meaningless direction'. The principal added that the programme lacked everything a school needs, including a dedicated and informed management team, official teachers, office space, classrooms, and even a properly functioning connection with the MoE as its parent institution. He added that the programme is a daily routine of classes which have to be repeated every day, for many hours, and that it involves many prisoners. Whilst the prison administration agreed to the schooling and teaching requirements on paper, in practice they discourage it and do not collaborate to ensure that it runs properly.

The lack of understanding and cooperation from the prison administration, and the lack of interest and capacity on the part of the MoE, has resulted in a boring and meaningless programme. Due to the inter-institutional dynamics and scarce resources, the prison school is not very attractive. Prison security has restricted prisoners' access to all the official educational programmes that involve regular classes outside of the lockup area. In the meantime, due to the poor quality of classes and the flawed admission processes, many prisoners have no particular interest in participating in the programme. In turn, this causes the programme to remain low priority for both the prison administration and the MoE.

According to the principal, the school has recently been used more for corruption, political favours, and other non-educational purposes. He added that it was beyond his power to control, because a corrupt and powerful circle of officials had infiltrated the educational system and was manipulating its admission process, daily programmes, and prison

resources. He continued, stating that these officials aimed to admit some prisoners to the programme, merely so that they could qualify for special treatment and pardon decrees, in exchange for money. The principal's allegations were confirmed by other people outside of the prison system, and they seemed to be accurate, at least in part.

In addition to my observations of the prison, I recall from my work in monitoring presidential decrees that attendance and good performance at the prison school was often put forward as a 'personality change' factor, and hence a basis for pardoning a prisoner.

8.4.3 The adult literacy programme

The Adult Literacy Programme at Pul-e-charkhi offers courses for reading, writing, and numeracy skills, and targets prisoners who were not able to participate in any formal education before entering the prison but who are interested in attending formal or vocational education whilst in prison. According to the head of the prison's education division, the MoE and a number of other non-governmental organisations assist with the literacy programme, and 85 educated prisoners volunteer to teach the courses. In 2017 and 2018, about 79 courses were taught. The courses took place once a week, and ran for approximately 90 minutes each; in total, 1,910 prisoners benefitted from the courses.

However, based on my personal observations, the literacy programme was nothing more than a name, much like the official school programme. I did not see any physical classrooms (not even a corner of a prison corridor) which were reserved for literacy programmes. I also did not see any printed materials or a planned schedule for the literacy programme. If it exists at all, the literacy programme runs on an ad hoc basis, as an internationally funded project operating via non-government and civil society organisations. The programme therefore qualifies only as educationally motionless activities that are (allegedly) intended to create a false impression of the prison's facilities and human rights situation.

8.4.4 Madrasa as prison-based education

Pul-e-charkhi also has an informal education programme called Madrasa. Although the Ministry of Haj and Islamic Affairs claims the ownership of all Madrasas, its sessions run independently and on the prisoners' own initiative. The service is intended to benefit prisoners who have special educational (primarily Islamic) interests. The prison administration is not directly involved in delivering a specific curriculum or services; instead, relatively well-trained clerics and mullahs manage and teach the courses.

Besides the main Madrasa, which is predominantly controlled and taught by national security prisoners, there are other ad hoc Madrasas of a

similar nature which stem from both the Ministry of Haj and Islamic Affairs and prisoners' own initiatives. Madrasas exist in many locations in different blocks and, ironically, the quality of classes and level of student availability are both better than for the more official education programmes. Logically, factors such as interest, access, and reach have played an essential role in this regard. For example, in contrast with the official school programme, prisoners are not required to ask anyone for permission to attend classes, because they do not need to leave the lockup area to 'go to' Madrasa sessions.

Different sessions and courses take place at many locations that are normally accessible to most prisoners. Although it is difficult to estimate the exact number of classes, and the coverage of madrasas, due to dynamic themes and timing, the majority of prisoners benefitted from them, either via direct participation or simply because they would hear the lectures happening in their cell, without actually attending in person. It is important to note that not all Madrasa classes are the same. For example, a class on topics such as daily prayer might last for hours. In contrast, a class about *Hadith* could take anywhere from several months to several years to teach, depending on the topics and teachers.¹¹

In addition to their accessibility, Madrasas have a set of rules that are based on traditional values, such as honor and respect, as well as Islamic teachings. Almost everyone, even if they are not part of the Madrasa, observes and adheres to these rules. The majority of prisoners rate the Madrasas as imparting better quality and discipline, which is why many of them are willing to participate in at least some Madrasa sessions.

8.4.5 Assessment of target group factors for the education programmes

Interest: There is an exceptionally low rate of participation in the official school programme, which can be seen in the total number of 996 participants, representing less than 10% of the prison population. The majority of the prison population are illiterate and in need of education, but this also partly explains their low participation rate.¹² Indeed, low participation is not only due to issues with access and technical difficulties; it generally relates to prisoners' levels of interest as well.

11 *Hadith* is an Arabic word meaning 'new'. It can also mean: 'statement', 'talk', 'story', 'conversation' or 'communication'. In the context of Islamic teaching, a hadith technically means 'the narration of the sayings, doings or approvals of the prophet Muhammad' (pbh).

12 As indicated earlier, the prison's official school programme starts at secondary school level, due to age limits. Those who end up in prison are usually 18 or older, which is well beyond the minimum age limit for primary education. Such prisoners presumably already have primary level literacy, and if not, it is better that they qualify for a literacy course than for primary school level education.

When exploring reasons for the low participation rate, it becomes evident that the official school programme is tiring, as it is built on a sequence of repeated lessons. At best, it offers poor quality education due to a serious lack of books, teaching materials, and teachers. Thus, many prisoners who know about the school programme are not interested in it. Some prisoners claim that they attended the official school for three or four years, and that they were mechanically promoted to higher grades without doing any proper exams at the end of the year. The following year, they were taught by the same teacher using the same books and materials, which made the programme very dull to follow.

The school is also increasingly being used for purposes other than education. Particular prisoners can take advantage of the programme, in order to qualify for unique treatments and pardon decrees. Hence, there are many opportunities for corruption, and this has become the main reason for official institutions' lack of interest and cooperation in the programme. The issue is so significant, that the MoE has had difficulty recognising the school's certificates, and this is now another factor that discourages students from enrolling in the school.

The Adult Literacy Programme, which runs in parallel with the official school, has similar issues with prison security limitations and teachers, so the prisoners are not interested in it as a continually ongoing prison-based education programme. In addition, the programme has been struggling with graduate accreditation, making it even less interesting for prisoners. On the whole, prisoners seem more interested in the unofficial programme of Madrasas, which is primarily due to their quality of service and discipline, as well as being easily accessible.

Access: Prisoners' access to the official school programme is limited by several factors, including prison security, overcrowding, the location of classes, and the limited number of classes and teachers. As discussed previously, due to limited resources and coordination issues, the official school programme is offered to only a limited number of prisoners (see 7.3.3 above). Even if prisoners qualify for the programme, they might not gain access to it. This is due, in part, to the absence of a dynamic leadership, and there are no mechanisms in place to create alternatives, or to redirect interested prisoners to other accessible educational programmes.

Access to the prison school is problematic, even for those admitted to the programme. In the first place, the programme schedule (and sometimes the location of classes) varies, and even if this were not the case classes are usually barely accessible and are hardly conducive to education. In almost all cases prisoners have to go outside of their wing, and sometimes outside of the building, to access their classrooms. They must obtain authorisation for this from the security section, and they must follow the internal rules and procedures every time they leave the building. However, these rules vary from block to block within the prison. Hence, prisoners' access to the programme is seriously restricted by the internal order and prison security.

The unofficial education (Madrasa) programme is better, in terms of access. The numerous programmes offered are almost always flexible in terms of timing, and will normally be at a time that would suit all (or most) prisoners. All Madrasa sessions take place within the lockup area, the prayer room, or inside prison cells, so that prisoners do not need permission to leave the wing to attend classes. The biggest Madrasa is within the national security block, where prisoners have access to a big area for five sessions of prayer, and they can visit without security restrictions; this is also where most of the Madrasa classes take place.

Reach and enforcement: These factors should, in theory, pose less of a concern for prison programmes, primarily due to the nature of the prison environment, in which programmes and their target groups are strictly controlled, and wilful behaviour is generally limited. However, in the case of Pul-e-charkhi, the official educational programmes can hardly reach the Taliban and national security prisoners, which is the biggest group of prisoners. Due to their particular behaviours, explained in (8.2 above), this group has proven pretty difficult for the education programmes, in terms of reach and enforcement.

When looking at prison-based education in the broader context of the prison institution's legal mandate, there appears to be a clear lack of enforcement. This can be attributed mainly to issues related to the programme's reach and the programme's design, but also to poor leadership and resources.

8.4.6 The prison-based work and vocational training programme

Another prison-based rehabilitation scheme within the Afghan prison system is the vocational training and work programme. The primary objective of this programme is to train prisoners and provide them with employment opportunities in a small-scale manufacturing activity; therefore, it is also referred to as the 'industrial programme'.¹³ A work and vocational programme was part of Pul-e-charkhi's original design, hence the industrial programme has been standard practice since the prison first operated under the PDP (see 6.2.1 above).

The prison-based work and vocational programmes have an independent infrastructure; namely, workshops and separate accommodation facilities for prisoners who are admitted to the programme.¹⁴ At the time of

13 It is important to note that the term 'industrial' in this context does not refer to conventional industrial activity, or mass production; rather, it is the name of a programme that runs a few small workshops within the prison boundaries.

14 Block Five is used to accommodate prisoners working within the industrial programme. Although this block is within the main prison zone, it has an access route to the three large hangars, which are used as workshops and in which all of the industrial activity happens.

my fieldwork, the prison-based work and vocational training programme involved six initiatives, including carpet making, tailoring, shoe making, carpentry, metal work, and blacksmith work. These initiatives are set up as workshops, recruiting prisoners for training and income generation, both for the prison institution and for the programme itself.

According to the head of the prison enterprise division, the programme has the capacity to recruit up to 750 prisoners, but at the time of my fieldwork approximately 500 prisoners were enrolled as workers and trainees, and only around 145 prisoners actually worked there.¹⁵ The head of the department was very enthusiastic about the industrial programmes and, in his opinion, most programme participants were developing positive behaviours and attitudes, which helped them to focus on their work and learning process.

The prison authorities and their international reform partners, including the CSSP, claimed to have been working on transforming the programme from a 'cottage program in to a sustainable satellite program'. There were plans to create new industries, such as carpet shearing and washing, as well as automotive repairs. At some point, the programme also made some contractual commitments to make police uniforms and underwear. In order for the prison to meet its obligations, the CSSP procured a number of commercial grade sock machines and thermal fabrics. High-tech machines were actually brought to the prison and parked at one of the prison shops, but nobody could operate them.

Similarly, the so-called 'sustainable satellite programme', and the related business ideas proposed by its international helpers, were unknown to the prison system in general. According to my observations, there were hardly any properly planned activities within any of the six workshops and, with the exception of a few models that respondents claimed had been produced in the prison, I did not personally see any specific product which had been manufactured via the prison industrial programmes.

The prisoners enrolled in the programme hardly engage in any professional work or planned vocational training. Instead, they spend their time in the workshops cleaning the shop and occasionally repairing broken items, such as beds and chairs. This points not only to a troubled prison-based work and vocational training programme, but also to a flawed implementation process and the limited extent to which the prison's legal mandate is being fulfilled at Pul-e-charkhi.

15 The leadership qualities and connections of the directorship are discussed above, but (in brief) his department is responsible not only for management, business development, and marketing of the section, but also for maintaining supply and demand, and for building relationships with the programme's stakeholders and customers beyond the prison walls.



Metalwork shop (source: GDPDC media)



Tailoring/sewing shop (source: GDPDC media)

Although the prison authorities (and some of their international partners helping with prison reform) saw the industrial programme primarily as a source of institutional income generation, with added potential to help train prisoners, the majority of the prisoners themselves (and another group of the international partners) saw it as a training opportunity to educate prisoners, which also had the potential to generate some income for the prison (Ron Renard *et al.*, 2013, p. 68).

As part of the prison's legal mandate, prison-based work and vocational training were also influenced by several other factors. Prison security and corruption were two major factors for all activities within Pul-e-charkhi, presenting a significant issue for prison-based rehabilitation programmes. For example, the authorities decided to shut down the prison bakery, as it was a threat to the security of the prison. In addition, due to security protocol, all prisoners working in the industrial workshops had to work between 8.00 a.m and 3.30 p.m, because they had to be in their residential building by 4.00 p.m to participate in a headcount.

Some of the workshops could have remained open for longer hours if prisoners had worked in shifts, as this would have accommodated greater scope for timing and work opportunities. Outside the prison, carpet industry employees traditionally work in shifts, which is mainly due to the intensity and nature of carpet making work. Similarly, many factories allow their workers to operate in shifts around the clock. Whilst this may not be a very attractive idea outside of prison, it can perhaps be useful for mitigating shortages in infrastructure and resources inside prison.

Finally, confusion between the income generation and training functions of the programme resulted in existential problems for prison-based work and vocational training. The industrial programme's structure is not aligned with the State-owned Enterprises Law, a problem which has never been resolved. Due to this structural issue, the MoF decided to prevent it from accessing its own money, which had been generated over time. Therefore, the prison administration preferred to contract out its workshops to individual prisoners, who were then responsible for managing the workshops and interacting with their fellow prisoners.

In this case, in addition to helping private vendors (i.e. the prisoners themselves) reach agreements with the Technical and Vocational Training Directorate (TVT), prison administration also supported the vendors in setting up vocational training in their respective workplaces. The immediate effect of this approach was serious limitations on the reach and enforcement of the programme as a general prison-based rehabilitation scheme. The business owner had a strong role in deciding who would be admitted, instead of decisions being made via rules and procedures. The programme also clearly deviated from workable and recommended prison-based rehabilitation ideas, particularly from the perspectives of differential treatment and an amenability framework.

8.4.7 Assessment of target group factors for the work and vocational training programmes

Interest: The industrial section, its workshops, and residential area are located separately from the general prison population. All prisoners registered in the industrial programme live in the industrial building. Amongst the benefits of the area is that it is better equipped, less crowded, and has relatively fewer security restrictions. To that end, irrespective of the programme's contents, almost the entire prison population is interested in some version of the programmes, mainly due to the facilities offered.

Access: Similar to the education programme, access to the work and vocational training programmes is restricted to a limited number of prisoners. Although most prisoners in Pul-e-charkhi expressed an interest in the prison's industrial programme, the service was not accessible to all prisoners, due to the limiting factors of the prison security conditions, and the prisoners' work histories and criminal records. In the meantime, widespread corruption and the prison mafia played a significant role. For example, rich prisoners would outweigh ordinary prisoners in the competition for access to the industrial and prison-based work programme.

That is not only because of the programme capacity, it is also due to a flawed and corrupt admission process. In accordance with the Prisons and Detention Centres Bylaw (2007), all prisoners with relevant educational or work experience can register as candidates for work and vocational training. However, there are limited spots, and so many prisoners qualify for these programmes. The prison administration has therefore developed a procedure for admission to these programmes which is flawed and tainted by corruption.

According to the procedure, all interested prisoners must apply to the court liaison section of the prison and provide proof that they have relevant experience and are not high risk or violent criminals. An assessment is conducted after prison administration has received a request to cross-check the applicant's background and behaviour. This step is known as 'initial evaluation and screening', and its data provide a long list of potential candidates for industrial and vocational training programmes. However, there is no time limit for the process or specific responsibilities for responding to prisoners' application for the programme.

A selection committee, consisting of the director of the prison, its administrative deputy, the commander of the security unit (known as *Qet-tah*), the director of the industrial section, a court liaison representative, and commanders of the blocks where the prisoners reside, gather and interview the applicants. It is entirely up to the committee to drop people from the longlist, assign them to specific programmes, or give them a probationary opportunity. There are no guidelines for why and how these selections should be made.

Reach and enforcement: In the case of the industrial programme, reach and enforcement is complicated. This is because, in addition to inter-institutional politics, the latter programme involves financial incentives and commercial matters, which make the already troubled programme implementation vulnerable, and susceptible to misuse and corruption. For example, due to the privatization of workshops the entire function has been intertwined with a number of private institutions, small companies, and individuals. In this regard, a number of institutions and individuals interact with the work and industrial programmes at Pul-e-charkhi. In most cases, the interests of these institutions and individuals affect the broad reach and fluent enforcement of the programmes. For example, due to the privatisation of workshops, the entire function has become intertwined with a number of private institutions, small companies, and individuals.

The programme also fails to engage in substantial reformatory (or otherwise useful) activities that are beneficial to the prisoners. This is perhaps one of the main reasons why people already admitted to the programme were mostly passing time in the workshops. There is a clear correlation between a company's lack of business and the lack of employment opportunities for the prisoners within the programme. This approach to privatisation, backed by widespread corruption in the system, has also affected some of the productive initiatives of the industrial programme, such as the carpet making shop and bread making factory, which were two major areas where the prison industrial programme could have made a difference.

In this way, the reach and enforcement of the minimal work opportunities were not only severely limited, they were also blocked by the involvement of business interests, poor management, and widespread corruption.

8.5 PRISONERS' COPING MECHANISMS

As Clemmer (1940) and Sykes (1958; 2020) described, prisons have a unique social structure, consisting of a chain of social hierarchy and a value system that contrasts with and sometimes contradicts the outside world's values. Therefore, prisoners inevitably face a variety of challenges whilst incarcerated, and it is usually prison-based official programmes that assist prisoners in coping with those challenges. However, as the entire prison population cannot participate in such programmes – some prisoners do not need to, some are not interested, and some do not fit the programme criteria (including issues of access) – there are other coping mechanisms for prisoners to turn to.

Based on my observations, prisoners in Pul-e-charkhi cope with unwelcome prison conditions by adopting one, or a combination, of the following two approaches: 1) Amalgamating within different social classes inside the prison; and, 2) Negotiating a compromise for a better quality of life in prison. Both approaches echo many of the dynamics discussed under the 'adoption and importation' phenomenon discussed in (Sykes, 1958; Western and Sykes, 2020).

8.5.1 Andiwali as a coping mechanism

Andiwali is a specific type of friendship between prisoners who have similar economic, social, and educational backgrounds and similar character traits, which when put together create a bond between them. Individuals who are part of *Andiwali* are referred to as *Andiwals*, and they possess equal rights and equal social status.¹⁶ The group often stays united around the values that brought them together. During times of need, they share resources such as money and food, and protect and watch each other's backs. In addition to sharing resources and offering support to each other in combating all sorts of prison issues, the network members also assist each other with social and personal issues, such as family problems, outside the confines of the prison. Thus, the *Andiwali* network is well-established and it functions as a safety net for all its members, who depend on it as if it were their family.

Membership of an *Andiwali* is not automatic, and it requires a great deal of effort; new potential members can even be subjected to life-threatening tests. For this reason, certain prisoners always remain outside *Andiwali* circles: mentally ill people, drug addicts, and those who are economically disadvantaged. The latter category is not entirely excluded, and if they happen to be part of an *Andiwali*, as a result of qualities such as honesty and education, they are generally regarded as suitable candidates to hire for cleaning, cooking, laundering, etc. The group members would, in return, pay them a minimum wage, with which they can buy food and other supplies to help them survive in prison.

8.5.2 Corruption and prison system faults as coping mechanisms

The second coping mechanism prisoners have is the result of prevalent corruption and complex weaknesses within the prison system and its management. Certain groups of prisoners have the opportunity to negotiate better prison conditions and the system reaches a compromise with them. Although every prisoner would like to live in the best facilities available, this is only possible for a limited number of idiosyncratic prisoners who can prove their worth to top management. One of the reasons that prison management is an attractive career option for individuals already engaged in corrupt activities is that the negotiations necessary for this process to happen involve levels of give and take that are rarely seen in most state institutions, and thus need to have been honed elsewhere.

16 Although all members have equal social status within the group, one member is usually seen as the group's leader and representative. The representative of the group typically has some charisma, or is an elder in the group, and is considered to be more knowledgeable, productive, and respected. The leader of the group is usually the person who originally promoted it.

In Pul-e-charkhi, two main categories of prisoner find their way to an unfettered lifestyle: the economically well-off; and those associated with powerful political and criminal networks. Both categories use certain channels to reach decision makers within the prison, and to negotiate things they desire within the prison, including better living conditions. Both categories of prisoner are also supported by influential figures from outside the prison, so they usually achieve better prison conditions, one way or another. Nevertheless, such conditions can be difficult to retain over an extended period of time; therefore, ongoing agreements need to be established.

Various deals, such as the provision of services on-site, may involve enrolment in official prison programmes, and access to mobile telephones, food, drugs, and the like. As a general rule, as long as the prisoner purchases these services, they can enjoy all the other benefits, as if they were living in a guesthouse. Therefore, rich prisoners have greater opportunity to stay in better accommodation for a longer time. For example, the owner of the old Kabul Bank and a few other businessmen have rooms that are equipped with air conditioning, and they can choose who lives with them, what to eat, and when to eat.

Many high-ranking government officials imprisoned for corruption (such as former Afghan Central Bank officials) are also considered members of the 'rich' prison population. Although I did not see any specific examples during my observations, many prisoners asserted that the wealthy could arrange virtually anything to be brought in from outside, citing a long list including things like alcohol, drugs, and sex workers, all of which are strictly prohibited outside of the prison. This was also confirmed by prison officials, who stated that they had witnessed many such examples of illegal procurement; they had attempted to stop it, but the process seemed never ending and they did not know who was behind it all.

Political strongmen also tend to enjoy a similarly favourable position, due to their disobedience and violent conduct in prison. These prisoners include, for instance, members of the Taliban and prison gangs, and some members of the drugs mafia.¹⁷ In contrast with the wealthy, they do not enjoy the same freedoms, but they do have certain other rights and privileges. For example, due to their high social capital within the prison, the Taliban typically impose their own rules within the confines of their cells and sometimes even within whole wings (where they are housed).

They even punish or reward other prisoners according to their own set of rules. With their access to self-made weapons (or weapon-like equip-

17 Whilst this is not a predominant phenomenon, individuals and networks of prisoners operate organised crime within Pul-e-charkhi. Despite having no corporate identity (as such), they function in perpetuity as drug dealers, extortionists, and leaders of terrorism and other crimes. For instance, quite a few of the National Security prisoners have been suspected of leading terrorist operations from within the prison. It is also believed that some of the drug mafia imprisoned in Pul-e-charkhi led their enterprises from inside, which meant they had more resources and became more bossy and powerful than the majority of ordinary prisoners.

ment) and a somewhat considerable influence over other prisoners, the Taliban is capable of introducing new routines and rituals that allow them to remain relevant in the prison context.¹⁸ For example, whenever there is an official event in the prison the Taliban's flag and banner are displayed, instead of the officially recognised flag of the Islamic Republic of Afghanistan. Search operations rarely visit the Taliban's quarters, hence the prison police avoid regularly visiting them for checks and controls. When prison police do attempt to carry out checks and controls, they often encounter resistance from prisoners and are subjected to disturbance. As a result of their unity of command and adherence to the same values, the Taliban often cause prison riots.¹⁹

8.6 A COMPARATIVE OBSERVATION FROM BALKH PRISON

The available statistics echo the existence of three categories of inmate in Balkh prison. The categories include: general criminals, drug trafficking criminals, and national security criminals. However, unlike Pul-e-charkhi, where the majority of prisoners belong to the national security group, at Balkh prison about 95% of prisoners belong in the general criminals' category. Thus, it can be assumed that almost all the Balkh inmates have been arrested and prosecuted in compliance with regular court procedures. In the context of the overall national prison population, Balkh hosts about 6% of prisoners. Similarly, the population of Balkh accounts for 4% of overall general criminals, and less than 1% of overall national security prisoners.

The prison has an industrial department, which was used in the past to operate vocational programmes such as tailoring and carpet making. However, at the time of the fieldwork the only production-oriented activity was beading and tailoring, which kept only a small number of prisoners busy. These activities were very small-scale, and could not promise any considerable financial benefit for the prisoners. The only benefit it could have was to keep them busy and prevent them from engaging with each other negatively whilst serving their sentences.

18 See BBC News, *The prison staffed by inmates released by the Taliban* (Mashal Afghan News, 2021).

19 For example, National Security inmates connected with the Taliban initiated a serious hunger strike in August 2018. The strike claimed prisoner rights to pardon decrees. It lasted for ten days and had over 4,000 participants. It escalated in its final days, involving several inmate and prison administration deaths and casualties. It finally came to an end when National Assembly members and some other politicians got involved. Inmates who have been imprisoned for national security crimes, corruption, and violence against women are generally excluded from pardon decrees. There were two exceptions to this rule in the 20-year history of Pul-e-charkhi, including the peace deal with Hizb-e-Islami of Hekmatyar in 2018, and the peace deal between the US and the Taliban in 2021. The latter resulted in 5,500 Taliban prisoners being freed. In all other cases, National Security inmates have never been given access to pardon decrees.

Although the northern provinces of Afghanistan are famous for their carpets, this specific project failed, because of the allegedly corrupt practices at the GDPDC. The project was reportedly provided with poor quality material, which resulted in bad quality products, and nobody wanted to buy them. As a result, prisoners who had worked day and night to produce them were not paid for their work and the project was closed down. From that point onwards, the daily programmes at Balkh prison were limited to school, literacy courses, language and computer classes, and a few Islamic education sessions (i.e. Madrasa).

However, none of these programmes had a fixed daily plan or predetermined schedule. In addition, none of the prisoners interviewed listed the prison education programme as their favorite activity. This is perhaps due to the fact that programmes like school and literacy have very poor content and teachers, that classes are not conducted regularly, and that there are limited measures in place to promote and encourage participation in either of the activities. To this end, most of the school-age prisoners, as well as those in need of literacy courses, are generally engaged in playing chess or 'carom board', which were the most favored activities for (43%) and (26%) of the prisoners interviewed.

Other activities for the prisoners included simply hanging out with other inmates in the prison yard, or engaging in activities such as beading, watching TV, and doing sports. Unlike Pul-e-charkhi, self-employment opportunities, such as working for the economically well-off, laundering, and barbering, are not common at Balkh prison. Many prisoners in Balkh believed that helping others for money was unethical, and contrary to their local values. Many prisoners reported that if someone needs help inside the prison, almost every other capable prisoner would volunteer to help them.

8.7 CONCLUSION

Engaging in morally or materially beneficial activities would be a natural, rational choice for almost all the prisoners. Indeed, the two prison-based rehabilitation programmes offered in Pul-e-charkhi were of genuine interest to the vast majority of prisoners. However, since the programmes do not have a proper underlying design, in almost every respect, they follow poor copies of international standards. This culminated in confusion about the programmes' objectives and, consequently, poor performance in terms of their rehabilitative function.

In recent years, prisoners' access to the programmes, as well as the programmes' quality and (in some cases) reach have been the source of significant problems. Additionally, implementation of the two programmes has been hindered by inadequate human capacity, insufficient financial resources, poor leadership and institutional coordination, and widespread corruption. Thus, it is hard to see the programmes as serious prison-based interventions, because they rarely address the needs of their target groups.

As a matter of fact, prison authorities often bend the programmes to suit their own personal and group interests, or to financially benefit the prison institution.

There is also a mismatch between the majority of the prison population in Pul-e-charkhi and the idea of rehabilitation as a universal prison legal mandate. For instance, the official school and the industrial programmes, albeit not well situated, aim to address implementation of the prison's legal mandate for rehabilitation, but the prison is packed with National Security, drug trafficking, drug addicted, and mentally ill prisoners. These categories do not qualify for any of the programmes, either on the basis of 'prisoners' amenability criteria', or through any other logical frameworks. They therefore require a more specific type of intervention, such as those of *Mahmood Al-hitar*, and others (see 5.2 above).

Therefore and in view of the two programmes offered at Pul-e-charkhi, it is difficult to assert that the prison is inclined to carry out its legal obligations and address the rehabilitation needs of all its prisoners. This is because the programmes have an empty design, there is a mismatch between mandate and programme outputs, and there are flaws in defining the education and industrial programmes as the ultimate goal for implementing the prison's legal mandate. The programmes not only fail to include most of the ordinary prisoners, they also overlook everyone in the majority National Security group.

With this in mind, a thoughtful observer might wonder how the prisoners actually spend their time in Pul-e-charkhi, and whether there is anything available that would help them desist from committing further crimes. This can be answered in part by looking at the social constructs and life within the prison, as well as the broader social context. The latter is discussed before (see 8.2 above), but regarding the former, it is clear that money, political connections, and Andiwali are the three mainstream methods of coping with prison life.

The concept of Andiwali and the bonds that result from it are likely to have lasting effects on the prisoner, and those effects might continue well beyond their prison term, although it is important to emphasise that this can go in either a positive or negative direction, depending on the Andiwali circle that a prisoner joins. For example, individuals associated with a more politically oriented stream are more likely to adopt its values, others might become brainwashed by fundamentalists if they join such Andiwali groups, and still others who join an Andiwali group living in poor prison conditions later suffer from the addictions and diseases that are rife in such environments.

As far as Balkh prison is concerned, although it operates within an infrastructure that hardly qualifies as a prison, it still functions as the prison of an important city in Afghanistan, hosting over 800 prisoners (including 75 female prisoners and their children). The prison operates only nominal prison-based rehabilitation programmes, which in no way come close to the programmes applied at Pul-e-charkhi (even though the latter also does

not operate any standardised rehabilitation programmes). Yet, prisoners in Balkh live in a friendly environment and hang out with each other. There are only very limited records of prison fights or violent behaviour at Balkh, and the chance of such incidences occurring was reportedly very slight.

9.1 INTRODUCTION

This is not an optimistic dissertation. In the preceding chapters, I have emphasised that enormous challenges have been involved in the processes of state-building, lawmaking, criminal justice, and prison management, across Afghanistan's history. The country has faced complex domestic, regional, and international dynamics, which has led to several radical changes in state ideologies. As a result, constant adjustments have had to be made to individual state institutions, strategies, policies, laws, and regulations under the banner of reform leading to sustainability deficit in the governance system and structures. It is therefore not surprising that the post-2001 reform and state-building interventions have also been disappointing.

In spite of this, my dissertation is not entirely pessimistic, since it also argues that even when reform interventions have not been fully successful and there have been substantial challenges, modest progress has been achieved in some areas, generally leading to a better position than would have been the case without intervention. When I say modest progress, I do mean slight, although sometimes significant improvements are reported within the three storylines discussed in this work. During the Bonn and the Post-Bonn processes, two elected presidents and four parliaments (National Assembly) enacted numerous laws. An independent judiciary was re-established under the leadership of the Supreme Court, and due process was formally incorporated into the criminal justice system through the establishment of an AGO and an AIBA. Prisons began to function under the broad scheme of a criminal justice system, and have since been in consistently better condition than in the era preceding 2001, particularly compared to conditions under the Mujahidin and Taliban governments (see 2.8 above).

A number of key findings and conclusions can be drawn around the fundamental research problem debated in this work, but a direct answer to the main research question can be elaborated on more easily by exploring two aspects: *how the prisons' legal mandate emerged, and how the mandate was implemented*. Whilst each of the two aspects must be carefully assessed against the backdrop of broader historical and contextual factors, as well as a specific institutional analysis of Pul-e-charkhi, for convenience, a shorter answer can also be provided.

The Afghan prison system's relative disparity dates back to its ancient history as an oppressive place that rulers could exploit as they wished. After 1880, prison institutions emerged as part of the Afghan criminal

justice system, although prisons were still oppressive, intimidating places, barely governed by law. After Afghanistan's war of independence in 1919, the legal framework for prisons, and thus their legal mandate, continuously expanded, whilst their practical use followed a convoluted and twisting pattern of development. The first Prisons and Detention Centres law was enacted in 1923, officially requiring the prison system to serve mainly as means of incapacitation. The legal mandate concerned was steadily maintained and implemented for over 60 years, including the decade of democracy (from 1964 to 1973), when efforts were made to upgrade prison conditions and infrastructure, and to make prisons more humane institutions, but the legal mandate for prisons never officially changed.

The prison system's legal mandate first experienced fundamental changes during the era of socialist legality (1978-1991), and again in the aftermath of 2001. During the earlier period, the prisons' official mandate was extended beyond mere incapacitation and, for the first time in the country's history, rehabilitation became an explicit part of the prisons' legal mandate. The expansion was due to the third Prison and Detention Centres law, which was passed in 1983 after a period of serious abuse and extra-judicial use of prisons. The latter period used a mixture of previous laws, intertwined with new concepts and human rights standards, including the UN minimum standards for the treatment of prisoners, as well as placing special emphasis on the rehabilitation of prisoners, social reintegration, and alternatives to imprisonment.

However, as the Pul-e-charkhi case study indicates, in spite of gradual expansion of the prison system's legal mandate and target population, prisons' practical attributes, including infrastructure, institutional capacity, resources, and the overall environment for implementing its legal mandate remain inadequate. In addition to institutional capacity and structural issues, the prisons are packed with national security prisoners, who are in a state of war with the government (outside of the prison) on the one hand, and who challenge or refuse to undergo prison-based programmes (inside the prison), including rehabilitation, on the other.

Likewise there is a large number of prisoners, such as those convicted due to judicial error (or the 'innocent prisoners'), who either do not qualify for any of the existing prison-based programmes, or do not need any such programmes in the first place. These prisoners generally have higher educational and vocational qualifications than are required for a prison-based rehabilitation programme. Additionally, they do not demonstrate serious behavioural problems, which would justify their placement in a prison-based treatment programme. Thus, the main concern of the prison has been to isolate the national security and innocent prisoners from the rest of the prison population, by keeping them in lock-up.

As a result of the above, it has been difficult for the prison system to fully implement its rehabilitation function, which was a significant part of its legal mandate. However, the incapacitation function, another element of the prison system's legal mandate, has been implemented relatively well.

9.2 EVOLUTION OF THE PRISON SYSTEM'S LEGAL MANDATE

An examination of Afghanistan's political history suggests that wars and instability, especially political ruptures and subsequent regime changes, have had the greatest impact on the criminal justice system and the evolution of prison institutions in general. The Ghaznavid Dynasty (977-1163 CE) created a criminal justice system that included prisons. Afterwards, Genghis (1219-1222) destroyed everything that had been built previously, including the criminal justice system and prison institutions developed by the Ghaznavids. Ahmad Shah Durani (1747-1840) rebuilt the criminal justice system, including prisons, as part of the overall state structure, and Abdulrahman (1880-1901) regulated the criminal justice system and utilised prison institutions extensively.

These are prominent examples of a resilient system of punishment, emerging not just from years of war, critical disorder and invasion, but also from the atrocities, abuse, and subjugation perpetrated by ruling governments in order to centralise their power. Abdulrahman used a harsh criminal justice system and horrific prison institutions as a central element of his strategy to claim and restore the state's monopoly on power. Many of his successors adopted a similarly aggressive (or slightly more modest) version of the same strategy, because although in theory they remembered Abdulrahman's time as particularly tyrannical, in practice they preferred to follow his approach. This was particularly evident in prison management during the PDP era, as well as during the Mujahideen, the Taliban regime, and the post-2001 international intervention and the War on Terror.

Prison institutions therefore have a long, deep-rooted history of serving as the primary instrument to suppress political opposition and assert state coercion, and they are often used to attempt to maintain control over the central government. In view of the close historical link between prison institutions and state power, oppression and mistreatment have become part of the prison system's genealogy, which has continued to manifest itself in various forms, more specifically, via the exchange of prison personnel and cadre.

A fundamental counter-measure, was the development of a legal framework for prisons, which not only regulated their use, but also specified their exact mandate. The legal mandate for the prison system was a fundamental cure, which emerged alongside the development of a legitimate state after 1919. It is safe to assert that the initial legal mandate for prisons dates back to the first Prisons and Detention Centres Law of 1923.¹ Apart from limiting the number of prisons to only one per province, and assigning prison personnel to help police and manage the prisons, this law introduced specific legal boundaries for prison institutions.

1 The first Prison and Detention Centres Law was called, *Nizam nama-e-tawqif khana ha wa mahboos khana ha*, 10th Mizan 1302 [3rd October 1923].

Prison functions were limited to the incarceration or confinement of criminals (e.g. incapacitation), and would only be provided as a punishment for those convicted in state courts.² In addition to defining the role of prison institutions and prohibiting their widespread arbitrary use, the same law gave initial indications of prison-based work and services, such as health and catering.³ These were not connected with concepts such as the education and rehabilitation of prisoners, and neither of these were mentioned in the law. It is therefore clear that the only official objective of both imprisonment and the system's fundamental legal mandate was incapacitation.

The second Prisons and Detention Centres Law was passed almost 30 years later, in 1950. The law was an almost identical copy of its predecessor, hence the legal mandate for prisons also remained unchanged.⁴ Later, by virtue of a 1971 secondary regulation, the Central Board of Prisons was created as the first joint management body for the coordination of prison affairs.⁵ This resulted in some specialised prison-based programmes, such as health, education, work, and vocational trainings, which were jointly mandated to the prison administration and other state institutions.

Due in part to changes in the overall state-building process during the golden era (from 1964 to 1973), the Central Board of Prisons brought together relevant state agencies and served as a coordination platform for prison management and services. By delegating specialised prison services to state institutions, the board not only reduced the burden on national prison administration, it also allowed for more fundamental steps to be taken towards upgrading the prison system's infrastructure, including constructing new prisons such as Pul-e-charkhi (see 2.5 above).

The biggest step in defining the legal mandate for prisons was taken under the PDP, in the third Prisons and Detention Centres Law, passed in 1983.⁶ The law encompasses both incapacitation and rehabilitation as legal mandates for the prison system, and it is twice as long and detailed as the previous laws (72 articles, as opposed to 27). The fourth Prisons and Detention Centres Law was passed during the Taliban era, in 1999, and it was an exact copy of the prison law passed during the PDP era.⁷

The next time the prison system's legal mandate fundamentally changed was when state-building efforts after the 2001 international interventions had repercussions for law-making and criminal justice. The

2 See rule number 10 of the 1923 law.

3 See rule number 18 of the 1923 Food and Medical Services Law, and rule number 22 on compulsory work during incarceration.

4 The second Prison and Detention Centres Law was called *Usool nama-e-tawqif khana ha wa mahboos khana ha*, 16th of Jadi 1329 [6th January 1951].

5 The bylaw was called *Muqarara-e-tanzim wazaif bord markazi mahbis Afghanistan*, 31st of Hamal 1350 [30th April 1971].

6 The third Prisons and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 15th of Jadi 1361 [6th January 1983].

7 The fourth Prisons and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 20th of Jamadi alawal 1421 [20th August 2000].

change was introduced alongside the fourth Prisons and Detention Centres Law, decreed in 2005 and adopted by the National Assembly in 2007 (see 4.3.5 above). The new law further broadened the scope of the legal mandate for the prison system, by incorporating a mix of previous laws and modern criminal justice concepts, including the UN minimum standards for the treatment of prisoners. Although initially the law was silent about rehabilitation as a direct legal mandate of the prison system, the concept was reinserted via a modification made by the National Assembly's Upper House.⁸

In summary, throughout the almost 60 years following the enactment of the first Prisons and Detention Centres Law, similar legal arrangements were used consistently, and the prison's legal mandate did not change. The prison's mandate remained unchanged even during the golden era (from 1964 to 1973), when reforms flourished across all other sectors. In contrast, the two most significant changes in the legal mandate for prisons took much less time to emerge, and both occurred during periods when foreign influence and intervention were the most prominent factors.

The fluctuation of the legal mandate suggests that prisons were especially relevant and attractive during times of foreign intervention. Paradoxically, at times when prison institutions (particularly Pul-e-charkhi) were experiencing some of their most notorious conditions, their legal mandate was in its ideal form in terms of prison conditions, prisoners' rights, and state duties and responsibilities for prisoners' wellbeing.

9.3 IMPLEMENTATION OF THE PRISON SYSTEM'S LEGAL MANDATE

As discussed earlier, the prison systems' legal mandate has two aspects: incapacitation and rehabilitation. This research focussed mainly on the rehabilitation aspect, and I examined understanding of rehabilitation at three levels: legislators, general criminal justice actors, and prison administrators. This revealed some fundamental issues with the concept and practice of rehabilitation across the prison system, and particularly in Pul-e-charkhi:

First, legal drafters at the MoJ acknowledged that international blueprints were used to mandate prisons with modern criminal justice concepts, such as rehabilitation, although it was understood that it was not possible to

8 As discussed before, it seemed strange that two international consultants working for the UNODC did not include rehabilitation as an objective of imprisonment, but I have not been able to trace them to ask why they did so. One can assume that the consultants were aware of the broader justice reform strategy and that the criminal justice system had to support certain functions of the War on Terror. Presumably a prison system serving the interests of incapacitation, rather than rehabilitation, would be most effective in those situations. Moreover, understanding the consultant's perspective on the ground and the probability that rehabilitation would be a far-fetched dream for the prison system, was probably also important during the decision making process to leave out rehabilitation as an objective of imprisonment.

achieve, in practice. Second, domestic actors considered *Kar-e-Sharafatmand* as the most relevant type of rehabilitation for Afghan prisons, hence they did not fully embrace anything beyond that concept.⁹ Third, almost all the modern concepts, ideas, and standards of rehabilitation that were adopted in laws, regulations, and lower statutory documents remained somewhat alien to prison institutions, hence they were technically challenging, difficult to apply, and lacking in financial rationality.

The real life implication of these shortcomings are two rehabilitation programmes (education and vocational training, in the case of Pul-e-charkhi), which are not akin to any standard rehabilitation practices. There was a particularly significant mismatch with the Something Works framework and the treatment amenability criteria, which both call for a differential intervention and treatment amenability perspective. Both programmes failed to clearly and concisely address the four key principles of the Something Works framework (e.g. risk, need, responsivity, and integrity).

In addition to lacking 'responsivity', the two prison-based rehabilitation programmes did not meet the 'need' and 'integrity' principles for most prisoners. The programmes' downside was most evident for National Security prisoners, who were the highest risk group at Pul-e-charkhi. For example, based on the 'need' and 'responsivity' principles, prisoners in the National Security category required programmes targetting issues related to fundamentalism, but such programmes were not being offered at the prison. If assessed against the institution-building framework, the two rehabilitation programmes also had issues with the 'integrity' principle, because they lacked an organised and systemic institutional arrangement, resources, and financial enablers.

The two programmes also suffered from what I would like to term as 'decidedly poor leadership'. Prisoners' access to the programmes was also problematic, due to lack of capacity, as well as restrictive security measures and power politics between state agencies, leading to poor programme delivery. Thus, the rehabilitation programmes in Pul-e-charkhi illustrate how, seemingly, mandating the prison system with rehabilitation and incapacitation as the underlying objectives of a prison sentence was an unrealistic expectation, given the prison's condition and level of development. The mandate was perhaps merely a legal facade for exploitation of the prison system as a means of state coercion.

This is testimony to the fact that laws loosely connected with social needs and realities are less likely either to succeed or to change the target institutions (Seidman and Seidman, 1994; Seidman, Seidman and Abeysekere, 2001). On the other hand, a broader review of the Afghan prison system throughout its history suggests that, even though the legal mandate for prisons has continually expanded, it has had hardly any influence on prison practice. Thus, one can assert that, like most other countries across

9 The term *Kaar-e-Sharafatmand* literally means 'constructive and honorable work'. It is a localised version of what sociological theories call 'protestant ethics' (Weber and Parsons, 2003).

the world (particularly south and central Asian countries), the incapacitation function of the prison outweighs its rehabilitation objective. A pronounced imbalance toward incapacitation could be observed, however, in the case of Afghanistan and Pul-e-charkhi. This has been due to the wide gap between the prison systems' ability and the function of rehabilitation as a prison-based intervention.

In conclusion, the prison-based rehabilitation in Pul-e-charkhi is hindered by several shortcomings. Addressing these shortcomings will require increased funding and resources, better coordination and collaboration between different organizations, and a more comprehensive approach that addresses the underlying causes of criminal behavior. With that in mind, if incapacitation was not another objective of imprisonment, Pul-e-charkhi, with its poor rehabilitation function, would have been deemed a obvious failure.

9.4 STATE-BUILDING EFFORTS AND THEIR IMPACT ON LAWMAKING AND CRIMINAL JUSTICE

9.4.1 State-building

My main research question refers to the context of state-building and its impact on lawmaking and criminal justice, which is crucial to understanding how the legal mandate for the Afghan prison system developed. Afghanistan's history is not just a story of interrupted state-building processes and disturbed development patterns, over a long period of time. The country also assumed the characteristics of a rentier state, due to foreign interventions, subsidies, and an influx of external financing, which were more intense during some periods than others, but were always connected to conditions prejudicial to the state-building process in general.

For example, during the nineteenth century the British exerted influence over Afghanistan's international affairs and used the country as a buffer state against the expansion of the Russian Empire. Likewise, the Soviet Union and the United States gave considerable aid to Afghanistan in lieu of their Cold War strategies. Later, as a result of the Soviet occupation of Afghanistan in 1978, large amounts of materials and substantial financial support were provided both to the state and to its opponents, making Afghanistan one of the world's largest recipients of development assistance. This meant that the country's rulers did not have to mobilise domestic revenue, make plans, or worry about covering their own expenditure or that required to run vital sectors.

Consequently, the country became a rentier state and was left with a set of weak institutions that were incapable of performing their basic functions. Layers of socio-political differences and domestic 'blocks' had also emerged, due to national and regional power politics. Later, political parties and opposing groups were shaped by ideologies ranging from constitution-

alist liberal democracies and socialism, to communism at one extreme and Islamist radicalism at the other. As a result, ambitious reforms and efforts towards social change almost always met with resistance and confrontation, regardless of their direction.

For example, King Amanullah's attempt to impose social reforms in 1919 met with fierce opposition, resulting in his removal from power. Likewise, the (communist-oriented) PDP's reforms in the 1970s met with violent opposition, resulting in long-lasting unrest. With these background matters in mind, it is vital to note that tensions between 'historical blocks', and amongst domestic groups and individuals, have all had significant impact on the reversal of state-building processes, which has ultimately led to ruptures, turmoil, and civil wars.

On the basis of a relatively brief part of the country's history, another important conclusion can be drawn about its political leadership. Experiences from the 'golden days' / democracy decade (1964 to 1973) suggest that, along with gradual movement towards self-reliance, modest political liberalisation manifested in the form of a new constitution and parliament. Whilst the physical reach of the state was limited, especially in the countryside, its authority and legitimacy were widely acknowledged and accepted. The state was therefore able to provide workable arrangements to meet the basic needs of its citizens. This suggests that gradual and calculated changes were not only acceptable, but desirable and welcome.

This period of the country's history reveals one important lesson, in terms of the significance of effective national leadership when dealing with internal and external issues and dynamics. By national leadership, I mean not only a king or president, but also a broader group of actors, including key officials, state apparatus, political parties, civil society, and elders, as argued in Hyden (1999). This kind of leadership is illustrated by experiences from the 1950s to early 1970s, when the collaboration of various state institutions led the country towards gradual modernisation and development, in spite of the regional and international dynamics which had existed previously and persisted beyond that period.

The next important lesson relates to the quality and strength of state institutions. Although the institutional capacity perspective (discussed in Chapter 1) has been criticised as a concept, because it is based on a purely Weberian hypothesis, which is not a perfect fit for developing countries, the history of Afghanistan demonstrates that having strong state (not necessarily Weberian) institutions is a pre-condition for stable state-building processes in developing countries. The weak and incapable institutional landscape of post-2001 international intervention (discussed in Chapter 3) is testimony to the fact that the relevance of strong institutions is not just a historical matter; it has also been relevant recently, and will remain so in the foreseeable future.

Concerning post-2001 international intervention, it is important to note that in the aftermath of the Taliban almost all state institutions were exhausted, and professional leadership had diminished under decades of conflict. The UN adopted an 'international light footprint' approach,

resulting in the relevant UN agencies stepping back from deep, meaningful, institutional-level engagement. Consequently, reform interventions became donor-driven, were planned with minimal checking and balancing measures, and had conflicting development agendas that were often influenced by the interests of individual donors (Banakar and Travers, 2005)

It soon became a trend for all donors to impose temporary institutions and project implementation units across all sectors of reform, perhaps inspired by the 'commission modality' provided in the Bonn Agreement. This modality not only prevented the natural development of domestic institutions, it also widened the gap between domestic actors and the idea of overall reform. Many of these aspects therefore faced issues relating to their compatibility with the social and institutional conditions in Afghanistan.

As for the main consequences of the post-2001 international intervention, although it resulted in some progress for state-building endeavours at the beginning, the persistence of certain strategies (such as engaging questionable domestic actors and a lack of coherence in international development policies) overshadowed such progress. One serious problem was that post-2001 international intervention was intended not only to promote democracy and improve state institutions, but also to placate warring factions by integrating them into political processes.

Whilst the Taliban was already excluded as one such warring faction, other opposing groups were integrated on the assumption of political reconciliation, due to international consultants' evident lack of knowledge about the struggle between domestic actors and 'historical blocks', and due to flawed processes that were unable to maintain a balance between the technical and political dimensions of reform. Consequently, many reform efforts, including the constitution making and judicial reform processes, were marked by harsh power struggles between different groups.

In early post-2001 the struggle was evident amongst formerly warring factions, consisting of powerful warlords and Islamists, as well as newly emerging liberal leaders and western-oriented technocrats. As part of international coalition efforts to overthrow the Taliban, the former group possessed some leverage, which was reinforced by a sense of coercion, as they were also powerful enough to undermine stability. The latter group, by contrast, was driven by extensive support and demands from international partners for reforms that rarely corresponded to the reality of the situation in Afghanistan.

Many of the reform steps in the Bonn Process – including the ELJ, the Transitional Authority, the CLJ, presidential and parliamentary elections, as well as technical institutions, such as the Constitutional and JRC – were used or manipulated by the international community, to legitimise infamous groups and individuals who espoused a flawed rhetoric of political inclusion. This resulted in including potential spoilers in state structures. In turn, this led to marginalisation of the rule of law, notably in the areas of security, criminal justice, and particularly transitional justice (Giustozzi and Isaqzadeh, 2011; SIGAR, 2022).

9.4.2 Lawmaking

The lawmaking effort and overhaul following 2001 did not start from scratch. There was a much neglected legacy of lawmaking and reform that was particularly rich and consistent during the golden era. That period of consistency, development, and euphoria was followed by long-lasting instability, war, and distraction (1978 to 2001). In the aftermath of the Taliban's departure from power in 2001, almost all the state institutions crumbled, and the quality of state leadership weakened dramatically; these were partially rebuilt after 2001, but the rebuilding process and results were associated with many problems. Therefore, it is safe to claim that only modest progress was made.

Most of the post-2001 law reform was far from well-informed and logical, and the way in which criminal justice laws were affected by the reform process reminds us of that. Many of the reform institutions were temporary in nature, and had unclear or disputed goals. Also, multiple participants, different identities, and conflicting interests were all involved in the law-making processes. Intervention was primarily focussed on introducing the rule of law on the bases of international blueprints, rather than on analysing how existing frameworks could be modified or adopted, and this created confusion.

Many of the interventions also ignored the perceptions of domestic actors. As a result, reform efforts advanced along one track, whilst domestic practices advanced along another. In the area of criminal justice (for example), wide disparity between the perceptions of domestic actors and the provisions of laws regarding rehabilitation led to a huge difference between the law and the reality of the prison system.¹⁰ However, it is important to note that different periods of post-2001 reform had different features and characteristics.

During the Bonn Process (2001-2005) lawmaking was heavily influenced by donors and international experts, and this gradually deviated towards the specific developmental goals of donors and the bilateralisation of reform activities, as soon as the 'lead donor approach' was adopted. Examples of legislative products from this period include the supply-driven Interim Criminal Procedure Code 2004, adopted by the IJPO, and in the decreed Prison and Detention Centres Law 2005. During the Post-Bonn Process,

10 I have used the term 'domestic actors' quite a few times, and at this point it helps to elaborate on the different types of domestic actors. One main group of domestic actors worked as government employees in the relevant field (for example, the national prison administration), and another group of domestic actors were hired by relevant development projects. These actors were considered project staff, rather than government employees. Yet another group of domestic actors did not consider themselves part of either of the above two groups, and were either employed by private consulting firms or hired/contracted by donors for short-term consultancy. The first group was the most prominent, and tended to choose a different path when they felt alienated or suppressed by internationally funded reform initiatives.

however, there was an increasing tendency to engage domestic actors. Meanwhile, draft laws followed a more normal lawmaking process. Amongst the most relevant legislative products of this period are the Criminal Procedure Code (2014) and the Penal Code (2017).

After 2014, legislative processes witnessed more engagement from domestic actors, but donors became less responsive to the development needs of individual state institutions. As a result, lawmaking gradually lapsed back into 'benchmarking' and project-oriented laws, in order to attract donor money (see 3.3.6 above).¹¹ Although this approach to lawmaking had existed from the outset (since 2001), it was more prevalent after 2014, and it produced some of the worst quality laws, particularly in terms of counter-corruption and procurement, because the reform interventions in particular did not connect with social needs, aiming instead at a flow of funds.

One general finding from this study suggests that benchmarking and project laws profoundly challenged the authority of domestic actors working in the lawmaking domain, leading to institutional paralysis. Domestic actors refrained from serious participation, as well as from thorough analysis and debate during the drafting processes, because they were convinced that drafts associated with the donor agenda or backed by certain projects would be approved in one way or another, no matter how useful they were. Thus, in many cases the technical details of the laws were overlooked, as there was no will or chance for domestic actors to discuss them.

Legislative proposals, initiated directly or indirectly by donors and projects, used to be monitored by national and international consultants, who were involved from the drafting of the law up until the approval process. Domestic actors who were part of permanent institutions, such as the MoJ or other state agencies, tended either to avoid debating in front of the consultants or to debate solely for the purpose of completing formalities, rather than for the purpose of calculating the expediency of ideas proposed.

Another tricky aspect of reform was the excessive use of legislative decrees. This was unavoidable during the Bonn Process, because fast track changes were required in almost all walks of life and the system lacked an active legislature to oversee the function of lawmaking. However, after the National Assembly began its work in 2005, legislative decrees did not have much room, and had to stop in the interests of drafting more careful and calculated legislation. Nonetheless, enforcing laws via decrees was still a predominant approach, particularly in the area of criminal justice, in which

11 Traditionally, benchmarking was used by the MoF to describe the agreement it had made with donors to complete certain tasks, which was a condition for the flow of funds to the national treasury. The benchmarking conditions might include a range of activities, such as improving livelihoods, combating corruption, increasing the number of children admitted to school, and enacting legislation. If the passing of a law was a condition for releasing funds, the MoJ would refer to that law as a 'benchmark', superseding almost any procedural limitations, including the legislative plan.

all the relevant legislation was decreed and enacted before the National Assembly adopted it, usually without making many substantive changes.

To this end, a few issues were common to almost all the stages of the reform, including an overcrowded landscape of actors, the existing legal frameworks being ignored, employing temporary institutions to work on reform processes, the marginalization of permanent institutions, a lack of public consultation, using shortcuts to pass laws such as legislative decrees, and forcing donor conditions via a variety of funding conditionalities, particularly benchmarking agreements.

When looking at the situation from a conceptual perspective, the closest theoretical framework that can explain what happened during the post-2001 law reform process is the 'Garbage Can' model for decision making, proposed in (Cohen, March and Olsen, 1972). The model basically provides a framework for understanding the decision-making process in the absence of a rational, informed and structured approach, which leaves room for decision making based on constant, accidental and arbitrary interaction between semi-independent choice opportunities, and internal and external problems, solutions and participants.

This seems to have been the case for most criminal justice legislation affected by the post-2001 reforms. Thus, it is not surprising that many legislative products did not have the capability to elevate criminal justice and state-building as a whole. Sometimes, conflicts with institutions such as prisons were even created, because of a wide gap between the domestic notion of justice and that of the ideal situation provided in the legislation. As Riggs (1964) argued, under the concept he referred to as 'formalism', a wide gap between prescribed norms and effective practice has been a key feature of developing countries, in general. One could argue that Afghanistan is an extreme example of such a gap.

It is worth reiterating that these issues were only partly due to international intervention post-2001. The intra-Afghan dynamics, and the relationship between state elites and society, as well as various social groups, also played an important role. In almost all the historical periods discussed in this work, reform interventions encountered serious opposition, to the extent that they have challenged government institutions, exacerbated the situation, and challenged the stability of the state.

There are, however, two lessons to be learned from this history (e.g. from the golden era): i) gradual and calculated change under unifying and broad-based domestic leadership is most likely to result in a higher degree of success; and, ii) reasonably strong state institutions are necessary to ensure sustainable progress towards longer term development.

9.4.3 The criminal Justice system

During the Bonn Process (2001-2005) and the Post-Bonn Process (2006 and beyond), reforms resulted in a combination of success and failure. In the

two phases, a republic was founded on a constitution that guaranteed respect for citizens' civil rights and ensured separation of powers between the government, the legislature, and the judiciary. Two elected presidents and four elected parliaments enacted numerous laws, and a Supreme Court was reconstituted as the head of a constitutionally independent judiciary with over 2,000 judges.

In addition, due process was formally introduced into the criminal justice system via the restoration of the AGO, with nearly 5,000 prosecutors, and the emergence of a formally AIBA, with approximately 4,000 lawyers. Wardak (2016) argues that "the reform initiatives also include the administrative capacity development of justice institutions, equipping them with modern office facilities.... Moreover, many justice institutions have been refurbished and many more built from scratch" (2016, p. 7).

In the meantime, a series of relevant works rightly point out that an absence of a professional judicial cadre that is free from corruption and political bias, the lack of systemic cooperation between key justice institutions, and the lack of nationwide coverage of justice services, were all key deficiencies of the formal justice system (Wardak, 2004, 2011, 2016; Bassiouni *et al.*, 2007; Wardak, Saba and Kazem, 2007; Wardak and Braithwaite, 2013). The deficiencies contributed to several reform failures, including the inability to establish a stable political environment, to promote law and order, to build trust, and to eliminate corruption.

As a result, a culture of impunity has developed that, in turn, has led to industrial-level corruption and fraudulent political processes, resulting in most people losing faith in the formal justice system. The Taliban took advantage of those failures, even before their military takeover in 2021, by setting up parallel institutions, including a 'shadow judiciary'. Some authors have argued that, in addition to imposing harsh punishments, the Taliban's shadow judiciary also resolve civil disputes more quickly than an official court system (Baczko Adam, 2021).

Although criminal justice system issues and the failures of the expansive post-2001 reform could generally be explained in a number of ways, I would like to pinpoint two explanatory factors that in my experience were of great significance. First, as in most other conflict and post-conflict situations, Afghanistan was an example of a switch and swing poly-normative society, where Sharia, tradition, and statutory laws are mixed and rule together. The public engages in 'forum shopping', and it is open to accepting various norms, depending on their outcomes. For example, people are generally in favour of harsher punishments, if they fear for their safety and security.

This is understandably rooted in their own bad experiences of living through long-lasting war and insecurity, and the fact that people believe crime rates will drop if a harsher social reaction is applied. As a result, an informal justice system, particularly the Taliban's harsh and illegitimate shadow justice, is encouraged to compete with the official criminal justice system. In response, the official criminal justice system also becomes

increasingly punitive. The dilemmas of innocent prisoners, the punitiveness of the criminal justice system, and the increasing corruption and malpractice within the criminal justice system are all good examples of this, because they demonstrate not only a punitive tendency within the formal criminal justice system, but also that the system is weak and flexible enough to be manipulated for political ends.

This brings me to the second explanatory factor, which has to do with the main thrust and primary motive behind post-2001 reform and international intervention. As others have rightly mentioned, the primary goal of post-2001 international intervention was not the establishment of a complete state, particularly regarding the judiciary. The primary goal was defeating the Taliban and stopping the territory becoming a base of operations for future international terrorists. The international community, particularly the United States, began to place a high priority on state-building after 2006, when intervention was already advancing towards a chaotic outcome, but this was only a means of bringing an end to the ongoing Afghan conflict. Some authors claim that, “the dynamic was so exacerbated in Afghanistan that the U.S. strategy seemed to ping pong at times between war fighting, counterterrorism, security assistance, and retreat” (Woods and Yousif, 2021).

Due to fluctuations in the overall direction of reform, only specific aspects of the criminal justice system that were immediately necessary to achieve international strategies were strengthened. These primarily related to areas of the criminal justice system, such as the Heavy Crimes Unit, which dealt with issues relating to drug enforcement, anti-terrorism, and (nominally) anti-corruption. The rest of the system was left out of the scope, in order to address its internal conflicts, resource issues, and lack of legitimacy. Thus, it is safe to argue that the reforms qualify best for what is called ‘goal displacement’, resulting in the redirection of criminal justice resources to fight the War on Terror more than ordinary crimes.

9.5 PUL-E-CHARKHI

Pul-e-charkhi has chronic operational problems as an institution, despite having relatively better infrastructure compared to other prisons in the country. The prison inherited some of its core values from the previous Soviet Union system of governance. The socialist legality and beliefs about rights and responsibilities inspired the prison’s management and its treatment of prisoners. The values were enshrined so deeply within the prison that vague changes after consecutive political ruptures, including the country’s experience of an anti-communist orientation in 1990 to 2001, could not change them.

On the contrary, due in part to the political ruptures and regime changes, a convoluted pattern of values, institutional cultures, and management practices was injected into the prison. These contradictory values and institutional cultures, served in particular as strong deterrents to reform and

unification, with certain parts of the institution working to counteract others at every step towards reform. This was mainly due to tensions between the new ideas and old institutional values, which were retained by the cadre and personnel and had deep historical roots in opposing belief systems.

Furthermore, due to regime changes the prison management authority swapped between prisoners and prison guards a number of times. Almost always, the earlier group opposed the values of the latter, or at the very least had no good memories of them, and then ended up becoming the new prison authority instead. Due to this factor alone, previous prison reforms were reversed in a dramatic manner that had lasting impact on the prison infrastructure. For instance, the Mujahidin's use of the prison as a military base resulted in so much destruction of the prison infrastructure that it could hardly be recovered throughout the post-2001 reform period.

The post-2001 reform presented a unique opportunity for the prison system in general, and Pul-e-charkhi in particular. As a result of reform, the prison's infrastructure and resources moderately improved, and its contradictory values started to shrink gradually, in favour of liberal democratic values such as human rights and UN minimum standards for treatment of prisoners. The over-arching legal frameworks of prisons were revised and made more lenient towards modules adapted from western countries – more specifically, from Europe and the United States.

However, as is evident from the fieldwork data, the reform failed to address a wide gap in prison resources, particularly the technical, legal, and professional resources required for its programmes such as rehabilitation. As a result of poor leadership, the two rehabilitation programs that existed in Pul-e-charkhi suffered not only from structural issues, but also from lack of motivation, communication, and coordination problems. Traditionally, rehabilitation programmes have been led by patronage networks, rather than by merit-based recruitment, resulting in a lack of tangible programmatic support.

In addition, due to its minimal budgetary allowance, daily operation of the prison (including maintenance of its infrastructure) was difficult. The prison system has always been low priority for the government and for international donors. Thus, the institution's capacity is not only inappropriate for its programmatic needs (as discussed in Chapters 6, 7, and 8), it also has issues with almost all other aspects of its operation. For example, the prison has traditionally been loaded with as many as two or three times its capacity for prisoners. Thus, the prison's institutional capability, its resources, and its overall environment are all inadequate.

Despite being one of the biggest prisons in the region and ranking higher than all other prisons in the country, Pul-e-charkhi is unsatisfactory in so many aspects. The conditions of its living areas, kitchens, restrooms, and sports areas, and its running water and visitation arrangements are almost all poor. Due to pervasive corruption, both at domestic level and via internationally funded contracts, there is a long way to go before these issues can be fixed. For example, according to the donor reports, the

planned renovation of Pul-e-charkhi remains unfinished after five years, and almost all of the \$20.2 million contract value has been spent, due to flawed designs and corruption within the contracting agency and its private contractor(s) (SIGAR, 2014, p. 7).

Regarding prisoners, as has been stated above, those affiliated with the Taliban and anti-government militias are the largest group of prisoners in Pul-e-charkhi. During my fieldwork, it was noted that National Security prisoners often challenge prison-based programmes, either directly or by offering alternatives, such as offering a Madrasa instead of an official school. They are often the source of riots and strikes within the prison, because they tend to remain united, even when they are scattered across different blocks within the prison.

In addition, there are general criminals and drug trafficking groups who do not follow specific sets of values, but unlike the Taliban they do not oppose prison programmes. In this category, the only prisoners who have a significant role in the prison are the Bashees, who tend to influence not only prison conditions but also prison-based programmes. Although Bashees have generally been supportive of prisoners, there are many exceptions to this rule, especially when they come from a prison gang background. In the event that they reflect the latter affiliation, Bashees usually either support prison gangs or engage in other types of transaction, including with the prison guards that may benefit them and their close friends.

9.6 LESSONS FROM BALKH PRISON

A simple comparison between Balkh and Pul-e-charkhi points to a few differences that can be used as lessons for the prison system in Afghanistan. Pul-e-charkhi is a relatively standard and central prison, whilst Balkh is a second grade provincial prison in Afghanistan. The latter operates within an office building for traffic police, which is not even close to the standard of Pul-e-charkhi. Likewise, except for an official literacy programme, there are not many official prison-based rehabilitation programmes in Balkh. Nevertheless, prisoners in Balkh appear to be happier, healthier, and friendlier than those in Pul-e-charkhi.

The size and the security level of the prison does matter, and it is mainly due to its lower security level that prisoners in Balkh can walk freely inside the prison, spend extended hours in the open air, and hang out with other prisoners. The prison leadership has had a clear and significant impact. Due to the innovative and localised approaches of the prison leadership towards the prison routine, prisoners could receive visitors more frequently, choose to bring or cook their own food, and stay in touch with and help other prisoners, when necessary. Together, these factors have resulted in an environment so conducive to the rehabilitation of prisoners that, I believe, if there is a way to reform prisoners, it would be easier in a prison like Balkh than in a prison like Pul-e-charkhi.

10.1 INTRODUCTION

In this epilogue I will discuss two major changes, which occurred after I ended my field work in 2019.¹ During the first period, in the spring of 2020, the legal mandate was affected by an institutional overhaul and the shift of prisons' responsibility to a civilian institution. In the second period, in the summer of 2021, the legal mandate for prisons changed, along with the overall structure of the government and political regime, as the Taliban rose to power for the second time. Both periods had significant impacts on the prison system and its legal mandate, will be summarised below.

10.2 THE OFFICE OF PRISON ADMINISTRATION AND ITS CHALLENGES

Amidst a volatile political and security situation within the country, in November 2019 the Islamic Republic of Afghanistan's cabinet announced the need for a prison system that is "coordinated, rehabilitation-focussed, and managed by civilians". Following this announcement, the Prisons and Detention Centres Law was revised in a rush, and a presidential decree, issued in January 2020, confirmed the establishment of the Office of Prison Administration to replace the GDPDC.² In its founding decree, the office was tasked with taking any initiatives necessary for a thorough reform of the prison system, including revising lower legislation and proposing a five-year reform plan.

1 Although the majority of my fieldwork was conducted from 2017 to 2019, some changes were introduced to the prison system's overall structure in 2020, so I conducted additional interviews and observations of the prison-based programmes in 2020 as well.

2 Establishment of the Office of Prison Administration was proposed by the Cabinet's Legal Sub-committee through decision number 11, dated 17/10/1389 (7 January 2020) and was endorsed by Presidential Decree number 106, dated 25/10/1398 (15 January 2020).

Admittedly, the prison system had long sought reforms of this type, and they were actively advocated by the MoJ in 2012 (see 7.2.3 above). However, at that time a 'military first' approach was favoured, and the government did not pay attention to those proposals. In 2020, when the prison system was exposed to the influence of political factors around peace negotiations, and was arguably more robust, the 'military first' approach was no longer necessary, and the government opted to shift the prison system to a civilian administration.

In accordance with the new prison law, however, the Office of Prison Administration has been tasked with a broad mandate, including: provision of services such as catering, health, and education for all prisoners; development of new prisons and reform of existing ones; expansion of work opportunities within prisons; identification of beneficiaries for presidential pardon; implementation of pardon decrees; and taking care of any other business related to prisons and detention centres.³

In terms of its institutional structure, the Office of Prison Administration is composed of both military and civil service positions, and its workload is divided between civilian and military personnel. The office is headed by a Director General – a civilian position, directly appointed by the president. The Director General is supported by two deputies, one for general management, including policy formulation (a civilian position), and one for security management (a military position).

The civil service section of the prison administration consists of two first-grade and 46 second-grade senior management positions, assisted by over 2,000 support staff who are also civil service personnel.⁴ All the civil service employees must be hired through a meritocratic and open competition, based on the Civil Service Law (2018) and other relevant guidelines. In contrast, the military section has more than 7,000 guards and employees, approximately three times more than the civilian structure, and unlike their civilian counterparts they are not hired via a competitive process.⁵

From a technical and administrative perspective, the reformed structure of the Office of Prison Administration presents several institutional challenges, albeit after the culmination of years of reform and restructuring effort. For example, although the relevant cabinet decision calls for the establishment of a civilian prison administration, the reform simply followed the civilian leadership approach used by the ANP in early post-2001,

3 Article 11 of the Prisons and Detention Centres Law, Official Gazette number 1375, dated 28 Hamal 1399 (April 2020).

4 In accordance with the Civil Service Law there are basically six civil service grades. Grades 1 and 2 are management ranks, with 1 being the most senior.

5 In accordance with the Prisons and Detention Centres Law 2020, all military positions have to be filled by recruits from the Afghan Public Protection Force (APPF), which is essentially a state-owned security company. Prior to the establishment of the new Office of Prison Administration, all military recruits were drawn from the Police Academy of Afghanistan, or from other branches of the National Police.

According to the Afghan Public Protection Force Advisory Group and the APPF official website: “the APPF is a pay-for-service Afghan government security service provider underneath the MoI that protects people, infrastructure, facilities, construction projects and convoys. It is organized as a State Owned Enterprise (SOE) in order to be able to contract with domestic and international customers for security services. The APPF guards are not members of the ANA or Police and they have no mandate to investigate crimes or arrest suspects. The APPF was established in 2009 in order to allow Afghan Uniformed Police (AUP) to focus more on traditional law enforcement tasks. The APPF today has about 10,000 guards who provide security for international, government and non-governmental entities, sites and facilities.” (APPF, 2018)

and installed a mixed military and civil administration. The civilian leadership approach was a problematic solution then, and it was not adjusted, adequately defined, or regulated to match prison system requirements now.

One major negative consequence of this approach was the occurrence of several institutional level clashes between the two streams of managers. Whilst civilians were nominally in the lead, the military structure of the prison system was entrusted with more operational power, enhancing its responsibilities, strengths, and other features. As a result, an age-old and predominantly military environment was maintained across the prison system, resulting in furious administrative competition at all levels, but more visibly within the second and third tiers of bureaucracy, including in individual prisons such as Pul-e-charkhi, where military features and routines took over the institution, but fresh and less experienced civilians still claimed to be in charge.

In order to strengthen the position of civilian management, the Office of Prison Administration introduced a new stream of civilian managers across the prison system. These managers were authorised to exercise significant leadership roles in almost every aspect of prison management, including its internal and external relations. In addition, they had significant influence over the development of a five-year reform plan (with an estimated budget of 80 million dollars) and set of proposals for outsourcing certain prison services, including security management, education, and industrial programmes – a task assigned to the Office of Prison Administration in its founding decree.

These changes in the prison system's structure and personnel apparently did more harm than good, because most of the ideas and plans pushed by civilian management were highly ambitious and unrealistic. In some cases, exerting too much pressure and influence in order to centralise prison-related matters at the Office of Prison Administration resulted in animosity and resentment between the new administration and other institutions within government bureaucracy. As discussed in bureau-political theory (Tanner, 1995, 1999), this process would come naturally to the agencies which were having their authority curtailed during the revision process for the Prisons and Detention Centres Law, in 2020.

To that end, the new ideas and plans were not only abandoned (to remain on paper) due to a lack of cooperation from other state institutions, they also served as a reason for other institutions to dislike the new administration for cutting their ties to the prison system, and to refrain from engaging in prison-related initiatives (even by blocking them, where possible). The MoE, for example, took practical steps to sabotage the new administration's initiatives for independent implementation of its educational programmes.

As explained before, prison-based education has traditionally been part of the MoE's job, hence its staff and budget belonged to the ministry. Due to the revised Prisons and Detention Centres Law (2020), prison-based education had become an independent programme, directly managed by the

Office of Prison Administration. The MoE vigorously opposed this modification in the law, which it translated as an infringement of its authority and institutional structure. However, eventually the ministry agreed to make the prison school independent and gave away its staff and budget to the Office of Prison Administration.⁶

In return, the MoE decided not to recognise the prison school as an official state programme comparable to those overseen by the MoE. This move by the ministry posed a big challenge for the prison administration, because without accreditation the prison school provided no value beyond the prison walls. In addition, when accreditation became problematic, the prison administration started to face several other challenges, including a further lack of prisoner interest in the official educational programme. The prison administration also found it difficult to find resources, such as up-to-date syllabi, teaching curricula, and textbooks.⁷

In much the same way, a number of serious disagreements developed between the office and most of the other relevant government agencies (notably the court and prosecutors), which were linked to power politics and dynamics between state institutions and their individual struggles to expand their areas of control and authority; some of these chaotic situations are recorded in (UNAMA, 2019; AIHRC, 2021). In particular, tensions between the prosecutors and the Office of Prison Administration resulted in a disorderly situation, to the extent that they accused each other of large-scale misuse of authority and corruption.

As a result, the General Director of the Office of Prison Administration, who was appointed just months ago to fight corruption, is now a wanted man (by the judicial administration). He is charged with large-scale embezzlement, corruption, and the misuse of authority (Ansari Mashood, 1399). The most serious allegations against the director involve his receipt of a 34 million dollar bribe to facilitate the escape of Abdul Ahad, a famous criminal convicted of financial crimes connected to the Azizi bank (one of several private commercial banks in Afghanistan) case; the director of Pul-e-charkhi at the time was also accused of facilitating the escape.

In summary, due in part to the controversial nature of the reform and its inappropriate timing, as well as to leadership issues within the civilian administration of the system, post-2020 prison reform soon turned into a

6 The prison school had only one staff member, appointed by the MoE, and he was the principal, or 'headmaster', as they called it in the prison. According to the prison authorities, the headmaster did not go to Pul-e-charkhi regularly, and he did not provide technical assistance, guidance, or help with material support, including teaching materials.

7 The Office of Prison Administration also encountered difficulties in finding private sector partners, due to limited funding and procurement processes. Although, in late 2020, the office was able to partly resolve the problem, by inaugurating an official school in the female section of Pul-e-charkhi, I believe that fundamental recognition and accreditation issues were still in place. Thereby, the much-troubled prison school programme got into deeper difficulty, with both technical and operational aspects strengthening and contributing to each other's issues.

failure. This allowed political elites to become implicated in the large-scale misuse of authority, and paved the way for the embarrassing exploitation of prisons and prisoners, in order to achieve a political deal under the guise of a peace process.

10.3 HISTORY REPEATS ITSELF: PRISON REFORM FOLLOWS POLITICS

As summarised in (10.2 above), the 2020 overhaul of the prison system was planned during a chaotic political and security situation. It was a time when international partners of the Afghan government, had already negotiated a peace process and reached an agreement with the Taliban, later signed in Doha in February 2020 (Farr, 2020).⁸ The agreement essentially called for the withdrawal of the United States and coalition forces from Afghanistan, in return for the Taliban's promise not to allow terrorist groups to operate on Afghan soil. It also stressed the importance of dialogue between the Taliban and the Afghan government.

The United Nations Security Council endorsed the agreement via resolution S/RES/2513 of March 2020, urging its full and expedited implementation, in order to end the long-running conflict in Afghanistan. The Afghan government, however, was neither part of the initial negotiations, nor a signatory to the final agreement. An interestingly relevant aspect of the agreement was the commitment to release up to 5,000 combatants and political prisoners (Taliban) from Afghan prisons. This was reportedly a confidence-building measure, and a condition for the beginning of intra-Afghan negotiations, which did not succeed as Afghans had expected.

Following the Doha agreement in February 2020, the process of releasing national security prisoners began, and within about five months (April to August 2020) over 90% of the 5,000 prisoners were freed. A specific category of (about 400) prisoners that were important to the Taliban remained imprisoned. The government claimed that they were imprisoned for their affiliation with the Taliban, but they were also guilty of other serious crimes, so they could not go free without undergoing due process.⁹

Ultimately, the government invited a consultative Loya Jirga of over 2,300 people, from all the provinces of Afghanistan, to gather in Kabul from 7th to 8th August 2020. The Loya Jirga advised the government to release the remaining 400 prisoners, in return for a promise from the prisoners and

8 The agreement had confidential attachments which have never been made public (at least up until the time of writing), but a copy of the public version of the agreement can be found on the official website of the US Department of State, under: *Agreement for Bringing Peace to Afghanistan* (Last accessed in October 2021).

9 According to the government, of the 400 prisoners in question, 156 were sentenced to death, 105 were accused of murder, 34 were accused of kidnapping that led to murder, 51 were accused of drug smuggling, 44 were on the blacklist of the Afghan government and its allies, six were accused of other crimes, and four were accused of unspecified crimes.

the Taliban to accelerate peace negotiations. The final 400 Taliban prisoners were released a day later (August 9th) by an order signed by the president. This also reminds us of the critical role of Jirgas as informal, but powerful, mechanisms of state-building, law, and order.

After the release of over 5,000 national security prisoners and the announcement of the hasty withdrawal of international troops, the Taliban were in their strongest position ever. As a result, they increased their attacks on the government until they achieved a chaotic takeover of the country, even before the withdrawal of foreign troops had been completed. The Taliban then established an Islamic Emirate as the country's political system, and announced that Amir-al-Muminin ('leader of the faithful') would lead the state. The operation of the government, however, would be overseen by a caretaker government led by a prime minister.

In summary, and against the backdrop of issues discussed in (2.7 and 10.2 above), many of the 2020 peace negotiation conditions and processes, and their connection to prisons, were similar to those encountered in the 1990 dilemma presented by the PDP, in swapping political prisoners for peace negotiations. In 1990, prisoner swaps were relatively easy, due to the dominance of a socialist legality and one party system. It was perhaps not as easy in 2020, particularly with the ANP in charge of security and the management of prisons on the one hand, and fighting insurgency on the other.

One of the most compelling reasons for this complication lies in the fact that the ANP are relatively diverse, compared to the PDP, and they are in a constant state of war with the Taliban outside of prison walls. Due to the fact that both sides have actively killed each other on the battlefield, there has been a great deal of resentment and animosity between them, for some time. In recognition of the police force's role as guardians of the rule of law and public order, and the Taliban's role as an enemy of both the public and order, the police have a negative attitude towards Taliban prisoners; an attitude that has concerned domestic politicians, as well as foreign diplomats and other actors involved in peace negotiations.

A significant factor in the prison system's overhaul has therefore been a shared lack of trust between the government and its international partners in the police. The lack of trust was evident throughout the post-2001 era, and still manifests itself in a recent report from the US Special Inspector General for Afghanistan Reconstruction (SIGAR) (SIGAR, 2022). Thus, amongst several other pressing political and technical factors, the fact that the police were seen as potential spoilers of a smooth process of prisoner swapping undoubtedly resulted in state-led advocacy of an urgent need to reform the prison system. To that end, political factors, namely the negotiation parties' ability to gain political ground by using thousands of insurgents held in prisons as bargaining chips, played a greater role in prison reform than technical factors.

10.4 PRISON ADMINISTRATION AND ITS OPERATION UNDER THE TALIBAN¹⁰

As the Taliban took over, it dissolved the legislature (i.e. the National Assembly), the Independent Electoral Commissions (IEC), and the AIHRC. Likewise, it replaced the Ministry for Women's Affairs with the Ministry for the Promotion of Virtue and Prevention of Vice. However, it preserved most of the other administrative structures provided by the 2004 Constitution, including the Office of Prison Administration and its subordinate institutional structures down to the individual prison level such as Pul-e-charkhi.¹¹ However, normal prison system operations have been severely disrupted, due to the following two factors.

First, in an echo of what has happened during other political ruptures in Afghanistan (discussed in Chapter 2), once they had gained control the Taliban released all prisoners, nationwide. This not only led to murderers, rapists, and thieves being freed, but also to releasing the remaining Taliban prisoners into society, causing all the prison institutions to become isolated and abandoned places. Pul-e-charkhi (for example), once the country's biggest prison, is now littered with the clothing, footwear, and other belongings of prisoners and prison personnel who escaped in the immediate aftermath of August 2021.

According to reports, the prison "is littered with rubbish, and the stench of rotting food and fetid latrines hangs heavy over the site" (AFP, 2021). The only prisoners who reportedly remained in Pul-e-charkhi were those detained on suspicion of being members of the Islamic State. Even from amongst this category, the Taliban kept some prisoners and executed others, including Abu Omar Khorasani, who was leader of the Islamic State of Khorasan and was imprisoned by the previous government (Alan, 2021; The Week, 2021). However, based on lessons from the history, it is safe to argue that prisons will not remain empty for long and the Taliban will soon start to pack prisons with ordinary criminals and their own political oppositions alike.

Secondly, most of the senior and middle management prison administration staff left the country when the Republic fell in 2021. In the rare cases where the staff did not leave, the Taliban removed them from their positions and replaced the majority of them with pro-Taliban personnel. Many former National Security prisoners were instead appointed as prison managers and guards, across the country (Al Jazeera, 2021). For example, Pul-e-charkhi

10 This section is mainly based on news reports and telephone conversations with informants and relevant actors who remained in Afghanistan after August 2021.

11 The Taliban have restructured the judiciary to align with a Sharia court system, composed of a judge (*Qazi*), a religious jurist/legal expert (*mufti*), and a clerk. It has dismissed previous judges and instead appointed individuals with titles like *Mawlawi* and *Akhund*. *Mawlawi*, *Akhund*, and *Mufti* are not standardised titles, and they do not correspond to a fixed set of qualifications. However, the titles suggest that the individual possesses some knowledge of Sharia, and particularly Islamic jurisprudence.

is headed by former prisoner, “Mawlawi Abdulhaq Madani, a 33-year-old Taliban fighter”, who still views the prison with disdain (AFP, 2021).

Since all the laws of the Republic era, including the Prisons and Detention Centres Law, have been annulled by the Taliban and new laws have not yet been introduced, prison institutions are not required to comply with the legal mandates described above. In spirit, prisons exist as institutions that are used for coercion of those opposing the Taliban, and for intimidating members of the general public who demand to be given their civil rights. More generally, summary justice and on-the-spot punishments are commonplace. The Taliban’s militiamen and local commanders deliver justice ranging from public shaming, through corporal punishment and (in severe cases) death, either on the spot or after a brief on-site consideration.

As a matter of fact, the Taliban’s criminal justice system operates in much the same way as their first Emirate (from 1996-2001). They do not rely seriously on the prison system, as their formal criminal justice system handles only a small number of criminal cases. When they do use prisons it is only for a short while, and the prison staff pay less (or no) attention to prisoners’ rights or their living conditions. The Taliban also use the prison facilities for other means. According to some reports, “the Taliban’s first move upon seizing power in Afghanistan was to take extreme measures to tackle the country’s drug epidemic. To that end, thousands of addicts were rounded up, beaten, and marched off to prison” (RFE, 2022).¹²

In addition to this account concerning the official prison system, some reports raise concerns about the countless private prisons that remain hidden from the public. According to local sources, “these informal prisons operate in nearly every province... Kabul itself has at least three of these black-sites” (Jason, 2022). As a matter of fact, these are not completely new phenomenon, as there are plenty of examples of private prisons which existed alongside of the official prison system in very recent history, including during the Mujahidin, the Taliban’s first Emirate, and the Republic era (as discussed in Chapter 2, above).

In the months after the Taliban takeover, efforts were made to place the prison system under civilian command. The formal motive for this was prison reform, whereas giving high priority to security must have been the true primary motive. In retrospect, the real motive was to please the Taliban and approach the Doha agreement, thus marginalising the role of the police within the prison system. After the Taliban takeover, the existing legal mandate was annulled and replaced by a general Sharia mandate. What the latter will amount to remains to be seen. If we look at the legal mandate during the previous Emirate, we can see that (after some time) it

12 Although Taliban officials claim “to have successfully treated more than 2,000 addicts in the past seven months”, and they consider imprisonment a better option for addicts than rehab clinics, local psychologists disagree and assert that coercion is never the best medicine (RFE, 2022).

enacted some legislation which was substantially similar to the preceding legislation, but modified in a more organised way.

As far as implementation of the legal mandate under the Taliban is concerned, the Office of Prison Administration has been retained, although it was already weakened before the takeover. After the takeover, the office was abandoned by high level civil servants who fled abroad, and their replacements were generally Mullahs and others without administrative experience. Similarly, concerning implementation of the legal mandate at the level of individual prisons, the release of all prisoners was an ultimate denial of the purpose of the prison system, especially as former Taliban prisoners are the replacement prison managers.

In conclusion, the modest progress made in Afghanistan during the years of reform has been regressing at an alarming rate, since the Taliban took control. At the time of writing this dissertation, the criminal justice system and prison institutions have already been seriously impacted by the relapse, and the situation continues to deteriorate. With the Taliban's order to annul all the laws made under the republic, the prison system's legal mandate has diminished, and its function has been reduced to paramilitary institutions that are operated by Taliban fighters and governed by an unclear interpretation of Sharia.

Summary

This dissertation examines Afghanistan's largest prison, Pul-e-charkhi, as a case study of state-building, lawmaking, and the criminal justice reform before and after 2001. More specifically, it contributes to discussions around evolution and implementation of the prison system's legal mandate (notably rehabilitation of prisoners) in the context of the post 2001 state-building efforts and overhaul.

In so doing, Chapter 1 outlines the study's research problem. It narrates how the central concepts of state-building, lawmaking, and criminal justice relate to each other, by referring to the relevant literature. Considering the nuanced particularities of the central concepts, the chapter suggests looking beyond the familiar dualistic notion of 'law in the books and law in action' and proposes the use of an institution-building framework to analyse prison institutions and the implementation of their legal mandates, including prison-based rehabilitation. After a concise sketch of the study's rationale, research questions and methodology, the chapter reflects on the specific features of the prisons visited for the purpose of this study – Pul-e-charkhi near Kabul, and the provincial prison of Balkh in the north of the country. In this regard, the chapter joins a body of literature that maintains a critical account of prison conditions in Afghanistan. At the end, the chapter provides a brief outline of the dissertation.

Chapter 2 offers a concise historical foundation for the rest of the dissertation, by providing a simplified periodisation of the history of state-building, before and after 2001. The main point of the chapter is to illustrate how Afghanistan's political ruptures and subsequent regimes have affected its state-building at large, and its lawmaking – in particular regarding the field of criminal justice and the prison system; notably, regarding the prison-based rehabilitation programmes. In that regard, the chapter argues that until 1978 there was a deep conflict between modernisers and traditionalists, mainly mullahs and local power brokers; winners and losers were alternating. During the last ten years of that period, there were signs of progress towards 'modern' state-building and the development of state institutions.

From 1978 to 2001 there was a deterioration of state authority. The first political rupture, in 1978, brought the People's Democratic Party (PDP) to power. The PDP espoused a communist, anti-Islamic ideology. The second political rupture, in 1991, brought the Mujahedin to power. The Mujahedin followed Islamist ideology and had strong connections with the Muslim Brotherhood. In 1995, a third political rupture brought the Taliban to power for the first time. The Taliban established their first Islamic Emirate, inspired by traditional and fundamentalist Islamic beliefs. In the aftermath of 2001,

until 2020, there were modest improvements, but at the same time there was clear alienation between donors on the one hand and the Afghan government and society on the other. Finally, in 2021 there was a regression, in the form of the resurgence of the Taliban, that was partly due to the contentious peace negotiations in Doha.

The chapter argues that, historically, Afghanistan's state-building process has been chequered, chaotic, and incomplete, due to both internal and external factors. The problems of state-building have been mirrored in many of the post-2001 reforms and state-building overhauls, including lawmaking, criminal justice reform, prison management, as well as prison-based rehabilitation programmes in Pul-e-charkhi and other prisons.

Chapter 3 speaks about the institutional context of law-making and criminal justice reform, in the aftermath of 2001. The chapter argues that almost all state-building efforts involve some kind of lawmaking and reform. Whereas in recent decades legal reform, or 'rule of law promotion', has been a core activity of international intervention across the Global South, legal reform, particularly in Afghanistan, was a huge undertaking after 2001. In order to fully capture the context, the chapter discusses two distinct periods in the post-2001 overhaul, namely: the Bonn Process (2001-2005) and the Post-Bonn Process (2006 and beyond). It argues that in both periods interventions led to reform policies and projects that were alienated from the permanent state institutions and domestic realities, and that the end results were often counterproductive, since the interventions did little to strengthen permanent institutions; even weakened them. This was at first both in theory and in practice; later (after 2006), it changed to being less so in theory but still in practice.

The chapter also argues that, during the Bonn Process, the Judicial Reform Commission and the Constitution Commission were the two most important platforms for change. During the Post-Bonn process, these were followed by a number of temporary institutions and platforms, such as international conferences, working groups, and commissions. Together, these led to (a) subsequent lawmaking for reform, under the influence of multiple sources. As a result, the future of reform remained vulnerable to ad hoc interventions, (b) an inadequate foundation for reform of the justice sector, (c) an inability to define a clear relationship with permanent justice institutions, and failure to reconcile differences amongst and within those institutions.

The ultimate result of intervention has been an institutional framework that is unable to establish a solid unified basis for further legal development. It has not only failed to 'heal' the admittedly imperfect, ruptured, and conflicted system of permanent 'legal institutions' already in place, but it has made things worse by: a) not building on 'elements that work' in the existing system of permanent legal institutions; b) bringing in 'multiple sources of influence'; and, c) eroding the permanent state institutions by hindering their natural capacity building process.

In conclusion, the chapter highlights that these complications have been

due, in part, to the fact that the system inherited by the Interim Administration in 2001/2002 had its own serious problems, caused by past rupture and disruption, as well as the political, economic, and socio-cultural context of state institutions. Solving these problems in themselves would have been a huge challenge, even without the problematic involvement of donors after the 2001 international intervention.

Chapter 4 presents a case study of four criminal justice laws that were reformed as part of the post-2001 international overhaul. These are the Criminal Procedure Code 2004, the Criminal Procedure Code 2014, the Penal Code 2017, and the Prisons and Detention Centres Law 2005, 2007 and 2020. The case studies reinforce, and even go beyond, many of the critical points that Thomas Carothers made in his work on promoting the rule of law abroad'.

The chapter begins with a section on the standard lawmaking process, which in practice did not translate into much action. It makes an important argument about the extent to which and how the post-2001 reform departed from the prescribed lawmaking process, and why. The four case studies respond to the question of whether or not domestic actors 'fully embraced' the reform, or if parts (or all) of it remained alien to them. It argues that many domestic actors, particularly, those who were 'traditionally-minded' remained skeptical of 'modern' concepts, such as rehabilitation. However, judges and prosecutors strongly believed in prison-based rehabilitation and prison administrators had a generally sound understanding of rehabilitation.

This all indicates the heterogeneous and overlapping nature of norms and institutions in Afghanistan, which typically lead to widespread ambiguity and a lack of consensus vis-à-vis national law, policies and institutions in general, ultimately leading to the strengthening of patronage networks and paving the ground for endemic corruption. Whilst this has also been the case in many other developing countries, as theoreticised in Fred Riggs (1964) *Administration in developing countries*, the issue is connected to the serious lack of resources and technical expertise in Afghanistan.

Chapter 5 deals with the prison system's legal mandate; notably, the part relating to rehabilitation. It argues that there is an evident lack of stable consensus amongst academics and policy makers worldwide, about the effectiveness of rehabilitation as a prison-based programme. Proponents persist amongst UN staff, policy makers, and academics. In this regard, there is some consensus about the programmatic and institutional conditions for successful prison-based rehabilitation, particularly on the basis of the 'something works' framework. The chapter also draws on examples of successful rehabilitation programmes in the Muslim world, including in Middle Eastern countries, such as Yemen, and in central Asian countries.

The chapter further argues that gradual evolution of the prison system's legal mandate dates back to the pre-2001 period. It maintains that rehabilitation as part of the prison system's legal mandate developed gradually, and became a clearer objective of the criminal justice policy and regulations after

2001. The chapter presents a clear and concise outline of important provisions in pre- and post-2001 regulations, including the relevant directives in a chronological order. It indicates conflicting provisions in the pertinent legal framework, i.e. the 2004 Constitution (e.g. articles 27 and 130), the 2017 Penal Code, and the 2020 Prison and Detention Centres Law.

The chapter also refers to skepticism amongst domestic actors regarding the possibilities for achieving rehabilitation in Afghan prisons. As a result of which, the prison system is directed towards and made more conducive for incapacitation. Similarly, the chapter points towards skepticism and pre-existing knowledge of a mismatch between the actual conditions of prison institutions and the expectations implicit in the relevant legislation. The chapter relies on Allott's theory of 'law as a program', to partly explain why domestic actors did not challenge unrealistic legislation.

Chapter 6 examines key contextual factors in relation to the case study of Pul-e-charkhi: including historical, political, socio-economic, and technological factors. The chapter begins with a concise historical record of Pul-e-charkhi and maintains that, despite many views to the contrary, Pul-e-charkhi was the first prison with a modern structure, the construction of which coincided with important legal developments, such as the implementation of the first modern Penal Code in 1976. Prior to 2001, the prison underwent three consecutive periods of unconventional management, due to political ruptures, which affected not just its reputation within society, but also its physical structure, organisational culture, and institutional ability to function as an establishment that was fully committed to and prepared for changing behaviour and reducing recidivism.

The chapter contends that there have been insufficient social, political, economic, and technological foundations for prison-based rehabilitation programmes that would demonstrate the 'something works' framework, or perhaps other feasible frameworks for prison-based intervention. The chapter also maintains that the prison system has often been influenced by political factors, and, due to a lack of leadership, it has only followed changes in the broader political and security environment. The system has therefore remained enslaved to its past, and to old management and leadership methods. Together, these factors have paved the way for prisons to serve as a tool for the government and politicians, to impose coercion and ruling by law, rather than ruling by the rule of law.

Chapter 7 is about the prison system's institutional framework. It defines the three tiers functioning within the prison system in Afghanistan: national prison administration, individual prison administration, and programme or technical level administration. The chapter also argues that, despite a gradual expansion of the prison system's legal mandate, its institutional capacity and resources have remained insufficient across all the three tiers. However, it is also clear that a lack of leadership has played the most prominent role within the institutional factors outlined in the chapter. In addition, the chapter argues that the prison system has been given lower priority within the overall criminal justice system. Therefore, in all

circumstances prison leadership has been weak and has lacked appropriate supervision. The internal structure of the system was also shaken up and reduced several times, resulting in poor management and weakened authority for prison officials, which in turn hampered the system's implementation capabilities.

In view of these limitations, the chapter argues that the prison system seems to have focussed primarily on the easier parts of its legal mandate, notably incapacitation and ensuring the security of prisons. The implementation of its substantive and relatively difficult aspects, namely rehabilitation, has not been fully undertaken. In addition, specific scrutiny of international investment in the prison system in general, and in Pul-e-charkhi in particular, reveals that most of the donor funds have been wasted on flawed designs and faulty implementation, as well as on Kabul-centric initiatives.

Chapter 8 is about the prisoners in Pul-e-charkhi and the prison's failing prison-based rehabilitation programmes. The chapter maintains that engaging in morally or materially beneficial activities is a natural and rational choice for almost all Pul-e-charkhi prisoners. It further argues that rehabilitation programmes are of genuine interest to the vast majority of prisoners. However, the system lacks adequate initiatives and resources to support prisoner demand. There are some rehabilitation programmes, but they appear to be based on poor copies of international standards, rather than on reality in the prison, and in society at large. This has culminated in a confusing lack of clarity around programme objectives and, consequently, poor performance in terms of their rehabilitative function.

The chapter also argues that the most significant problems have been prisoners' access to the programmes, the quality of the programmes, and (in some cases) the programmes' reach. Additionally, it argues that implementation of prison-based rehabilitation has been hindered by inadequate human capacity, insufficient financial resources, poor leadership and institutional coordination, and widespread corruption. As a result, the programmes rarely address the needs of their target groups. Instead, the prison authorities often bend the programmes to their own personal and group interests, or to the financial benefit of the prison institution.

Chapter 9 summarises the main findings of this research. It builds on findings of Chapter 5 (the prison system's legal mandate), chapters 6 and 7 (the contexts and institution of the prison), and Chapter 8 (the prison population and rehabilitation programmes). Chapter 9 argues that the prison system's legal framework, and thus its legal mandate, developed after Afghanistan's war of independence, in 1919. From that point onwards it continuously expanded, whilst its practical application followed a convoluted and twisted pattern of development.

The prison system's legal mandate experienced fundamental changes during the era of socialist legality (from 1978-1991), and in the aftermath of the 2001. During the first period, the prisons' official mandate was extended beyond mere incapacitation and, for the first time in history, rehabilitation

explicitly became part of the prison mandate. This expansion was laid down in the third Prisons and Detention Centres Law, passed in 1983, after a period of serious abuse and extrajudicial use of prisons. The latter period, however, was marked by a mixture of previous laws, intertwined with new concepts and human rights standards, including the UN minimum standards for the treatment of prisoners, as well as a special emphasis on the rehabilitation of prisoners, social reintegration, and alternatives to imprisonment.

Chapter 10 is an epilogue about the post-2020 changes and a reflection on the changes in criminal justice and prison management in the aftermath of the Taliban's takeover in 2021. The epilogue discusses two major developments, which occurred after I ended my field work in 2019. During the first period the prison system's legal mandate was affected by an institutional overhaul and the shifting of prison responsibilities to a civilian institution. In the second period, however, the legal mandate for prisons changed, along with the overall structure of the government and the political regime, with the Taliban rising to power for a second time in 2021.

The epilogue argues that both periods had a significant impact on the prison system and its legal mandate. The first period saw a number of contentious and politically oriented changes, leading to institutional reform and restructuring that allowed a large number of prisoners to go free. The second period changed the prison system back to institutions that lacked a clear and concise legal mandate, operating instead mostly on personal preference and traditional interpretations of Sharia.

Samenvatting (Dutch Summary)

STAATSOPBOUW, WETGEVING EN STRAFRECHT IN AFGHANISTAN
*Een casestudy over de wettelijke opdracht van het gevangeniswezen,
en de rehabilitatieprogramma's in de Pul-e-charkhi gevangenissen*

Dit proefschrift onderzoekt de grootste gevangenis van Afghanistan, Pul-e-charkhi, als een casestudy van staatsopbouw, wetgeving en de hervorming van het strafrecht voor en na 2001. In het bijzonder draagt het bij aan discussies over de ontwikkeling en uitvoering van het wettelijke mandaat van het gevangeniswezen (met name de rehabilitatie van gevangenen) in de context van wederopbouw en herstel van de staat na 2001.

Hoofdstuk 1 schetst het onderzoeksprobleem van de studie. Het vertelt hoe de centrale concepten van staatsvorming, wetgeving en strafrecht zich tot elkaar verhouden, onder verwijzing naar de relevante literatuur.

Gelet op de complexiteit van de centrale concepten, gaat het hoofdstuk verder dan de bekende dualistische notie van 'recht in de boeken en recht in actie' en introduceert 'institution building' als conceptueel kader voor de analyse van gevangenisinstellingen en de uitvoering van hun wettelijke mandaten, met inbegrip van rehabilitatie in gevangenissen. Na een beknopte schets van de reden, de onderzoeksvragen en de methodologie van het onderzoek, gaat het hoofdstuk in op de specifieke kenmerken van de gevangenissen die voor dit onderzoek zijn bezocht – Pul-e-charkhi bij Kabul en de provinciale gevangenis van Balkh in het noorden van het land. In dit opzicht sluit het hoofdstuk aan bij de bestaande literatuur die de gevangenisomstandigheden in Afghanistan kritisch beschouwt. Aan het eind wordt de opzet van het proefschrift in het kort gepresenteerd.

Hoofdstuk 2 biedt een beknopte historische basis voor de rest van het proefschrift, door een vereenvoudigde periodisering te geven van de geschiedenis van de staatsopbouw, voor en na 2001. Dit hoofdstuk wil vooral illustreren hoe de politieke omwentelingen en opeenvolgingen van regimes in Afghanistan de staatsopbouw in het algemeen en de wetgeving in het bijzonder hebben beïnvloed – met name op het gebied van het strafrecht en het gevangeniswezen – in het bijzonder wat betreft de rehabilitatieprogramma's. In dat verband betoogt het hoofdstuk dat er tot 1978 een diepgaand conflict was tussen modernisten en conservatieven, voornamelijk mullahs en lokale machthebbers; winnaars en verliezers wisselden elkaar af. Tijdens de laatste tien jaar van die periode waren er tekenen van vooruitgang in de richting van een 'moderne' staatsopbouw en de ontwikkeling van staatsinstellingen.

Van 1978 tot 2001 ging het gezag van de staat achteruit. De eerste politieke omwenteling, in 1978, bracht de Democratische Volkspartij (PDP) aan de macht. De PDP hing een communistische, anti-islamitische ideologie aan. De tweede politieke omwenteling, in 1991, bracht de Mujahedin aan de macht. De Mujahedin volgden een islamistische ideologie en hadden sterke banden met de Moslimbroederschap. In 1995 bracht een derde

politieke omwenteling de Taliban voor het eerst aan de macht. De Taliban richtten hun eerste Islamitische Emiraat op, geïnspireerd door traditionele en fundamentalistische islamitische overtuigingen. In de nasleep van 2001, tot 2020, waren er bescheiden verbeteringen, maar tegelijkertijd trad er duidelijk een vervreemding op tussen donoren enerzijds en de Afghaanse regering en samenleving anderzijds. In 2021 ten slotte was er een terugval, in de vorm van de heropleving van de Taliban, die mede het gevolg was van de omstreden vredesonderhandelingen in Doha.

In het hoofdstuk wordt betoogd dat het proces van staatsopbouw in Afghanistan historisch gezien met horten en stoten, chaotisch en onvolledig is verlopen, als gevolg van zowel interne als externe factoren. De problemen van staatsopbouw zijn weerspiegeld in veel van de hervormingen en herzieningen van na 2001, in de wetgeving, de strafrechtssketen, het gevangenisbeheer en de rehabilitatieprogramma's in Pul-e-charkhi en andere gevangenissen.

Hoofdstuk 3 gaat over de institutionele context van wetgeving en strafrechtshervorming na 2001. Het hoofdstuk betoogt dat bijna alle pogingen tot staatsopbouw wetgeving en hervorming met zich mee brengen. Terwijl in de afgelopen decennia juridische hervorming of rechtstaatbevordering een kernactiviteit was van internationale interventies in het hele Zuiden, was juridische hervorming, met name in Afghanistan na 2001 een enorme onderneming. Om de context volledig te kunnen vatten, bespreekt het hoofdstuk twee afzonderlijke perioden in de hervorming na 2001, namelijk het Bonn proces (2001-2005) en het Post-Bonn proces (2006 en daarna). Gesteld wordt dat de interventies in beide perioden hebben geleid tot hervormingsbeleid en projecten die ver af stonden van de permanente staatsinstellingen en de binnenlandse realiteit, en dat de eindresultaten vaak contraproductief waren, aangezien de interventies weinig hebben bijgedragen tot de versterking van de permanente instellingen, en deze zelfs hebben verzwakt. Dit was aanvankelijk zowel in theorie als in de praktijk het geval; later (na 2006) was dit in theorie minder het geval maar in de praktijk nog steeds.

Het hoofdstuk stelt ook dat tijdens het Bonn proces de Commissie voor Justitiële Hervorming en de Constitutionele Commissie de twee belangrijkste platforms voor verandering waren. Tijdens het Post-Bonn proces werden deze gevolgd door een aantal tijdelijke instellingen en platforms, zoals internationale conferenties, werkgroepen en commissies. Samen leidden deze tot a) wetgevingsprojecten gericht hervorming, mnaar onder invloed van verschillende bronnen. Als gevolg daarvan bleef de toekomst van de hervorming kwetsbaar voor ad-hoc interventies, b) een ontoereikende basis voor de hervorming van de justitiële sector, c) onvermogen om een duidelijke relatie met permanente justitiële instellingen te bepalen, en om onenigheid tussen en binnen die instellingen op te lossen.

Het uiteindelijke resultaat van de interventie was een institutioneel kader dat niet in staat is een solide, uniforme basis te leggen voor verdere juridische ontwikkeling. De interventie heeft niet alleen gefaald in het 'helen' van reeds bestaande permanente 'juridische instellingen', die, toe-

gegeven, onvolmaakt, verbrokkeld en veelal met elkaar in conflict waren; maar zij heeft de zaken nog erger gemaakt door: a) niet voort te bouwen op 'elementen die werken' in het bestaande systeem van permanente juridische instellingen; b) verschillende invloedrijke bronnen in te brengen; en c) de permanente staatsinstellingen uit te hollen door hun natuurlijke proces van capaciteitsopbouw te belemmeren.

Tot slot wordt in het hoofdstuk benadrukt dat deze complicaties deels te wijten zijn aan het feit dat het systeem dat de interim-regering in 2001/2002 erfde, zijn eigen ernstige problemen had, veroorzaakt door omwentelingen en verstoringen in het verleden, alsmede door de politieke, economische en sociaal-culturele context van de staatsinstellingen. Het oplossen van deze problemen op zich zou al een enorme uitdaging zijn geweest, zelfs zonder de problematische betrokkenheid van donoren na de internationale interventie van 2001.

Hoofdstuk 4 bevat casestudies van vier strafwetten die in het kader van de internationale herziening na 2001 zijn hervormd. Het gaat om het Wetboek van Strafvordering van 2004, het Wetboek van Strafvordering van 2014, het Wetboek van Strafrecht van 2017 en de Wet op de Penitentiaire Inrichtingen (Gevangeniswezen en Detentiecentra) van 2005, 2007 en 2020. De casestudies bevestigen veel van de kritiekpunten die Thomas Carothers in zijn werk over *Promoting the Rule of Law Abroad* naar voren heeft gebracht, en gaan zelfs verder.

Het hoofdstuk begint met een paragraaf over het standaard wetgevingsproces, dat in de praktijk weinig is omgezet in actie. Het laat duidelijk zien in hoeverre en op welke wijze de hervormingen van na 2001 afwijken van het voorgeschreven wetgevingsproces, en waarom. De vier casestudies geven een antwoord op de vraag of de binnenlandse actoren de hervorming al dan niet 'volledig hebben omarmd', of dat delen (of het geheel) ervan hen vreemd zijn gebleven. Veel van de 'moderne' concepten, zoals rehabilitatie – zo wordt betoogd – werden verworpen door binnenlandse actoren en degenen die meer traditioneel ingesteld waren. Daarentegen geloofden rechters en openbare aanklagers sterk in rehabilitatie in gevangenis, en gevangenisbeheerders hadden over het algemeen een goed begrip van rehabilitatie.

Dit alles wijst op de heterogene en overlappende aard van normen en instellingen in Afghanistan, die doorgaans leiden tot wijdverbreide ambiguïteit en een gebrek aan consensus over nationale wetgeving, beleid en instellingen in het algemeen, hetgeen uiteindelijk leidt tot de versterking van patronagenetwerken en de weg vrijmaakt voor endemische corruptie. Hoewel dit ook het geval is geweest in vele andere ontwikkelingslanden, zoals getheoretiseerd door Fred Riggs (1964) in zijn *Administration in Developing Countries*, bestaat er een verband met het grote gebrek aan middelen en technische deskundigheid in Afghanistan.

Hoofdstuk 5 gaat over het wettelijk mandaat van het gevangeniswezen, met name het gedeelte dat betrekking heeft op rehabilitatie. Het betoogt dat er onder academici en beleidsmakers wereldwijd geen stabiele consensus

bestaat over de effectiviteit van programma's voor rehabilitatie in gevangenen. Onder VN-personeel, beleidsmakers en academici zijn er nog steeds voorstanders. In dit verband is er wel enige consensus over de programmatische en institutionele voorwaarden voor succesvolle rehabilitatie in gevangenen, met name op basis van de 'something works' theorie. Het hoofdstuk haalt ook voorbeelden aan van succesvolle rehabilitatieprogramma's in de moslimwereld, waaronder in landen in het Midden-Oosten, zoals Jemen, en in Centraal-Aziatische landen.

Het hoofdstuk stelt verder dat al vóór 2001 het wettelijke mandaat van het gevangeniswezen zich geleidelijk ontwikkelde. Het stelt dat rehabilitatie als onderdeel van het wettelijke mandaat van het gevangeniswezen zich eerst geleidelijk ontwikkelde, en na 2001 een duidelijker doelstelling is geworden van het strafrechtbeleid en de strafrechtelijke regelgeving. Het hoofdstuk geeft een duidelijk en beknopt chronologisch overzicht van belangrijke bepalingen in de regelgeving van voor en na 2001, inclusief de relevante richtlijnen. Er wordt gewezen op tegenstrijdige bepalingen in het betreffende juridische kader, d.w.z. de Grondwet van 2004 (bijv. de artikelen 27 en 130), het Wetboek van Strafrecht van 2017 en de Wet op het Gevangeniswezen en Detentiecentra van 2020.

Het hoofdstuk verwijst ook naar de scepsis onder binnenlandse actoren over de mogelijkheden om rehabilitatie in Afghaanse gevangenen te bewerkstelligen. Als gevolg daarvan is het gevangeniswezen gericht op en bevorderlijker gemaakt voor vrijheidsbeneming. Evenzo laat het hoofdstuk zien dat men sceptisch was en bewust ten aanzien van een wanverhouding tussen de feitelijke omstandigheden in gevangenisinstellingen en de verwachtingen die impliciet in de desbetreffende wetgeving besloten liggen. Het hoofdstuk baseert zich op Allott's theorie van 'law as a program', om gedeeltelijk te verklaren waarom binnenlandse actoren onrealistische wetgeving niet aanvochten.

Hoofdstuk 6 onderzoekt de belangrijkste contextuele factoren met betrekking tot de casestudy van Pul-e-charkhi, waaronder historische, politieke, sociaal-economische en technologische factoren. Het hoofdstuk begint met een beknopte geschiedenis van Pul-e-charkhi en stelt dat Pul-e-charkhi, ondanks vele tegengestelde opvattingen, de eerste gevangenis was met een moderne structuur, waarvan de bouw samenviel met belangrijke juridische ontwikkelingen, zoals de invoering van het eerste moderne Wetboek van Strafrecht in 1976. Vóór 2001 onderging de gevangenis drie opeenvolgende perioden van ongebruikelijk beheer als gevolg van politieke omwentelingen, die niet alleen gevolgen hadden voor de reputatie van de gevangenis in de samenleving, maar ook voor de fysieke structuur, de organisatiecultuur en het institutionele vermogen om te functioneren als een instelling die zich volledig inzet voor en voorbereid is op gedragsverandering en het terugdringen van recidive.

Het hoofdstuk stelt dat er onvoldoende sociale, politieke, economische en technologische grondslagen zijn geweest voor rehabilitatieprogramma's in gevangenen die de 'iets werkt'-theorie zouden aantonen, of misschien

andere geschikte theorieën voor interventie in gevangenissen. Het hoofdstuk stelt ook dat het gevangeniswezen vaak is beïnvloed door politieke factoren, en dat het door een gebrek aan leiderschap slechts veranderingen in de bredere politieke- en veiligheidscontexten heeft gevolgd. Het systeem is daarom vast blijven zitten in zijn verleden en aan oude management- en leiderschapsmethoden. Samen hebben deze factoren de weg vrijgemaakt voor gevangenissen om slechts te functioneren als een instrument van de regering en politici om dwang en *rule by law* op te leggen in plaats van *rule of law*.

Hoofdstuk 7 gaat over het institutionele kader van het gevangeniswezen. Het onderscheidt de drie niveaus van het gevangeniswezen in Afghanistan: het nationale gevangenisbestuur, het bestuur van individuele gevangenissen en het bestuur op programma- of technisch niveau. Het hoofdstuk stelt ook dat, ondanks een geleidelijke uitbreiding van het wettelijk mandaat van het gevangeniswezen, de institutionele capaciteit en middelen van het gevangeniswezen op alle drie de niveaus onvoldoende zijn gebleven. Het is echter ook duidelijk dat een gebrek aan leiderschap de meest prominente rol heeft gespeeld binnen de geschetste institutionele factoren. Bovendien wordt in dit hoofdstuk betoogd dat het gevangeniswezen binnen het algemene strafrechtstelsel een lagere prioriteit heeft gekregen. Daardoor is onder alle omstandigheden het leiderschap in het gevangeniswezen zwak geweest en ontbrak het aan passend toezicht. De interne structuur van het systeem werd ook herhaaldelijk opgeschud en ingekrompen, wat resulteerde in slecht bestuur en verzwakt gezag van gevangenisfunctionarissen, wat op zijn beurt de uitvoeringscapaciteit van het systeem belemmerde.

In het licht van deze beperkingen, zo stelt het hoofdstuk, lijkt het gevangeniswezen zich vooral te hebben gericht op de gemakkelijkere onderdelen van zijn wettelijke mandaat, met name vrijheidsbeneming en het waarborgen van de veiligheid van de gevangenissen. De uitvoering van de inhoudelijke en relatief moeilijke elementen ervan, met name rehabilitatie, is niet volledig ter hand genomen. Bovendien blijkt uit een specifiek onderzoek van de internationale investeringen in het gevangeniswezen in het algemeen, en in Pul-e-charkhi in het bijzonder, dat de meeste donorgelden zijn verspild aan gebrekkige ontwerpen en een foutieve uitvoering, en Kabul-centrische initiatieven.

Hoofdstuk 8 gaat over de gevangenen in Pul-e-charkhi en de falende rehabilitatieprogramma's aldaar. Het hoofdstuk stelt dat volgens bijna alle gevangenen in Pul-e-charkhi het voor hen vanzelfsprekend zou zijn om moreel of materieel nuttige activiteiten te ondernemen, en dat de overgrote meerderheid van de gevangenen oprecht geïnteresseerd is in rehabilitatieprogramma's. Het systeem ontbeert echter adequate initiatieven en middelen om aan de vraag van gevangenen tegemoet te komen. Er zijn enkele rehabilitatieprogramma's, maar deze lijken eerder gebaseerd op slechte kopieën van internationale normen dan op de realiteit in de gevangenis en in de samenleving in het algemeen. Dit heeft geculmineerd in een

verwarrend gebrek aan duidelijkheid over de programmadoelstellingen en bijgevolg tot slechte uitvoering van de rehabilitatiefunctie.

Het hoofdstuk stelt ook dat de belangrijkste problemen de toegang van gevangenen tot de programma's, de kwaliteit van de programma's en (in sommige gevallen) het bereik van de programma's waren. Daarnaast wordt gesteld dat de uitvoering van rehabilitatie in gevangenissen is belemmerd door onvoldoende capaciteit van het personeel, onvoldoende financiële middelen, slecht leiderschap en coördinatie, en wijdverbreide corruptie. Daardoor beantwoorden de programma's zelden aan de behoeften van de doelgroepen. In plaats daarvan richten de gevangenisautoriteiten de programma's vaak in naar hun eigen persoonlijke en groepsbelangen, of ten behoeve van financieel voordeel van de gevangenisinstelling.

Hoofdstuk 9 vat de belangrijkste bevindingen van dit onderzoek samen. Het bouwt voort op de bevindingen van hoofdstuk 5 (het wettelijk mandaat van het gevangeniswezen), de hoofdstukken 6 en 7 (de context en de instelling van de gevangenis) en hoofdstuk 8 (de gevangenisbevolking en de rehabilitatieprogramma's). In hoofdstuk 9 wordt betoogd dat het wettelijk kader van het gevangeniswezen, en daarmee het wettelijke mandaat, zich heeft ontwikkeld na de onafhankelijkheidsoorlog van Afghanistan, vanaf 1919. Sedertdien breidde het mandaat zich voortdurend uit, maar de praktische toepassing ervan verliep ingewikkeld en kronkelig.

De wettelijke opdracht van het gevangeniswezen onderging fundamentele wijzigingen tijdens de periode van socialistisch recht, van 1978-1991, en in de nasleep van 2001. In de eerste periode werd het officiële mandaat van de gevangenissen uitgebreid tot meer dan loutere vrijheidsbeneming en werd voor het eerst in de geschiedenis rehabilitatie expliciet onderdeel van het mandaat. Deze uitbreiding werd vastgelegd in de derde Wet inzake Gevangenissen en Detentiecentra, aangenomen in 1983, na een periode van ernstig misbruik en buitengerechtelijk gebruik van gevangenissen. De tweede periode werd echter gekenmerkt door een vermenging van eerdere wetten, verweven met nieuwe concepten en mensenrechtennormen, waaronder de VN-minimumnormen voor de behandeling van gevangenen, en een bijzondere nadruk op de rehabilitatie van gevangenen, sociale reïntegratie en alternatieven voor gevangenisstraf.

Hoofdstuk 10 is een epiloog over bepaalde veranderingen na 2020 en een reflectie op de veranderingen in strafrecht en gevangenisbestuur sinds de machtsovername door de Taliban in 2021. De epiloog bespreekt beide belangrijke ontwikkelingen, die zich voordeden nadat ik mijn veldwerk in 2019 had beëindigd. In de eerste periode werd het wettelijke mandaat van het gevangeniswezen beïnvloed door een grote reorganisatie waarbij gevangenisstaken werden overgebracht van een militaire naar een civiele instelling. In de tweede periode veranderde het wettelijke mandaat voor gevangenissen, samen met de algehele omwenteling van politiek en bestuur, toen de Taliban in 2021 voor de tweede keer aan de macht kwamen.

In de epiloog wordt betoogd dat beide perioden een aanzienlijke invloed hebben gehad op het gevangeniswezen en het wettelijke man-

daat ervan. De eerste periode kende een aantal controversiële, politiek georiënteerde veranderingen, die leidden tot bestuurlijke reorganisatie en beleidsherziening waardoor een groot aantal gevangenen vrijuit kon gaan. In de tweede periode verloren de instellingen van het gevangeniswezen een duidelijk en beknopt wettelijk mandaat, en gingen zij in plaats daarvan weer vooral werken op basis van persoonlijke voorkeuren en traditionele interpretaties van de Sharia.

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Curriculum Vitae

Najib Amin is an Afghan lawyer and development practitioner born in 1976. He received his basic and primary education in Kabul, Afghanistan. Najib studied law at Kabul University and earned a master's degree in Law and Economics from Bologna University, Italy. In 2016, he became an external PhD candidate at the Van Vollenhoven Institute for Law, Governance, and Society at the Leiden Law School of Leiden University where he also wrote this dissertation.

Najib began his career as an assistant lecturer of law at Kabul Law School, in 2001. In due course, he became an associate professor there, teaching Theoretical Criminology, General Criminal Law, and International Criminal Law courses, up until the end of 2020. In addition to his academic role, Najib served in other key capacities, which provided him with extensive experience in policy formulation, leadership, and organisational development.

From 2002 to 2004, Najib led the research and analysis department of the Afghan Constitutional Drafting and Constitutional Review Commissions and later served as Chief Rapporteur for the Afghan Constitutional Loya Jirga, which adopted the Afghan constitution in 2004. During 2004, 2007, and 2008, Najib also assisted the Asia Foundation with the design and implementation of Afghanistan's largest public opinion surveys.

Between 2008 and 2014, Najib served as Undersecretary for the Cabinet of the Islamic Republic of Afghanistan and Deputy Director General of the Office of Administrative Affairs. He resumed his government work in 2017 as Commissioner for the Independent Administrative Reform and Civil Service Commission of Afghanistan and Director General of the Civil Service Appointments Board until the end of 2020. His latter role involved overseeing Afghan government's public sector reforms and putting together a merit-based civil service appointments system.

In 2021 Najib advised the Afghan government on the situation of the Islamic Republic of Afghanistan at the International Criminal Court (ICC). As the government's focal point, Najib liaised with the ICC and facilitated inter-governmental coordination, mainly within domestic justice institutions. In addition to these engagements, Najib played a substantive role in all Jirgas and Loya Jirgas held from 2002 to 2021, and led policy and content management of the Loya Jirgas from 2008 to 2019.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2022 and 2023

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