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

Amin, N.

3 The institutional context for post-2001 lawmaking and criminal justice reform

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 Ibrahimi, 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 regal 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 lawmaking 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 Sarposa (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, 'polynormativism' 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.