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

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4.1 INTRODUCTION

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

4.2 THE STANDARD LAWMAKING PROCESS POST-2001

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3 THE PRACTICE OF LAWMAKING POST-2001

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

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

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

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

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

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

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

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

4.3.1 The criminal procedure codes (2004 and 2014)

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

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

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

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

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

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

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

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

4.3.2 The Interim Criminal Procedure Code 2004

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.3 The Criminal Procedure Code 2014

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

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

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

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

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

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

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

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

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

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

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

19 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.4 The Penal Code (1976 and 2017)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 See Article 3 of the 2017 Code.

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

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

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

38 See Official Gazette Number 852 of May 2005.

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

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

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

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

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

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

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

41 Ibid, August 2016.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.4 CONCLUSION

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

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

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

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

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

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

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

