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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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Citation

Amin, N. (2023, June 22). *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*. *Meijers-reeks*. Eleven International Publishing, The Netherlands. Retrieved from https://hdl.handle.net/1887/3626666

Version:	Publisher's Version
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Downloaded from:	https://hdl.handle.net/1887/3626666

Note: To cite this publication please use the final published version (if applicable).

5 The legal mandate for prisons and the challenge of rehabilitation

5.1 Introduction

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

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

5.2 The concept of rehabilitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3 The policy and legal basis for the prison system mandate

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

5.4 The prison system's legal and policy foundations

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

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

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

In this regard, the group of laws dealing with issues of imprisonment includes the Penal Code 1976, the Constitution 2004, the Prisons and Detention Centers Bylaw 2007, the Criminal Procedure Code 2014, the Penal Code 2017, the Law on Alternatives to Imprisonment 2018, and the Prisons and Detention Centers Law 2020.[4] In addition, a group of guidelines that are not law, but which effectively regulate both the practical and normative aspects of the prison system, include presidential decrees, cabinet decisions, international agreements, and the principles of Sharia. The latter has a limited role in technical matters of imprisonment, but policymakers often mandate prison institutions to follow certain conditions, based on the general principles of Sharia, as the overarching normative framework for the system's daily operation.[5]

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

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

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

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

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

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

5.4.1 Substantive issues within the prison system's legal framework

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

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

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

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

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

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

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

8 Personal interview with AIBA member - August 2016.

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

5.4.2 Operational issues within the prison system's legal framework

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

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

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

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

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

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

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

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

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

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

5.5 Mandate emerging from the body of laws

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

5.5.1 Rehabilitation as an important legal mandate

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

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13 Article 2.7 of the Criminal Procedure Code 2014 provides that [translation] "the purpose of this law includes retraining criminals to create an ideology to obey the provisions of Sharia and the enacted laws, to respect religious beliefs, and to observe the morality, manners, and rules to live peacefully in society."
Article 2.1 of the Prison and Detention Centers Law 2020 provides that [translation] "the management and organisation of programmes, including educational, rehabilitation, vocational training, and employment for prisoners and minors in custody", are amongst the key objectives of the law.
Article 2.4 of the Prisons and Detention Centers Bylaw 2007 provides that [translation] "the purpose of the Bylaw includes educating prisoners and detainees, so that they reintegrate into society as healthy, law-abiding citizens."
Likewise, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules 2015) reiterate similar objectives. The Nelson Mandela Rules provide that "the purposes of imprisonment or similar measures are primarily to protect society against crime and to reduce recidivism. [These] can be achieved if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life" (2015b, Rule 4.1).

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

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

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

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

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

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

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

18 According to Article 3 of the Law on the Manner of Processing, Publishing, and Enforcing Legislative Documents (2017a), directives form part of the legislative documents that set standards for key functions of the concerned programmes. Smaller operational procedures, or operational manuals that are used to describe directives, are part of internal administrative procedures and are therefore part of internal regulations. Typically, directives are endorsed by ministers, as the final approving authority of the relevant ministry, and the thematic areas covered by the directive are inspired by parent legislation, in this case by the Prisons and Detention Centers Law.

19 The directives were developed by international staff, as part of a programme funded by the INL. The Corrections System Support Program (CSSP) engaged in mentoring and advising activities between American and Afghan corrections professionals. A US-based contractor, PAE, implemented a project that has been in the process of being scaled back since 2017; the plan is to completely withdraw it by 2020.

20 Both directives are based on the Prisons and Detention Centers Law and Prisons and Detention Centers Bylaw (2007). More specifically, articles 20 & 21 of the Prisons and Detention Centers Bylaw (2007) provides for further details on work and education. Art. 20 provides that [translation] "vocational education and literacy courses shall be established and facilitate future employment, in order to strengthen the development process for prisoners and detainees. The task shall be accomplished in collaboration with the Ministry of Liberal and Social Affairs, Martyrs and Disables [Martyrs and Disabled People], Education, and other governmental and non-governmental organisations. A separate directive shall be prepared to regulate further details of these programmes." Art. 21 provides that [translation] "the prison administration shall provide for educational and vocational training programmes aimed at helping convicted criminals understand the social damage caused by an act of crime, and at strengthening their sense of responsibility, social discipline, humanitarian values, respect for others, and respect for cultural norms and values."

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

5.6 Domestic actors' perceptions of rehabilitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.7 Conclusion

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

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

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

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

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

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