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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9 Main conclusions

9.1 Introduction

This is not an optimistic dissertation. In the preceding chapters, I have emphasised that enormous challenges have been involved in the processes of state-building, lawmaking, criminal justice, and prison management, across Afghanistan's history. The country has faced complex domestic, regional, and international dynamics, which has led to several radical changes in state ideologies. As a result, constant adjustments have had to be made to individual state institutions, strategies, policies, laws, and regulations under the banner of reform leading to sustainability deficit in the governance system and structures. It is therefore not surprising that the post-2001 reform and state-building interventions have also been disappointing.

In spite of this, my dissertation is not entirely pessimistic, since it also argues that even when reform interventions have not been fully successful and there have been substantial challenges, modest progress has been achieved in some areas, generally leading to a better position than would have been the case without intervention. When I say modest progress, I do mean slight, although sometimes significant improvements are reported within the three storylines discussed in this work. During the Bonn and the Post-Bonn processes, two elected presidents and four parliaments (National Assembly) enacted numerous laws. An independent judiciary was re-established under the leadership of the Supreme Court, and due process was formally incorporated into the criminal justice system through the establishment of an AGO and an AIBA. Prisons began to function under the broad scheme of a criminal justice system, and have since been in consistently better condition than in the era preceding 2001, particularly compared to conditions under the Mujahidin and Taliban governments (see 2.8 above).

A number of key findings and conclusions can be drawn around the fundamental research problem debated in this work, but a direct answer to the main research question can be elaborated on more easily by exploring two aspects: *how the prisons' legal mandate emerged, and how the mandate was implemented.* Whilst each of the two aspects must be carefully assessed against the backdrop of broader historical and contextual factors, as well as a specific institutional analysis of Pul-e-charkhi, for convenience, a shorter answer can also be provided.

The Afghan prison system's relative disparity dates back to its ancient history as an oppressive place that rulers could exploit as they wished. After 1880, prison institutions emerged as part of the Afghan criminal

justice system, although prisons were still oppressive, intimidating places, barely governed by law. After Afghanistan's war of independence in 1919, the legal framework for prisons, and thus their legal mandate, continuously expanded, whilst their practical use followed a convoluted and twisting pattern of development. The first Prisons and Detention Centres law was enacted in 1923, officially requiring the prison system to serve mainly as means of incapacitation. The legal mandate concerned was steadily maintained and implemented for over 60 years, including the decade of democracy (from 1964 to 1973), when efforts were made to upgrade prison conditions and infrastructure, and to make prisons more humane institutions, but the legal mandate for prisons never officially changed.

The prison system's legal mandate first experienced fundamental changes during the era of socialist legality (1978-1991), and again in the aftermath of 2001. During the earlier period, the prisons' official mandate was extended beyond mere incapacitation and, for the first time in the country's history, rehabilitation became an explicit part of the prisons' legal mandate. The expansion was due to the third Prison and Detention Centres law, which was passed in 1983 after a period of serious abuse and extra-judicial use of prisons. The latter period used a mixture of previous laws, intertwined with new concepts and human rights standards, including the UN minimum standards for the treatment of prisoners, as well as placing special emphasis on the rehabilitation of prisoners, social reintegration, and alternatives to imprisonment.

However, as the Pul-e-charkhi case study indicates, in spite of gradual expansion of the prison system's legal mandate and target population, prisons' practical attributes, including infrastructure, institutional capacity, resources, and the overall environment for implementing its legal mandate remain inadequate. In addition to institutional capacity and structural issues, the prisons are packed with national security prisoners, who are in a state of war with the government (outside of the prison) on the one hand, and who challenge or refuse to undergo prison-based programmes (inside the prison), including rehabilitation, on the other.

Likewise there is a large number of prisoners, such as those convicted due to judicial error (or the 'innocent prisoners'), who either do not qualify for any of the existing prison-based programmes, or do not need any such programmes in the first place. These prisoners generally have higher educational and vocational qualifications than are required for a prison-based rehabilitation programme. Additionally, they do not demonstrate serious behavioural problems, which would justify their placement in a prison-based treatment programme. Thus, the main concern of the prison has been to isolate the national security and innocent prisoners from the rest of the prison population, by keeping them in lock-up.

As a result of the above, it has been difficult for the prison system to fully implement its rehabilitation function, which was a significant part of its legal mandate. However, the incapacitation function, another element of the prison system's legal mandate, has been implemented relatively well.

9.2 Evolution of the prison system's legal mandate

An examination of Afghanistan's political history suggests that wars and instability, especially political ruptures and subsequent regime changes, have had the greatest impact on the criminal justice system and the evolution of prison institutions in general. The Ghaznavid Dynasty (977-1163 CE) created a criminal justice system that included prisons. Afterwards, Genghis (1219-1222) destroyed everything that had been built previously, including the criminal justice system and prison institutions developed by the Ghaznavids. Ahmad Shah Durani (1747-1840) rebuilt the criminal justice system, including prisons, as part of the overall state structure, and Abdulrahman (1880-1901) regulated the criminal justice system and utilised prison institutions extensively.

These are prominent examples of a resilient system of punishment, emerging not just from years of war, critical disorder and invasion, but also from the atrocities, abuse, and subjugation perpetrated by ruling governments in order to centralise their power. Abdulrahman used a harsh criminal justice system and horrific prison institutions as a central element of his strategy to claim and restore the state's monopoly on power. Many of his successors adopted a similarly aggressive (or slightly more modest) version of the same strategy, because although in theory they remembered Abdulrahman's time as particularly tyrannical, in practice they preferred to follow his approach. This was particularly evident in prison management during the PDP era, as well as during the Mujahideen, the Taliban regime, and the post-2001 international intervention and the War on Terror.

Prison institutions therefore have a long, deep-rooted history of serving as the primary instrument to suppress political opposition and assert state coercion, and they are often used to attempt to maintain control over the central government. In view of the close historical link between prison institutions and state power, oppression and mistreatment have become part of the prison system's genealogy, which has continued to manifest itself in various forms, more specifically, via the exchange of prison personnel and cadre.

A fundamental counter-measure, was the development of a legal framework for prisons, which not only regulated their use, but also specified their exact mandate. The legal mandate for the prison system was a fundamental cure, which emerged alongside the development of a legitimate state after 1919. It is safe to assert that the initial legal mandate for prisons dates back to the first Prisons and Detention Centres Law of 1923.[1] Apart from limiting the number of prisons to only one per province, and assigning prison personnel to help police and manage the prisons, this law introduced specific legal boundaries for prison institutions.

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

Prison functions were limited to the incarceration or confinement of criminals (e.g. incapacitation), and would only be provided as a punishment for those convicted in state courts.[2] In addition to defining the role of prison institutions and prohibiting their widespread arbitrary use, the same law gave initial indications of prison-based work and services, such as health and catering.[3] These were not connected with concepts such as the education and rehabilitation of prisoners, and neither of these were mentioned in the law. It is therefore clear that the only official objective of both imprisonment and the system's fundamental legal mandate was incapacitation.

The second Prisons and Detention Centres Law was passed almost 30 years later, in 1950. The law was an almost identical copy of its predecessor, hence the legal mandate for prisons also remained unchanged.[4] Later, by virtue of a 1971 secondary regulation, the Central Board of Prisons was created as the first joint management body for the coordination of prison affairs.[5] This resulted in some specialised prison-based programmes, such as health, education, work, and vocational trainings, which were jointly mandated to the prison administration and other state institutions.

Due in part to changes in the overall state-building process during the golden era (from 1964 to 1973), the Central Board of Prisons brought together relevant state agencies and served as a coordination platform for prison management and services. By delegating specialised prison services to state institutions, the board not only reduced the burden on national prison administration, it also allowed for more fundamental steps to be taken towards upgrading the prison system's infrastructure, including constructing new prisons such as Pul-e-charkhi (see 2.5 above).

The biggest step in defining the legal mandate for prisons was taken under the PDP, in the third Prisons and Detention Centres Law, passed in 1983.[6] The law encompasses both incapacitation and rehabilitation as legal mandates for the prison system, and it is twice as long and detailed as the previous laws (72 articles, as opposed to 27). The fourth Prisons and Detention Centres Law was passed during the Taliban era, in 1999, and it was an exact copy of the prison law passed during the PDP era.[7]

The next time the prison system's legal mandate fundamentally changed was when state-building efforts after the 2001 international interventions had repercussions for law-making and criminal justice. The

2 See rule number 10 of the 1923 law.

3 See rule number 18 of the 1923 Food and Medical Services Law, and rule number 22 on compulsory work during incarceration.

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

5 The bylaw was called *Muqarara-e-tanzim wazaif bord markazi mahbis Afghanistan*, 31st of Hamal 1350 [30th April 1971].

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

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

change was introduced alongside the fourth Prisons and Detention Centres Law, decreed in 2005 and adopted by the National Assembly in 2007 (see 4.3.5 above). The new law further broadened the scope of the legal mandate for the prison system, by incorporating a mix of previous laws and modern criminal justice concepts, including the UN minimum standards for the treatment of prisoners. Although initially the law was silent about rehabilitation as a direct legal mandate of the prison system, the concept was reinserted via a modification made by the National Assembly's Upper House.[8]

In summary, throughout the almost 60 years following the enactment of the first Prisons and Detention Centres Law, similar legal arrangements were used consistently, and the prison's legal mandate did not change. The prison's mandate remained unchanged even during the golden era (from 1964 to 1973), when reforms flourished across all other sectors. In contrast, the two most significant changes in the legal mandate for prisons took much less time to emerge, and both occurred during periods when foreign influence and intervention were the most prominent factors.

The fluctuation of the legal mandate suggests that prisons were especially relevant and attractive during times of foreign intervention. Paradoxically, at times when prison institutions (particularly Pul-e-charkhi) were experiencing some of their most notorious conditions, their legal mandate was in its ideal form in terms of prison conditions, prisoners' rights, and state duties and responsibilities for prisoners' wellbeing.

9.3 Implementation of the prison system's legal mandate

As discussed earlier, the prison systems' legal mandate has two aspects: incapacitation and rehabilitation. This research focussed mainly on the rehabilitation aspect, and I examined understanding of rehabilitation at three levels: legislators, general criminal justice actors, and prison administrators. This revealed some fundamental issues with the concept and practice of rehabilitation across the prison system, and particularly in Pul-e-charkhi:

First, legal drafters at the MoJ acknowledged that international blueprints were used to mandate prisons with modern criminal justice concepts, such as rehabilitation, although it was understood that it was not possible to

8 As discussed before, it seemed strange that two international consultants working for the UNODC did not include rehabilitation as an objective of imprisonment, but I have not been able to trace them to ask why they did so. One can assume that the consultants were aware of the broader justice reform strategy and that the criminal justice system had to support certain functions of the War on Terror. Presumably a prison system serving the interests of incapacitation, rather than rehabilitation, would be most effective in those situations. Moreover, understanding the consultant's perspective on the ground and the probability that rehabilitation would be a far-fetched dream for the prison system, was probably also important during the decision making process to leave out rehabilitation as an objective of imprisonment.

achieve, in practice. Second, domestic actors considered *Kar-e-Sharafatmand* as the most relevant type of rehabilitation for Afghan prisons, hence they did not fully embrace anything beyond that concept.[9] Third, almost all the modern concepts, ideas, and standards of rehabilitation that were adopted in laws, regulations, and lower statutory documents remained somewhat alien to prison institutions, hence they were technically challenging, difficult to apply, and lacking in financial rationality.

The real life implication of these shortcomings are two rehabilitation programmes (education and vocational training, in the case of Pul-e-charkhi), which are not akin to any standard rehabilitation practices. There was a particularly significant mismatch with the Something Works framework and the treatment amenability criteria, which both call for a differential intervention and treatment amenability perspective. Both programmes failed to clearly and concisely address the four key principles of the Something Works framework (e.g. risk, need, responsivity, and integrity).

In addition to lacking 'responsivity', the two prison-based rehabilitation programmes did not meet the 'need' and 'integrity' principles for most prisoners. The programmes' downside was most evident for National Security prisoners, who were the highest risk group at Pul-e-charkhi. For example, based on the 'need' and 'responsivity' principles, prisoners in the National Security category required programmes targetting issues related to fundamentalism, but such programmes were not being offered at the prison. If assessed against the institution-building framework, the two rehabilitation programmes also had issues with the 'integrity' principle, because they lacked an organised and systemic institutional arrangement, resources, and financial enablers.

The two programmes also suffered from what I would like to term as 'decidedly poor leadership'. Prisoners' access to the programmes was also problematic, due to lack of capacity, as well as restrictive security measures and power politics between state agencies, leading to poor programme delivery. Thus, the rehabilitation programmes in Pul-e-charkhi illustrate how, seemingly, mandating the prison system with rehabilitation and incapacitation as the underlying objectives of a prison sentence was an unrealistic expectation, given the prison's condition and level of development. The mandate was perhaps merely a legal facade for exploitation of the prison system as a means of state coercion.

This is testimony to the fact that laws loosely connected with social needs and realities are less likely either to succeed or to change the target institutions (Seidman and Seidman, 1994; Seidman, Seidman and Abeyesekere, 2001). On the other hand, a broader review of the Afghan prison system throughout its history suggests that, even though the legal mandate for prisons has continually expanded, it has had hardly any influence on prison practice. Thus, one can assert that, like most other countries across

9 The term *Kaar-e-Sharafatmand* literally means 'constructive and honorable work'. It is a localised version of what sociological theories call 'protestant ethics' (Weber and Parsons, 2003).

the world (particularly south and central Asian countries), the incapacitation function of the prison outweighs its rehabilitation objective. A pronounced imbalance toward incapacitation could be observed, however, in the case of Afghanistan and Pul-e-charkhi. This has been due to the wide gap between the prison systems' ability and the function of rehabilitation as a prison-based intervention.

In conclusion, the prison-based rehabilitation in Pul-e-charkhi is hindered by several shortcomings. Addressing these shortcomings will require increased funding and resources, better coordination and collaboration between different organizations, and a more comprehensive approach that addresses the underlying causes of criminal behavior. With that in mind, if incapacitation was not another objective of imprisonment, Pul-e-charkhi, with its poor rehabilitation function, would have been deemed a obvious failure.

9.4 State-building efforts and their impact on lawmaking and criminal justice

9.4.1 State-building

My main research question refers to the context of state-building and its impact on lawmaking and criminal justice, which is crucial to understanding how the legal mandate for the Afghan prison system developed. Afghanistan's history is not just a story of interrupted state-building processes and disturbed development patterns, over a long period of time. The country also assumed the characteristics of a rentier state, due to foreign interventions, subsidies, and an influx of external financing, which were more intense during some periods than others, but were always connected to conditions prejudicial to the state-building process in general.

For example, during the nineteenth century the British exerted influence over Afghanistan's international affairs and used the country as a buffer state against the expansion of the Russian Empire. Likewise, the Soviet Union and the United States gave considerable aid to Afghanistan in lieu of their Cold War strategies. Later, as a result of the Soviet occupation of Afghanistan in 1978, large amounts of materials and substantial financial support were provided both to the state and to its opponents, making Afghanistan one of the world's largest recipients of development assistance. This meant that the country's rulers did not have to mobilise domestic revenue, make plans, or worry about covering their own expenditure or that required to run vital sectors.

Consequently, the country became a rentier state and was left with a set of weak institutions that were incapable of performing their basic functions. Layers of socio-political differences and domestic 'blocks' had also emerged, due to national and regional power politics. Later, political parties and opposing groups were shaped by ideologies ranging from constitution-

alist liberal democracies and socialism, to communism at one extreme and Islamist radicalism at the other. As a result, ambitious reforms and efforts towards social change almost always met with resistance and confrontation, regardless of their direction.

For example, King Amanullah's attempt to impose social reforms in 1919 met with fierce opposition, resulting in his removal from power. Likewise, the (communist-oriented) PDP's reforms in the 1970s met with violent opposition, resulting in long-lasting unrest. With these background matters in mind, it is vital to note that tensions between 'historical blocks', and amongst domestic groups and individuals, have all had significant impact on the reversal of state-building processes, which has ultimately led to ruptures, turmoil, and civil wars.

On the basis of a relatively brief part of the country's history, another important conclusion can be drawn about its political leadership. Experiences from the 'golden days'/democracy decade (1964 to 1973) suggest that, along with gradual movement towards self-reliance, modest political liberalisation manifested in the form of a new constitution and parliament. Whilst the physical reach of the state was limited, especially in the countryside, its authority and legitimacy were widely acknowledged and accepted. The state was therefore able to provide workable arrangements to meet the basic needs of its citizens. This suggests that gradual and calculated changes were not only acceptable, but desirable and welcome.

This period of the country's history reveals one important lesson, in terms of the significance of effective national leadership when dealing with internal and external issues and dynamics. By national leadership, I mean not only a king or president, but also a broader group of actors, including key officials, state apparatus, political parties, civil society, and elders, as argued in Hyden (1999). This kind of leadership is illustrated by experiences from the 1950s to early 1970s, when the collaboration of various state institutions led the country towards gradual modernisation and development, in spite of the regional and international dynamics which had existed previously and persisted beyond that period.

The next important lesson relates to the quality and strength of state institutions. Although the institutional capacity perspective (discussed in Chapter 1) has been criticised as a concept, because it is based on a purely Weberian hypothesis, which is not a perfect fit for developing countries, the history of Afghanistan demonstrates that having strong state (not necessarily Weberian) institutions is a pre-condition for stable state-building processes in developing countries. The weak and incapable institutional landscape of post-2001 international intervention (discussed in Chapter 3) is testimony to the fact that the relevance of strong institutions is not just a historical matter; it has also been relevant recently, and will remain so in the foreseeable future.

Concerning post-2001 international intervention, it is important to note that in the aftermath of the Taliban almost all state institutions were exhausted, and professional leadership had diminished under decades of conflict. The UN adopted an 'international light footprint' approach,

resulting in the relevant UN agencies stepping back from deep, meaningful, institutional-level engagement. Consequently, reform interventions became donor-driven, were planned with minimal checking and balancing measures, and had conflicting development agendas that were often influenced by the interests of individual donors (Banakar and Travers, 2005)

It soon became a trend for all donors to impose temporary institutions and project implementation units across all sectors of reform, perhaps inspired by the 'commission modality' provided in the Bonn Agreement. This modality not only prevented the natural development of domestic institutions, it also widened the gap between domestic actors and the idea of overall reform. Many of these aspects therefore faced issues relating to their compatibility with the social and institutional conditions in Afghanistan.

As for the main consequences of the post-2001 international intervention, although it resulted in some progress for state-building endeavours at the beginning, the persistence of certain strategies (such as engaging questionable domestic actors and a lack of coherence in international development policies) overshadowed such progress. One serious problem was that post-2001 international intervention was intended not only to promote democracy and improve state institutions, but also to placate warring factions by integrating them into political processes.

Whilst the Taliban was already excluded as one such warring faction, other opposing groups were integrated on the assumption of political reconciliation, due to international consultants' evident lack of knowledge about the struggle between domestic actors and 'historical blocks', and due to flawed processes that were unable to maintain a balance between the technical and political dimensions of reform. Consequently, many reform efforts, including the constitution making and judicial reform processes, were marked by harsh power struggles between different groups.

In early post-2001 the struggle was evident amongst formerly warring factions, consisting of powerful warlords and Islamists, as well as newly emerging liberal leaders and western-oriented technocrats. As part of international coalition efforts to overthrow the Taliban, the former group possessed some leverage, which was reinforced by a sense of coercion, as they were also powerful enough to undermine stability. The latter group, by contrast, was driven by extensive support and demands from international partners for reforms that rarely corresponded to the reality of the situation in Afghanistan.

Many of the reform steps in the Bonn Process – including the ELJ, the Transitional Authority, the CLJ, presidential and parliamentary elections, as well as technical institutions, such as the Constitutional and JRC – were used or manipulated by the international community, to legitimise infamous groups and individuals who espoused a flawed rhetoric of political inclusion. This resulted in including potential spoilers in state structures. In turn, this led to marginalisation of the rule of law, notably in the areas of security, criminal justice, and particularly transitional justice (Giustozzi and Isaqzadeh, 2011; SIGAR, 2022).

9.4.2 Lawmaking

The lawmaking effort and overhaul following 2001 did not start from scratch. There was a much neglected legacy of lawmaking and reform that was particularly rich and consistent during the golden era. That period of consistency, development, and euphoria was followed by long-lasting instability, war, and distraction (1978 to 2001). In the aftermath of the Taliban's departure from power in 2001, almost all the state institutions crumbled, and the quality of state leadership weakened dramatically; these were partially rebuilt after 2001, but the rebuilding process and results were associated with many problems. Therefore, it is safe to claim that only modest progress was made.

Most of the post-2001 law reform was far from well-informed and logical, and the way in which criminal justice laws were affected by the reform process reminds us of that. Many of the reform institutions were temporary in nature, and had unclear or disputed goals. Also, multiple participants, different identities, and conflicting interests were all involved in the lawmaking processes. Intervention was primarily focussed on introducing the rule of law on the bases of international blueprints, rather than on analysing how existing frameworks could be modified or adopted, and this created confusion.

Many of the interventions also ignored the perceptions of domestic actors. As a result, reform efforts advanced along one track, whilst domestic practices advanced along another. In the area of criminal justice (for example), wide disparity between the perceptions of domestic actors and the provisions of laws regarding rehabilitation led to a huge difference between the law and the reality of the prison system.[10] However, it is important to note that different periods of post-2001 reform had different features and characteristics.

During the Bonn Process (2001-2005) lawmaking was heavily influenced by donors and international experts, and this gradually deviated towards the specific developmental goals of donors and the bilateralisation of reform activities, as soon as the 'lead donor approach' was adopted. Examples of legislative products from this period include the supply-driven Interim Criminal Procedure Code 2004, adopted by the IJPO, and in the decreed Prison and Detention Centres Law 2005. During the Post-Bonn Process,

10 I have used the term 'domestic actors' quite a few times, and at this point it helps to elaborate on the different types of domestic actors. One main group of domestic actors worked as government employees in the relevant field (for example, the national prison administration), and another group of domestic actors were hired by relevant development projects. These actors were considered project staff, rather than government employees. Yet another group of domestic actors did not consider themselves part of either of the above two groups, and were either employed by private consulting firms or hired/contracted by donors for short-term consultancy. The first group was the most prominent, and tended to choose a different path when they felt alienated or suppressed by internationally funded reform initiatives.

however, there was an increasing tendency to engage domestic actors. Meanwhile, draft laws followed a more normal lawmaking process. Amongst the most relevant legislative products of this period are the Criminal Procedure Code (2014) and the Penal Code (2017).

After 2014, legislative processes witnessed more engagement from domestic actors, but donors became less responsive to the development needs of individual state institutions. As a result, lawmaking gradually lapsed back into 'benchmarking' and project-oriented laws, in order to attract donor money (see 3.3.6 above).[11] Although this approach to lawmaking had existed from the outset (since 2001), it was more prevalent after 2014, and it produced some of the worst quality laws, particularly in terms of counter-corruption and procurement, because the reform interventions in particular did not connect with social needs, aiming instead at a flow of funds.

One general finding from this study suggests that benchmarking and project laws profoundly challenged the authority of domestic actors working in the lawmaking domain, leading to institutional paralysis. Domestic actors refrained from serious participation, as well as from thorough analysis and debate during the drafting processes, because they were convinced that drafts associated with the donor agenda or backed by certain projects would be approved in one way or another, no matter how useful they were. Thus, in many cases the technical details of the laws were overlooked, as there was no will or chance for domestic actors to discuss them.

Legislative proposals, initiated directly or indirectly by donors and projects, used to be monitored by national and international consultants, who were involved from the drafting of the law up until the approval process. Domestic actors who were part of permanent institutions, such as the MoJ or other state agencies, tended either to avoid debating in front of the consultants or to debate solely for the purpose of completing formalities, rather than for the purpose of calculating the expediency of ideas proposed.

Another tricky aspect of reform was the excessive use of legislative decrees. This was unavoidable during the Bonn Process, because fast track changes were required in almost all walks of life and the system lacked an active legislature to oversee the function of lawmaking. However, after the National Assembly began its work in 2005, legislative decrees did not have much room, and had to stop in the interests of drafting more careful and calculated legislation. Nonetheless, enforcing laws via decrees was still a predominant approach, particularly in the area of criminal justice, in which

11 Traditionally, benchmarking was used by the MoF to describe the agreement it had made with donors to complete certain tasks, which was a condition for the flow of funds to the national treasury. The benchmarking conditions might include a range of activities, such as improving livelihoods, combating corruption, increasing the number of children admitted to school, and enacting legislation. If the passing of a law was a condition for releasing funds, the MoJ would refer to that law as a 'benchmark', superseding almost any procedural limitations, including the legislative plan.

all the relevant legislation was decreed and enacted before the National Assembly adopted it, usually without making many substantive changes.

To this end, a few issues were common to almost all the stages of the reform, including an overcrowded landscape of actors, the existing legal frameworks being ignored, employing temporary institutions to work on reform processes, the marginalization of permanent institutions, a lack of public consultation, using shortcuts to pass laws such as legislative decrees, and forcing donor conditions via a variety of funding conditionalities, particularly benchmarking agreements.

When looking at the situation from a conceptual perspective, the closest theoretical framework that can explain what happened during the post-2001 law reform process is the 'Garbage Can' model for decision making, proposed in (Cohen, March and Olsen, 1972). The model basically provides a framework for understanding the decision-making process in the absence of a rational, informed and structured approach, which leaves room for decision making based on constant, accidental and arbitrary interaction between semi-independent choice opportunities, and internal and external problems, solutions and participants.

This seems to have been the case for most criminal justice legislation affected by the post-2001 reforms. Thus, it is not surprising that many legislative products did not have the capability to elevate criminal justice and state-building as a whole. Sometimes, conflicts with institutions such as prisons were even created, because of a wide gap between the domestic notion of justice and that of the ideal situation provided in the legislation. As Riggs (1964) argued, under the concept he referred to as 'formalism', a wide gap between prescribed norms and effective practice has been a key feature of developing countries, in general. One could argue that Afghanistan is an extreme example of such a gap.

It is worth reiterating that these issues were only partly due to international intervention post-2001. The intra-Afghan dynamics, and the relationship between state elites and society, as well as various social groups, also played an important role. In almost all the historical periods discussed in this work, reform interventions encountered serious opposition, to the extent that they have challenged government institutions, exacerbated the situation, and challenged the stability of the state.

There are, however, two lessons to be learned from this history (e.g. from the golden era): i) gradual and calculated change under unifying and broad-based domestic leadership is most likely to result in a higher degree of success; and, ii) reasonably strong state institutions are necessary to ensure sustainable progress towards longer term development.

9.4.3 The criminal Justice system

During the Bonn Process (2001-2005) and the Post-Bonn Process (2006 and beyond), reforms resulted in a combination of success and failure. In the

two phases, a republic was founded on a constitution that guaranteed respect for citizens' civil rights and ensured separation of powers between the government, the legislature, and the judiciary. Two elected presidents and four elected parliaments enacted numerous laws, and a Supreme Court was reconstituted as the head of a constitutionally independent judiciary with over 2,000 judges.

In addition, due process was formally introduced into the criminal justice system via the restoration of the AGO, with nearly 5,000 prosecutors, and the emergence of a formally AIBA, with approximately 4,000 lawyers. Wardak (2016) argues that "the reform initiatives also include the administrative capacity development of justice institutions, equipping them with modern office facilities…. Moreover, many justice institutions have been refurbished and many more built from scratch" (2016, p. 7).

In the meantime, a series of relevant works rightly point out that an absence of a professional judicial cadre that is free from corruption and political bias, the lack of systemic cooperation between key justice institutions, and the lack of nationwide coverage of justice services, were all key deficiencies of the formal justice system (Wardak, 2004, 2011, 2016; Bassiouni *et al.*, 2007; Wardak, Saba and Kazem, 2007; Wardak and Braithwaite, 2013). The deficiencies contributed to several reform failures, including the inability to establish a stable political environment, to promote law and order, to build trust, and to eliminate corruption.

As a result, a culture of impunity has developed that, in turn, has led to industrial-level corruption and fraudulent political processes, resulting in most people losing faith in the formal justice system. The Taliban took advantage of those failures, even before their military takeover in 2021, by setting up parallel institutions, including a 'shadow judiciary'. Some authors have argued that, in addition to imposing harsh punishments, the Taliban's shadow judiciary also resolve civil disputes more quickly than an official court system (Baczko Adam, 2021).

Although criminal justice system issues and the failures of the expansive post-2001 reform could generally be explained in a number of ways, I would like to pinpoint two explanatory factors that in my experience were of great significance. First, as in most other conflict and post-conflict situations, Afghanistan was an example of a switch and swing poly-normative society, where Sharia, tradition, and statutory laws are mixed and rule together. The public engages in 'forum shopping', and it is open to accepting various norms, depending on their outcomes. For example, people are generally in favour of harsher punishments, if they fear for their safety and security.

This is understandably rooted in their own bad experiences of living through long-lasting war and insecurity, and the fact that people believe crime rates will drop if a harsher social reaction is applied. As a result, an informal justice system, particularly the Taliban's harsh and illegitimate shadow justice, is encouraged to compete with the official criminal justice system. In response, the official criminal justice system also becomes

increasingly punitive. The dilemmas of innocent prisoners, the punitiveness of the criminal justice system, and the increasing corruption and malpractice within the criminal justice system are all good examples of this, because they demonstrate not only a punitive tendency within the formal criminal justice system, but also that the system is weak and flexible enough to be manipulated for political ends.

This brings me to the second explanatory factor, which has to do with the main thrust and primary motive behind post-2001 reform and international intervention. As others have rightly mentioned, the primary goal of post-2001 international intervention was not the establishment of a complete state, particularly regarding the judiciary. The primary goal was defeating the Taliban and stopping the territory becoming a base of operations for future international terrorists. The international community, particularly the United States, began to place a high priority on state-building after 2006, when intervention was already advancing towards a chaotic outcome, but this was only a means of bringing an end to the ongoing Afghan conflict. Some authors claim that, "the dynamic was so exacerbated in Afghanistan that the U.S. strategy seemed to ping pong at times between war fighting, counterterrorism, security assistance, and retreat" (Woods and Yousif, 2021).

Due to fluctuations in the overall direction of reform, only specific aspects of the criminal justice system that were immediately necessary to achieve international strategies were strengthened. These primarily related to areas of the criminal justice system, such as the Heavy Crimes Unit, which dealt with issues relating to drug enforcement, anti-terrorism, and (nominally) anti-corruption. The rest of the system was left out of the scope, in order to address its internal conflicts, resource issues, and lack of legitimacy. Thus, it is safe to argue that the reforms qualify best for what is called 'goal displacement', resulting in the redirection of criminal justice resources to fight the War on Terror more than ordinary crimes.

9.5 Pul-e-charkhi

Pul-e-charkhi has chronic operational problems as an institution, despite having relatively better infrastructure compared to other prisons in the country. The prison inherited some of its core values from the previous Soviet Union system of governance. The socialist legality and beliefs about rights and responsibilities inspired the prison's management and its treatment of prisoners. The values were enshrined so deeply within the prison that vague changes after consecutive political ruptures, including the country's experience of an anti-communist orientation in 1990 to 2001, could not change them.

On the contrary, due in part to the political ruptures and regime changes, a convoluted pattern of values, institutional cultures, and management practices was injected into the prison. These contradictory values and institutional cultures, served in particular as strong deterrents to reform and

unification, with certain parts of the institution working to counteract others at every step towards reform. This was mainly due to tensions between the new ideas and old institutional values, which were retained by the cadre and personnel and had deep historical roots in opposing belief systems.

Furthermore, due to regime changes the prison management authority swapped between prisoners and prison guards a number of times. Almost always, the earlier group opposed the values of the latter, or at the very least had no good memories of them, and then ended up becoming the new prison authority instead. Due to this factor alone, previous prison reforms were reversed in a dramatic manner that had lasting impact on the prison infrastructure. For instance, the Mujahidin's use of the prison as a military base resulted in so much destruction of the prison infrastructure that it could hardly be recovered throughout the post-2001 reform period.

The post-2001 reform presented a unique opportunity for the prison system in general, and Pul-e-charkhi in particular. As a result of reform, the prison's infrastructure and resources moderately improved, and its contradictory values started to shrink gradually, in favour of liberal democratic values such as human rights and UN minimum standards for treatment of prisoners. The over-arching legal frameworks of prisons were revised and made more lenient towards modules adapted from western countries – more specifically, from Europe and the United States.

However, as is evident from the fieldwork data, the reform failed to address a wide gap in prison resources, particularly the technical, legal, and professional resources required for its programmes such as rehabilitation. As a result of poor leadership, the two rehabilitation programs that existed in Pul-e-charkhi suffered not only from structural issues, but also from lack of motivation, communication, and coordination problems. Traditionally, rehabilitation programmes have been led by patronage networks, rather than by merit-based recruitment, resulting in a lack of tangible programmatic support.

In addition, due to its minimal budgetary allowance, daily operation of the prison (including maintenance of its infrastructure) was difficult. The prison system has always been low priority for the government and for international donors. Thus, the institution's capacity is not only inappropriate for its programmatic needs (as discussed in Chapters 6, 7, and 8), it also has issues with almost all other aspects of its operation. For example, the prison has traditionally been loaded with as many as two or three times its capacity for prisoners. Thus, the prison's institutional capability, its resources, and its overall environment are all inadequate.

Despite being one of the biggest prisons in the region and ranking higher than all other prisons in the country, Pul-e-charkhi is unsatisfactory in so many aspects. The conditions of its living areas, kitchens, restrooms, and sports areas, and its running water and visitation arrangements are almost all poor. Due to pervasive corruption, both at domestic level and via internationally funded contracts, there is a long way to go before these issues can be fixed. For example, according to the donor reports , the

planned renovation of Pul-e-charkhi remains unfinished after five years, and almost all of the $20.2 million contract value has been spent, due to flawed designs and corruption within the contracting agency and its private contractor(s) (SIGAR, 2014, p. 7).

Regarding prisoners, as has been stated above, those affiliated with the Taliban and anti-government militias are the largest group of prisoners in Pul-e-charkhi. During my fieldwork, it was noted that National Security prisoners often challenge prison-based programmes, either directly or by offering alternatives, such as offering a Madrasa instead of an official school. They are often the source of riots and strikes within the prison, because they tend to remain united, even when they are scattered across different blocks within the prison.

In addition, there are general criminals and drug trafficking groups who do not follow specific sets of values, but unlike the Taliban they do not oppose prison programmes. In this category, the only prisoners who have a significant role in the prison are the Bashees, who tend to influence not only prison conditions but also prison-based programmes. Although Bashees have generally been supportive of prisoners, there are many exceptions to this rule, especially when they come from a prison gang background. In the event that they reflect the latter affiliation, Bashees usually either support prison gangs or engage in other types of transaction, including with the prison gaurds that may benefit them and their close friends.

9.6 Lessons from Balkh prison

A simple comparison between Balkh and Pul-e-charkhi points to a few differences that can be used as lessons for the prison system in Afghanistan. Pul-e-charkhi is a relatively standard and central prison, whilst Balkh is a second grade provincial prison in Afghanistan. The latter operates within an office building for traffic police, which is not even close to the standard of Pul-e-charkhi. Likewise, except for an official literacy programme, there are not many official prison-based rehabilitation programmes in Balkh. Nevertheless, prisoners in Balkh appear to be happier, healthier, and friendlier than those in Pul-e-charkhi.

The size and the security level of the prison does matter, and it is mainly due to its lower security level that prisoners in Balkh can walk freely inside the prison, spend extended hours in the open air, and hang out with other prisoners. The prison leadership has had a clear and significant impact. Due to the innovative and localised approaches of the prison leadership towards the prison routine, prisoners could receive visitors more frequently, choose to bring or cook their own food, and stay in touch with and help other prisoners, when necessary. Together, these factors have resulted in an environment so conducive to the rehabilitation of prisoners that, I believe, if there is a way to reform prisoners, it would be easier in a prison like Balkh than in a prison like Pul-e-charkhi.