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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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Summary

This dissertation examines Afghanistan's largest prison, Pul-e-charkhi, as a case study of state-building, lawmaking, and the criminal justice reform before and after 2001. More specifically, it contributes to discussions around evolution and implementation of the prison system's legal mandate (notably rehabilitation of prisoners) in the context of the post 2001 state-building efforts and overhaul.

In so doing, Chapter 1 outlines the study's research problem. It narrates how the central concepts of state-building, lawmaking, and criminal justice relate to each other, by referring to the relevant literature. Considering the nuanced particularities of the central concepts, the chapter suggests looking beyond the familiar dualistic notion of 'law in the books and law in action' and proposes the use of an institution-building framework to analyse prison institutions and the implementation of their legal mandates, including prison-based rehabilitation. After a concise sketch of the study's rationale, research questions and methodology, the chapter reflects on the specific features of the prisons visited for the purpose of this study – Pul-e-charkhi near Kabul, and the provincial prison of Balkh in the north of the country. In this regard, the chapter joins a body of literature that maintains a critical account of prison conditions in Afghanistan. At the end, the chapter provides a brief outline of the dissertation.

Chapter 2 offers a concise historical foundation for the rest of the dissertation, by providing a simplified periodisation of the history of state-building, before and after 2001. The main point of the chapter is to illustrate how Afghanistan's political ruptures and subsequent regimes have affected its state-building at large, and its lawmaking – in particular regarding the field of criminal justice and the prison system; notably, regarding the prison-based rehabilitation programmes. In that regard, the chapter argues that until 1978 there was a deep conflict between modernisers and traditionalists, mainly mullahs and local power brokers; winners and losers were alternating. During the last ten years of that period, there were signs of progress towards 'modern' state-building and the development of state institutions.

From 1978 to 2001 there was a deterioration of state authority. The first political rupture, in 1978, brought the People's Democratic Party (PDP) to power. The PDP espoused a communist, anti-Islamic ideology. The second political rupture, in 1991, brought the Mujahedin to power. The Mujahedin followed Islamist ideology and had strong connections with the Muslim Brotherhood. In 1995, a third political rupture brought the Taliban to power for the first time. The Taliban established their first Islamic Emirate, inspired by traditional and fundamentalist Islamic beliefs. In the aftermath of 2001,

until 2020, there were modest improvements, but at the same time there was clear alienation between donors on the one hand and the Afghan government and society on the other. Finally, in 2021 there was a regression, in the form of the resurgence of the Taliban, that was partly due to the contentious peace negotiations in Doha.

The chapter argues that, historically, Afghanistan's state-building process has been chequered, chaotic, and incomplete, due to both internal and external factors. The problems of state-building have been mirrored in many of the post-2001 reforms and state-building overhauls, including lawmaking, criminal justice reform, prison management, as well as prison-based rehabilitation programmes in Pul-e-charkhi and other prisons.

Chapter 3 speaks about the institutional context of law-making and criminal justice reform, in the aftermath of 2001. The chapter argues that almost all state-building efforts involve some kind of lawmaking and reform. Whereas in recent decades legal reform, or 'rule of law promotion', has been a core activity of international intervention across the Global South, legal reform, particularly in Afghanistan, was a huge undertaking after 2001. In order to fully capture the context, the chapter discusses two distinct periods in the post-2001 overhaul, namely: the Bonn Process (2001-2005) and the Post-Bonn Process (2006 and beyond). It argues that in both periods interventions led to reform policies and projects that were alienated from the permanent state institutions and domestic realities, and that the end results were often counterproductive, since the interventions did little to strengthen permanent institutions; even weakened them. This was at first both in theory and in practice; later (after 2006), it changed to being less so in theory but still in practice.

The chapter also argues that, during the Bonn Process, the Judicial Reform Commission and the Constitution Commission were the two most important platforms for change. During the Post-Bonn process, these were followed by a number of temporary institutions and platforms, such as international conferences, working groups, and commissions. Together, these led to (a) subsequent lawmaking for reform, under the influence of multiple sources. As a result, the future of reform remained vulnerable to ad hoc interventions, (b) an inadequate foundation for reform of the justice sector, (c) an inability to define a clear relationship with permanent justice institutions, and failure to reconcile differences amongst and within those institutions.

The ultimate result of intervention has been an institutional framework that is unable to establish a solid unified basis for further legal development. It has not only failed to 'heal' the admittedly imperfect, ruptured, and conflicted system of permanent 'legal institutions' already in place, but it has made things worse by: a) not building on 'elements that work' in the existing system of permanent legal institutions; b) bringing in 'multiple sources of influence'; and, c) eroding the permanent state institutions by hindering their natural capacity building process.

In conclusion, the chapter highlights that these complications have been

due, in part, to the fact that the system inherited by the Interim Administration in 2001/2002 had its own serious problems, caused by past rupture and disruption, as well as the political, economic, and socio-cultural context of state institutions. Solving these problems in themselves would have been a huge challenge, even without the problematic involvement of donors after the 2001 international intervention.

Chapter 4 presents a case study of four criminal justice laws that were reformed as part of the post-2001 international overhaul. These are the Criminal Procedure Code 2004, the Criminal Procedure Code 2014, the Penal Code 2017, and the Prisons and Detention Centres Law 2005, 2007 and 2020. The case studies reinforce, and even go beyond, many of the critical points that Thomas Carothers made in his work on promoting the rule of law abroad'.

The chapter begins with a section on the standard lawmaking process, which in practice did not translate into much action. It makes an important argument about the extent to which and how the post-2001 reform departed from the prescribed lawmaking process, and why. The four case studies respond to the question of whether or not domestic actors 'fully embraced' the reform, or if parts (or all) of it remained alien to them. It argues that many domestic actors, particularly, those who were 'traditionally-minded' remained skeptical of 'modern' concepts, such as rehabilitation. However, judges and prosecutors strongly believed in prison-based rehabilitation and prison administrators had a generally sound understanding of rehabilitation.

This all indicates the heterogeneous and overlapping nature of norms and institutions in Afghanistan, which typically lead to widespread ambiguity and a lack of consensus vis-à-vis national law, policies and institutions in general, ultimately leading to the strengthening of patronage networks and paving the ground for endemic corruption. Whilst this has also been the case in many other developing countries, as theoreticised in Fred Riggs (1964) *Administration in developing countries*, the issue is connected to the serious lack of resources and technical expertise in Afghanistan.

Chapter 5 deals with the prison system's legal mandate; notably, the part relating to rehabilitation. It argues that there is an evident lack of stable consensus amongst academics and policy makers worldwide, about the effectiveness of rehabilitation as a prison-based programme. Proponents persist amongst UN staff, policy makers, and academics. In this regard, there is some consensus about the programmatic and institutional conditions for successful prison-based rehabilitation, particularly on the basis of the 'something works' framework. The chapter also draws on examples of successful rehabilitation programmes in the Muslim world, including in Middle Eastern countries, such as Yemen, and in central Asian countries.

The chapter further argues that gradual evolution of the prison system's legal mandate dates back to the pre-2001 period. It maintains that rehabilitation as part of the prison system's legal mandate developed gradually, and became a clearer objective of the criminal justice policy and regulations after

2001. The chapter presents a clear and concise outline of important provisions in pre- and post-2001 regulations, including the relevant directives in a chronological order. It indicates conflicting provisions in the pertinent legal framework, i.e. the 2004 Constitution (e.g. articles 27 and 130), the 2017 Penal Code, and the 2020 Prison and Detention Centres Law.

The chapter also refers to skepticism amongst domestic actors regarding the possibilities for achieving rehabilitation in Afghan prisons. As a result of which, the prison system is directed towards and made more conducive for incapacitation. Similarly, the chapter points towards skepticism and pre-existing knowledge of a mismatch between the actual conditions of prison institutions and the expectations implicit in the relevant legislation. The chapter relies on Allott's theory of 'law as a program', to partly explain why domestic actors did not challenge unrealistic legislation.

Chapter 6 examines key contextual factors in relation to the case study of Pul-e-charkhi: including historical, political, socio-economic, and technological factors. The chapter begins with a concise historical record of Pul-e-charkhi and maintains that, despite many views to the contrary, Pul-e-charkhi was the first prison with a modern structure, the construction of which coincided with important legal developments, such as the implementation of the first modern Penal Code in 1976. Prior to 2001, the prison underwent three consecutive periods of unconventional management, due to political ruptures, which affected not just its reputation within society, but also its physical structure, organisational culture, and institutional ability to function as an establishment that was fully committed to and prepared for changing behaviour and reducing recidivism.

The chapter contends that there have been insufficient social, political, economic, and technological foundations for prison-based rehabilitation programmes that would demonstrate the 'something works' framework, or perhaps other feasible frameworks for prison-based intervention. The chapter also maintains that the prison system has often been influenced by political factors, and, due to a lack of leadership, it has only followed changes in the broader political and security environment. The system has therefore remained enslaved to its past, and to old management and leadership methods. Together, these factors have paved the way for prisons to serve as a tool for the government and politicians, to impose coercion and ruling by law, rather than ruling by the rule of law.

Chapter 7 is about the prison system's institutional framework. It defines the three tiers functioning within the prison system in Afghanistan: national prison administration, individual prison administration, and programme or technical level administration. The chapter also argues that, despite a gradual expansion of the prison system's legal mandate, its institutional capacity and resources have remained insufficient across all the three tiers. However, it is also clear that a lack of leadership has played the most prominent role within the institutional factors outlined in the chapter. In addition, the chapter argues that the prison system has been given lower priority within the overall criminal justice system. Therefore, in all

circumstances prison leadership has been weak and has lacked appropriate supervision. The internal structure of the system was also shaken up and reduced several times, resulting in poor management and weakened authority for prison officials, which in turn hampered the system's implementation capabilities.

In view of these limitations, the chapter argues that the prison system seems to have focussed primarily on the easier parts of its legal mandate, notably incapacitation and ensuring the security of prisons. The implementation of its substantive and relatively difficult aspects, namely rehabilitation, has not been fully undertaken. In addition, specific scrutiny of international investment in the prison system in general, and in Pul-e-charkhi in particular, reveals that most of the donor funds have been wasted on flawed designs and faulty implementation, as well as on Kabul-centric initiatives.

Chapter 8 is about the prisoners in Pul-e-charkhi and the prison's failing prison-based rehabilitation programmes. The chapter maintains that engaging in morally or materially beneficial activities is a natural and rational choice for almost all Pul-e-charkhi prisoners. It further argues that rehabilitation programmes are of genuine interest to the vast majority of prisoners. However, the system lacks adequate initiatives and resources to support prisoner demand. There are some rehabilitation programmes, but they appear to be based on poor copies of international standards, rather than on reality in the prison, and in society at large. This has culminated in a confusing lack of clarity around programme objectives and, consequently, poor performance in terms of their rehabilitative function.

The chapter also argues that the most significant problems have been prisoners' access to the programmes, the quality of the programmes, and (in some cases) the programmes' reach. Additionally, it argues that implementation of prison-based rehabilitation has been hindered by inadequate human capacity, insufficient financial resources, poor leadership and institutional coordination, and widespread corruption. As a result, the programmes rarely address the needs of their target groups. Instead, the prison authorities often bend the programmes to their own personal and group interests, or to the financial benefit of the prison institution.

Chapter 9 summarises the main findings of this research. It builds on findings of Chapter 5 (the prison system's legal mandate), chapters 6 and 7 (the contexts and institution of the prison), and Chapter 8 (the prison population and rehabilitation programmes). Chapter 9 argues that the prison system's legal framework, and thus its legal mandate, developed after Afghanistan's war of independence, in 1919. From that point onwards it continuously expanded, whilst its practical application followed a convoluted and twisted pattern of development.

The prison system's legal mandate experienced fundamental changes during the era of socialist legality (from 1978-1991), and in the aftermath of the 2001. During the first period, the prisons' official mandate was extended beyond mere incapacitation and, for the first time in history, rehabilitation

explicitly became part of the prison mandate. This expansion was laid down in the third Prisons and Detention Centres Law, passed in 1983, after a period of serious abuse and extrajudicial use of prisons. The latter period, however, was marked by a mixture of previous laws, intertwined with new concepts and human rights standards, including the UN minimum standards for the treatment of prisoners, as well as a special emphasis on the rehabilitation of prisoners, social reintegration, and alternatives to imprisonment.

Chapter 10 is an epilogue about the post-2020 changes and a reflection on the changes in criminal justice and prison management in the aftermath of the Taliban's takeover in 2021. The epilogue discusses two major developments, which occurred after I ended my field work in 2019. During the first period the prison system's legal mandate was affected by an institutional overhaul and the shifting of prison responsibilities to a civilian institution. In the second period, however, the legal mandate for prisons changed, along with the overall structure of the government and the political regime, with the Taliban rising to power for a second time in 2021.

The epilogue argues that both periods had a significant impact on the prison system and its legal mandate. The first period saw a number of contentious and politically oriented changes, leading to institutional reform and restructuring that allowed a large number of prisoners to go free. The second period changed the prison system back to institutions that lacked a clear and concise legal mandate, operating instead mostly on personal preference and traditional interpretations of Sharia.