

Law in Afghanistan: A Critique of Post-2001 Reconstruction

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This article provides a critical reflection on the efforts at legal reconstruction initiated in 2001 by the international community and the Afghan government. Its aim is to highlight some of the more controversial factors that accompany the implementation of a foreign model of justice inspired by the ideology of the rule of law. Following Operation Enduring Freedom and the consequent arrival of various international agencies on Afghan soil, the international community (led by the United States) has attempted to bring political stability and democracy to Afghanistan. This endeavor has evolved into a more extensive, and rather controversial, process of reconstruction, which has called into question the mantra of democratization and modernization used to ideologically justify the US-led coalition control of a pro-Western Afghan government. By introducing a reflection on restorative justice and judicial mediation, I argue that the standardization and global circulation of specific models of justice present a series of problems often hidden behind legalistic interpretations. While in Western countries jurists and legal practitioners promote the industry of 'alternative dispute resolution' (ADR) and emphasize the recourse to mediation and conciliation, in Afghanistan governments and international agencies implement the rule of law, thus condemning and marginalizing customary practices in the resolution of disputes. Once taken away from the rules of the judicial order, judicial mediation becomes caught in a logic of compromise and deteriorates.

The Rule of Law in Afghanistan

In the global geopolitical scene, humanitarian intervention mediated by the use of force has increasingly marked the period following the end of the Cold War parallel to the reformulation of national sovereignty (Baylis and Smith, 2008; Barnett 2001; Hansen and Stepputat, 2006; Goodman, 2006; Ong, 2006).² David Chandler has noted that “humanitarian militarism, widely advocated during the 1999 Kosovo war, would have been an oxymoron before the 1990s; today it has become a tautology” (2001, p. 698). Expressions such as ‘humanitarian war’ and ‘preventive war’ have become common in the political jargon – silently incorporating the assumption that armed interventions are just and are carried out to protect human rights, safeguard womens’ dignity, and ultimately fight terrorism. To criticize this line of reasoning, Danilo Zolo (2005) has provocatively described contemporary wars as collective executions based on the presumption of criminal responsibility of all citizens of a state.

The overlapping of humanitarianism and militarism can be considered as an evolution of the traditional just war approach (*bellum justum*) as it has developed over the centuries (Dorn, 2011; Falk, 2004; Fixdal and Smith, 1998; Karoubi, 2004). Vasuki Nesiah (2004) has maintained that humanitarianism functions as a complement to militarism. In fact, in the case of Afghanistan there is a clear connection between the conspicuous activities of international agencies involved in the process of reconstruction, and democratization and military intervention.³ The inclusion of military contingents in the programs of international agencies is perhaps the most visible sign of such a relationship.⁴

In spite of the criticisms usually raised against theories of modernization, the paradigm continues to fuel international policies and actions in Afghanistan, where it explicitly sustains the ideology of reconstruction.⁵ This modernizing vision has rewritten the historical narratives of events in Afghanistan so as to emphasize what analysts and politicians have interpreted as a need for modernization and democratization. Accordingly there has been a diffused tendency to legitimize all social transformations in the name of external processes of modernization, while at the same time conveying an image of Afghanistan as a society rooted in its own traditions and resistant to externally imposed ‘improvements’. During several international conferences and meetings about the future of Afghanistan, the idea of legal reconstruction has recurrently and symbolically rested on the principle of the rule of law, in itself the basis for a larger project of democratization propelled by the international community. The underlying logic is that a global rule of law becomes valid for national administrations and available to citizens to assert their rights; state governments, in turn, are also subjected to these global rights. However, such an attempt at a global expansion of law has proven to be precarious, and a system based on

equal rights shows instability, notably because of the difficulty in determining the criteria to grant equal rights for all groups and individuals.

The document endorsed by the London Conference on Afghanistan (2006) was explicit in its desire and goal to “respect the pluralistic culture, values, and history of Afghanistan, based on Islam”. The objective was to merge the ideology of the rule of law (tied to the Western legal system) with a system of law founded on its own principles and rooted in the Islamic tradition. In this context, the insistence on establishing the rule of law was tightly intertwined with initiatives for “economic development” and “creating stability” in Afghanistan (UNAMA, 2006). Nevertheless, the convergence between the rule of law and Islamic law has not produced a well-defined set of judicial procedures nor have discrepancies between the 2004 constitution and the law in force been resolved. The current plans for the reformulation of the justice system, moreover, have avoided incorporating the customary practices and values of the Afghan people and have impeded the formation of an acceptable and recognized system that reflects the social fabric of the country. As I have learned while carrying out research in Afghanistan, these plans have been in direct conflict with the work of many judges who keep upholding a series of customary practices by adopting an approach of contamination that brings together a plurality of normative reference systems – notably custom, Islamic principles, and state law.

Since the beginning of my research in 2005, I have had the opportunity to speak to several United Nations workers (above all from UNIFEM and UNODC), with members of the International Development Law Organization (IDLO) and with a number of other organizations involved in the Afghan legal sphere. From my conversations with these protagonists of the reconstruction process I have observed a diffused sense of reluctance towards the application of customary practices to make decisions and settle disputes on the basis of their presumed inconstant, violent and sexist nature. Indeed, many international agencies have gathered evidence of (and in some cases have tried to resolve) dramatic episodes of human rights violations. Such attempts have often resulted in the collateral reproduction of determined political juxtapositions, and have contributed to an attitude of condemnation toward the entire system of customary practices and values, to the point of delegitimizing it in favor of norms and values that are externally imposed. Partha Chatterjee (1989) has found similar tendencies in the colonial project of achieving civilization.⁶ As Ehrenreich Brooks has aptly pointed out: “In an increasing number of places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves” (2003, p. 2228).

The idea that Afghanistan is not capable of creating a stable political system on its own is typical of international interventionism, which condones one country exercising control over another if the latter is not considered ready to govern itself. Such a perspective

reinforces the hegemonic nature of this form of interventionism, which manages to obfuscate the transnational historical processes at the core of internal political unrest. Typically, this unrest is wrongfully attributed to a country's inability to spontaneously and autonomously embrace democracy (see for example Hill, 2010). The role played by the US in supporting the emergence of fundamentalism during the past twenty-five years (Stabile and Kumar, 2005), for example, is generally concealed from this representation, though its repercussions on today political tensions are evident.

Contemporary Afghanistan is essentially governed by the United States, the United Nations, the European Community, and over a dozen NGOs. The international policies of these entities have made the rule of law a mantra that provides for further politico-legal models, which functionaries of the Afghan government, judges, attorneys, and local administrators must take into consideration and confront. It is within this culture of the rule of law that one must interpret the importation and exportation of political wills, which, in the rhetoric of international politics, acts as a guarantor for values such as social justice and human rights. Considered as "good for everyone" (Tamanaha, 2004), the theory of the rule of law has become inextricably tied to the concept of democracy and to the very idea of struggles for democracy.

Kabul's Judges and the Rule of Law

The apparatus of the rule of law operates on multiple levels and affects the judges of Kabul in varied ways. The judge's discretion is not immune or indifferent to legal instruments derived from discussions about human rights and international standards of law. Presently, different models of justice comprise the Afghan normative network. Under the influence of external force (following, for example, a military intervention), complex mechanisms of assimilation and resistance are triggered. The Western rule of law permeates the Afghan normative system in different ways through indoctrination, persuasion, and contamination across both political and humanitarian lines. If dominant countries have exercised their influence in an explicit and ostentatious manner in the past, nowadays they do so more through a tactic of moral persuasion. In the case of Afghanistan, however, the introduction of institutional changes was anticipated by a moment of violent transition: the war. The tactic of moral persuasion was implemented in a later stage in the form of a programmatic promotion of neoliberal economic models and humanitarian propaganda.

The numerous international conferences, treaties, and agreements that have taken place since 2001 have resulted in plans for action to be carried out from a top-down modality, but also through acquisitions and resistance. In fact, from the point of view of Kabul's judges the rule of law is not simply an externally imposed order. If on the one hand, the judges are the more visible representation of the influence exerted on the Afghan

normative system by foreign powers, on the other hand their own understanding of justice is rooted in Afghanistan's normative culture. Thus, contrasting initiatives and forces compete with one another. As unlikely as it may sound, the fundamentalist tendencies of some powerful judges of the Afghan Supreme Court are the by-product of a legal context heavily influenced by the policies of organizations like the United States Agency for International Development (USAID).

Judicial Training

The Afghan judiciary is rather heterogeneous. Although small in number, Afghanistan's present judges were nominated in different political moments (though within a short span of time), each marked by a different concept of the role of justice. Consider for example the difference between the Communist and Taliban regimes. Furthermore, they were often trained differently or did not hold an official qualification (Armytage, 2007). This heterogeneity partially explains the great deal of diversity that characterizes the practice of law in Afghanistan.

After the fall of the Taliban regime, the judicial system has been increasingly affected by its connection with international agencies. A notable consequence has been the influence and active involvement of international agencies in the training of judges.

A recent report by the Max Plank Institute for Comparative Public Law and International Law (Guhr, Moschtaghi and Afshar, 2009) maintains that even those judges who have gone through a conventional curriculum of studies might not be able to carry out their job properly, due to their shallow knowledge of Islamic and state law (which are both essential elements of the Afghan legal system). Moreover, the preparation of students who have attended *madrasa* further complicates the situation. With the goal of providing all the necessary tools for the various legal professions, the University of Kabul created a common curriculum for the Law and Shari'a Faculties that included a series of seminars for students (*ibid.*, p. 5). The report of the MPIL also points out how all judges are required to complete an internship in order to practice the profession, and yet only half of them had actually done so. Recently, however, this trend seems to have reversed. Furthermore, in 2005 the Supreme Court began a three-week vocational training program called Foundation Training, which was intended for judges who had not completed the judicial internship (*ibid.*, p. 6). The latter lasted a year and included a first phase of around 8 months of courses, followed by an exam, and finally an apprenticeship. The courses are organized in trimesters, the first conducted by IDLO, the second by the German MPIL and the French Institut International Pour les Etudes Comparatives (IIEPC), and the third by USAID. In addition to having an active role in the formation of the judges, these organizations are responsible for financing the internship project.

The report of the Max Planck Institute does not take into account custom in the training of judges. “The enactment of the Regulation of Judicial Conduct”, it argues, “can be seen against the background of a worldwide movement” (ibid., p. 10). The report then goes on to state: “the question of the enforcement of the Afghan regulation is especially difficult in Afghanistan, as the new Regulation of Judicial Conduct does not fully comply with the preexisting enforcement mechanisms”. Nevertheless, “by means of careful interpretation of the existing norms, the institute is able to provide a coherent, workable system based on the existing regulations. The comments on contemporary Afghan law are explained in the wider context of international development in the field of judicial ethics” (ibid., p. 10).

The Max Plank manual and seminars maintain that the “basic prerequisite for a fair trial is that proceedings are conducted by a competent, independent, and impartial tribunal” (MPIL, 2009, p. 56). The manual discusses another important issue: “the term law is to be understood in the strict sense of a parliamentary statute or an equivalent unwritten norm of common law” (ibid., p. 56). This becomes an important specification in the context of Afghanistan – a country where the normative substratum is not only shaped by national law but also by customary practices and values.

I do not mean, of course, that international organizations are altogether unaware of the political and legal relevance of customary assemblies, or that they do not understand the diffusion and significance of socio-normative practices that have consolidated over time. A 2005 USAID report, for instance, mentions the relevance of customary methods for dispute resolution, especially in cases of reconciliation or compensation. The absence of in-depth studies during the training of judges about the connection between custom and judicial practice reflects the opposition between ‘formal justice’ and ‘informal justice’⁷ that dominates the discourse on legal pluralism in Afghanistan, and is expressed at both the legal and political level in terms of a rigid juxtaposition of central and local authorities. As my research suggests, the judges continue to have recourse to certain customary practices in the fulfillment of their duties. They pay attention to ‘traditional’ authorities and consider family and inter-family conciliation as useful means of maintaining social equilibrium. The USAID report does not contain hostile language when referring to customary institutions. As mentioned above, the work of MPIL and the positions expressed by UN and IDLO workers seem to reject a customary system deemed disrespectful of human rights and favor a legal doctrine of internationalization of justice. The USAID report, on the contrary, suggests a more dialogic approach and underwrites the importance of a communicative exchange between so-called ‘formal’ and ‘informal’ justice systems.

Contradictions between the entities that share control over the training process of the judges are not uncommon in a context like Afghanistan, where a plurality of political

figures is involved – often without any real coordination between them – in the political, legal, economic, and social life of the country.

The influence of international organizations goes beyond the realm of the Supreme Court by creating a body of judges that in turn facilitates the implementation of international standards. Caught between the demands of a social structure which is coping badly with foreign interference and the controlling position of international institutions (to whom the government must answer), the judges practice a sort of negotiated justice which does not fulfill the needs of the citizens.

The USAID report takes an analytical approach to the Afghan legal system in order to understand the uniqueness of its form of justice that is built on a multiplicity of interconnected sources.⁸ The attention that such an approach pays to the local customary substratum may well be the result of the increasing resistance of Afghan citizens toward an externally imposed justice system, which they feel has little to do with their daily life. Unfortunately USAID's suggestions have had found little reflection in the implementation of projects throughout the country. Furthermore, international reports mention customary practices exclusively in relation to actions of social institutions like the *Jirgas* or *Shuras*,⁹ but ignore the fact that most conflicts and problems are dealt with within the family structure.

Institutions like the *Jirgas* and *Shuras* are indeed tied to the collective dynamics of the community – or in other words, to a whole web of social ties, neighborhoods, authorities, values and often resources. In a city like Kabul, demographic growth, mass immigration, housing policies, poverty, unemployment and the risk of social disruption have reconfigured the recourse to customary practices in the settlement of disputes within and among families. In Kabul, everyday life shows all the complexity of a multifaceted normative system (based on custom, state law and Islamic principles), and justice results from a continuous process of negotiation that sees each individual case examined from multiple contexts and angles – i.e., from the point of view of family mediation, intervention on the part of international organizations, meetings with attorneys, court hearings, decisions of the *Jirgas*, and so on.

It is worth mentioning, however, that there is a notable difference between customary practices initiated by individuals and families and customary practices judged by social institutions like the *Jirgas* and *Shuras*. In the case of a *Jirga*, for example, we are talking about a traditionally recognized social institution, whose political influence can be seen in the procedures of legitimation of political instances at the national level (i.e. the *Loya Jirga*, the Grand Assembly of leaders). Although the *Loya Jirga*¹⁰ has little to do with the local *Jirgas*, its symbolic and historical value is deeply rooted in the customary substrate that the *Jirgas* embody. At the community level, the customary assembly is an influential political subject fully involved in the reconstruction process. Provincial *Shuras*, for

example, represent a point of contact between Government, international agencies, and local communities, and have an important role in addressing issues of public interest.

If international agencies and organizations have – over the years – lost their presumed neutrality (Shannon, 2009) and proven to be vehicles for transnational orders that are only marginally interested in rectifying the unjust treatment of the people of Afghanistan, one should also take into account the broader connections, interests and implications that exceed the borders of the country. How do we discern between the work of USAID and the activities of Enduring Freedom? How can we evaluate the work done by the Italian Justice Project Office without considering the interest of the Italian government in international alliances? How should we consider the various and commingled aspects of political violence (Glassner, Karokhail and Schetter, 2007), drug trafficking networks, and the policies of the Afghan pro-Western government when looking at the ongoing reconstruction process? What complexity of relationships is behind the increased number of attacks in the capital, security policies, control over energy resources, and opportunities regarding neighboring countries like Iran and Pakistan? These questions raise issues that look distant from the daily injustices suffered by individuals, and yet they point to mechanisms that do actually foster violence and domination. Carolyn Nordstrom (2008) has used the term ‘global fault lines’ to explain the connection between the events in an individual’s life and phenomena of global proportions. In the story of her encounter with a war orphan who sold cigarettes, Nordstrom has considered the networks and profits tied to this illegal trade: half of the world’s cigarettes are contraband; cigarettes rarely circulate on their own and are usually transported together with arms, drugs, human beings, pharmaceuticals, cars, software, and so on. The money exchanged at these different levels and that ends up in financial markets, currency exchanges, and bonds markets might cause the collapse of a national currency. For Nordstrom, the war orphan is a critical aspect within the sphere of global finance. The tragedy of the child represents a sort of ‘tremor’. In the context of war and institutionalized violence, fault lines are determined by political, economic, and ethical relationships, which in turn create unequal access to power and resources.

Nowadays, it may well have become impossible to ignore the enormous interests behind the various actions legitimated by the rule of law. Fought in the name of freedom, the war that is still ravaging Afghanistan, in addition to the well-known interest in extracting energy resources, has created a favorable environment for conspicuous earnings to be made in the sectors of privatized security and reconstruction, as well as in relation to the creation of new fiscal paradises. From the point of view of the countries directly involved in the reconstruction process, the connection between legal expansion and economic penetration is therefore crucial. It is not difficult to imagine how such a scenario has forced

the post-2001 reconstruction process to follow a logic that is poorly suited to fighting injustice.¹¹

Restorative Justice and the 'Common Good'

What are the reasons that the international community has put forward to legitimate its intervention in the Afghan judiciary? What ideological foundation supports this fragile 'fault line' that we call a justice system?

After sentencing a young boy named Ali, arrested with six kilos of heroin in a suitcase, to six years imprisonment,¹² judge Ajmal¹³ of Kabul's Second District sat down to have a long conversation with my friend Basir.¹⁴ The judge spent a long time talking about the problem of drug trafficking in Afghanistan and its repercussions on the lives of Afghan youth. He then discussed the contemporary role of judges. For Ajmal, "the courts are a place where one can put the country in the right direction after many years of war and deprivation".¹⁵ With the expression "in the right direction", he was referring to the "need to follow the road to justice". When I pushed Ajmal to clarify the meaning of the word 'justice', he described two distinct qualities: the need for institutional reorganization, and the creation of a shared value system. Ajmal then expressed his idea of a nationally-shared legal awareness: "We should all be able to give the same response to the question: which justice are we talking about?"

Judge Ajmal's words invite us to consider how justice, even before referring to law, is tied to the concepts of 'right' and 'wrong', and how it presents itself as the oppressor of the latter in favor of the former. Both 'right' and 'wrong', however, are socially constructed categories that, although apparently stable, are continuously subject to reformulation by culture, religion, and law, as well as by events and social transformations. Opinions and convictions may lead one to judge an event (an action, a punishment, a demand) either right or wrong. Every individual has his or her own definition of what is right and what is wrong that he or she creates both rationally and unconsciously. Through this process of incorporation and re-elaboration, an individual learns to polish the boundaries of 'right' and 'wrong' (what, in their opinion, is 'good' and 'bad') on the basis of beliefs, social experience and dynamics of power. A justice system should therefore be founded on a collectively elaborated concept of justice. In other words, the ideal should support the institutional sphere of justice, even if a certain distance between the two is inevitable.

In the last two decades, there have been an increasing number of debates regarding the introduction of new elements into the justice systems of common law and civil law countries. These debates have emphasized the distance between the ideal and praxis, and have insisted on restorative justice as a possible evolution of justice making

(Braithwaite and Strang, 2000; Johnston, 2002; Okimoto, Wenzel and Feather, 2009). Restorative justice comprises of three main features: reparation, reconciliation, and community conflict management. Generally speaking, restorative justice seeks out resolutions – following an event in which established norms have been broken – with the aim of promoting reparation for injury, reconciliation between parties, and the reinforcement of community/collective equilibrium and cohesion.

When these reformulations of judicial procedures and the Western concept of law are resituated in a context like Afghanistan, they become part of a different legal and historical process. This shift calls for a comparative examination of the use of mediation¹⁶ in courts, and of the mechanisms that legitimate authority in the name of maintaining community equilibrium. This comparative view is predicated on the assumption that the politics of colonialism and imperialism had (and continue to have) long-lasting effects on the make-up of national legal systems. As John Schmidhauser has outlined:

Most modern commentators ... refer to the widespread utilization of the two major European families of law as part of a 'received' tradition – a designation which suggests willing acceptance of an external legal culture. The historic record of colonial expansion contradicts such benign explanations despite the tendency of most conventional law commentators to treat families of law such as the British common law or continental civil law as objective conflict resolution systems rather than manifestations of the cultural imperialism of powerful colonial nations. (1992, p. 321)

In reference to the Pashtun concept of justice, many scholars have noted that the norms of the *pashtunwali* often refer to a restorative rather than a retributive model of justice (Yassari, 2005, p. 50).¹⁷ When a norm is violated, the offender is forced to ask for forgiveness from the family of the victim and to pay blood money rather than being imprisoned. However, the meaning of the concept of blood money varies. In some cases, for instance, it means that the family of the perpetrator must give a daughter in marriage to the family of the victim. The need for reestablishing equilibrium after an illicit act is evident in these cases (see also Centlivres, 1998).

Such a concept of justice understands a transgression of consolidated norms as something that has repercussions beyond the single fate of the individual, or as something that affects the equilibrium of an entire community. In such a system, the repercussions for the victim and the community are just as important as those for the offender. In this sense, reconciliation and preservation of a certain 'order' within the community may be considered structural conditions of the customary normative system.

The decisions made by customary institutions like the *Jirgas* are in some ways tied to this restorative spirit and to the promotion of reconciliation. In mediation, for instance, one of the main goals is to limit the possible repercussions of a transgression, such as feuds or vendettas. When practices like *bad* – which entails giving a woman (as a form of compensation) from the family of an individual who has wronged another family to the family who has undergone the injury – are implemented by a *Jirga* (sometimes with the support of the *mullah* and/or of members of state or provincial institutions), this socio-normative idea of reconciliation is always underneath. As my Afghan interlocutors have maintained, the word *bad* refers to something that is not good to do, and which is therefore exceptional in nature. Initially emerging in the Pashtun areas, the practice of *bad* spread over time throughout the country. Although there are still similar cases, the *nizamnama-i-nikah-i arusi* of 1923 forbade *bad* as being disrespectful of Islamic principles. It is difficult to estimate the effective spread of this practice. The consensus is that while it was in frequent use several years ago, today there are only few cases attested. The complaints registered by the police, the Minister of Women Affairs and the Afghanistan Independent Human Rights Commission, however, are merely indicative of the practice's use, since many cases go unreported. It is also difficult to understand how this practice is connected to the so-called modernization processes, as well as to how it is linked to social conditions, even if it has become less frequent with the spread of state justice. The general view today is that *bad* constitutes an extreme method to resolve a conflict, whose variegated use reflects social fragmentation and a continual reformulation of customary practices.

A report issued by the Women and Children Legal Research Foundation (2003) speaks of *bad* as a practice that, while used for resolving disputes and problems, in reality enables “women and children are used as slaves”. However, an apriori affirmation of this sort is inadequate at best. Such an affirmation tends to set up a rigid opposition between tradition (identified with the customary system) and modernity (recognized in state and international law), which is the same dichotomy that underpins international interventionism. There are other elements that must be taken into consideration when looking at the mechanisms of customary dispute resolution, such as transformations in the social body, the reformulation of family roles, the resistance to externally imposed models of justice, and the tension present amongst various forms of authority. In this sense, the idea of “common good”¹⁸ behind certain practices and decisions should be considered in relation to the present conditions of the Afghan justice system, which has often been the outlet for a reconstruction policy that does not look out for the interests of the population.

Therefore, that which might elsewhere be considered as an innovative model of justice must in the context of Afghanistan be scrutinized: What are the conditions and the limits of reconciliation? At what cost must the equilibrium of the community be

persevered? Within a context of legal transplant, according to what criteria is this equilibrium defined?

This brief overview suggests a possible interpretation of some of the main transformations of the justice system from a viewpoint of ideology directed to hegemony. In theory, the Western dispute resolution system, where the normative function of the social group has been historically taken over by the state, gives voice to the weakest subjects (or those defeated by the processes of social transformation). For this reason, the euphoric attitude of those who support restorative justice and mediation turns out to be quite problematic: they seem to be taking for granted the 'withdrawal' of the state from its duty to protect rights in the name of conciliation. An insurance company, a bank, or an employer that includes a clause of mediation for possible disputes are in fact precluding their customers access to potentially emancipatory justice. This is similar to the ways in which colonial power would bar from such access women and the oppressed in Africa and Asia (Grande and Mattei, 2008; Mattei and Nader, 2008). To this end, the sole positive aspects of mediation are emphasized – namely, expedition and the virtue of compromise itself. On the other hand, though, a more nuanced and contradictory picture emerges from the analysis of subaltern and peripheral systems. Those very subjects that are actively involved in the ADR further the strengthening of a rule of law in the Western sense in order to subtract jurisdiction from traditional systems and reinforce formal power as a preferred interlocutor. Such a phenomenon is extremely visible in Afghanistan, where efforts to establish the rule of law are in fact an attempt to reinforce the centralized pro-Western government of Kabul, in contrast with far less submissive local powers (Grande and Mattei, 2008). Furthermore, the modernization of the legal system continues to fail due to a lack of means and legitimacy. Afghan citizens are left with a mediation that presumably resonates with traditional harmony but is in fact sustained by a radically different logic (Grande and Mattei, 2008). This of course implies that the mythologization and standardization of specific forms of justice are hardly viable ways of protecting citizens and improving living conditions.

My position in regard to the expression 'common good', in the use to which I am referring here, is of course critical. If a certain understanding of the 'common good' is associated with community life and may serve to legitimate certain forms of authority – and violence (like in the case of the *bad*) – it can just as easily be used to support the establishment of a rule of law project in the form intended by the international community. This is a sort of instrumental use of the concepts of 'common good' and 'superior interest' in favor of specific objectives. Within the customary sphere, community equilibrium is presented as a common good, which is of course a good that involves the consolidation of social hierarchies and reestablishes an economy of social connections. In the reconstruction process, governmental and international rhetoric presents the rule of law as

an essential element for the development of the country, and necessary for the good of all. The words of one USAID worker in this regard are telling: “Without the establishment of the rule of law it is impossible to build the foundations necessary for social justice and solid democracy in Afghanistan ... We have a fundamental role in seeing this process through”.¹⁹ The comments of a researcher for IDLO were similar: “Reforming the justice system is a primary objective of the international community, for the good of Afghanistan and for all of us”.²⁰

When certain positions in the name of the collective become absolute, they often result in the forced imposition of values, models, and ideas that are assumed to be indispensable in the pursuit of a common good, and for which certain people (or states) become the guarantors.

Todorov’s remark that “Whenever we see the dawn of an eternal good, the blood of old people and children is always shed” suggests that perhaps the idea of a definitive and incontestable good is unproductive at best (cited in Crespi, 2006, p. 90).²¹ Counter to this idea, “the fight against evil should be conducted without falling into illusory dogmatism, with awareness of the limits of our condition” (Crespi, 2006, p. 91). In the current politico-legal context of Afghanistan, instead of systematic examples of fighting injustice – or of “righting wrongs” (Spivak, 2002) – one finds ideological oppositions that tend towards dogmatism. In brief, the international community’s contribution often becomes a forced interference accompanied by the promotion of models and principles that ignore the social context of Afghanistan – an interference that often shadows different objectives and interests. At the same time, certain political leaders, *mullah*, *ulama*, faction leaders, and government officials provoke a type of antagonism which, when imbued with political importance, escalates into violence and attempts to root itself in an essentialized custom as a constructed symbol of dissidence towards external interferences. As a result, the juxtaposition of ‘formal’ and ‘informal’ justice takes on both a legal and political connotation. Certainly, the interconnections between different normative models (custom, human rights, Islamic law, state law), as well as the coexistence of customary assemblies and judicial institutions, are already a part of the normative panorama in Afghanistan. Nevertheless, this coexistence is characterized by tension rather than collaboration. Thus, normative interconnections result from processes of negotiation that are initiated by judges, and which aim at maintaining equilibrium amongst the varied forms of power and mechanisms of social legitimization. In this respect, I will now examine the action of mediation carried out by Kabul’s judges in greater detail and with a sensitivity for the broader context in which it is embedded.

Mediation within the Courtrooms of Kabul

The mediation role carried out by judges in the courtrooms of Kabul can be seen in both civil and criminal cases, although in different ways. However, the cases I have seen have spurred me to question statements such as the following, which attempts to explain what restorative justice is ‘in practice’:

In practice this means the affected parties are directly involved in the justice process, dealing with the injustice through interaction and mutual understanding. They are given voice to vent their feelings, present their side of the story, and ideally come to an agreement about the hurt the offense has caused, the offender’s responsibility, and what can be done to restore a sense of justice. (Okimoto et al., 2009, p. 157)

Though such an affirmation seemingly comes out of good intentions, it neglects the fact that mediation is influenced by several forces, and that judges (or mediators) carry out their work in a much more articulated context. For this reason I argue that it is more appropriate to speak of mediation at various levels, which involves both the mediating role of the judge in specific cases, and the negotiation between legal systems and different forms of authority (traditional, state, religious, and so on).

Subject to the pressures and circumstances of the present justice system, the judges of Kabul practice a form of mediation that does not simply conclude with an agreement or (a presumed) reconciliation, but also reflects the drifts of a negotiated justice that typically favors the strongest party over the weakest.

When examined in practice in a context like Afghanistan, the myth of mediation upheld by supporters of restorative justice in several Western countries assumes a different connotation and can no longer be accepted as a purely technical-judicial concept capable of resolving all problems. The myth of mediation is fueled by abstraction and is often based on unrealistic notions of harmony and reconciliation. Indeed, an uncritical celebration of harmony is at base an acceptance of philosophies that have more to do with ideological belief than with social justice (Nader, 2008). Moreover, this abstraction has the capacity to function as an implicit stamp of universality.

Kidnapping and Mediation

I discussed the following case with judge Abdul (who presided it) of the Second District Court of Kabul.²² The story begins one afternoon when Homaira, an eighteen-year-old girl, was approached by a car as she was making her way home from the *bazaar* where she had

done some shopping. The driver of the car, a twenty-year-old boy named Hossain, offered to give her a ride home. Since she knew the boy, who was from her own neighborhood, she accepted the ride and sat down in the back seat of the car. According to the girl, Hossain immediately became aggressive and threatened to kill her if she resisted him. After threatening her, Hossain drove out of town. Troubled by the fact that Homaira had not returned home, her father called the police, not to report that she was missing but that she had run away from home. As Homaira's mother explained, the father was evidently worried about the girl but in public he had to appear angry with his daughter for the insult she was bringing upon their family. Meanwhile, Hossain was taking Homaira toward the Pakistani border where he planned to sell her for profit. However, not having any experience or the right contacts in Pakistan, Hossain almost immediately gave up on the criminal venture. Three days after her disappearance, Homaira returned home. She immediately recounted what had happened and gave Hossain's name. But despite this, a day later she was put into jail and the police took no measures against Hossain. The report of the prosecutor who sentenced the girl stated that she had run away from home with a man. While she was in detention, a meeting between her father, Hossain, his father, and other male members of the two families was organized. During the meeting Hossain was asked if he was willing to marry Homaira, to which he agreed. Homaira was still in detention when she was given the news, but she refused to compromise.

A few weeks later, Hossain was also interrogated by the prosecutor, who did not charge him with kidnapping but did force him to appear in court. During the first hearing, everyone involved in the case was heard. Homaira remained in detention while Hossain returned home. In the second hearing, judge Abdul dropped the charge against Homaira after reading all the papers and testimonies regarding her case. However, the judge took no measures against Hossain. The following is the judge's explanation for this decision:

Judge: Homaira was detained for many months. From the testimonies and the documents it seems that her version of the facts was what actually happened. This is also demonstrated by the fact that she refused the marriage proposal of the boy. For her father and for the community, it did not matter what happened afterwards. The girl was wrong in accepting a ride from the boy. She should not have gotten into the car of a boy who was not her husband or one of her brothers. For Homaira's father this was a disgrace. These stories can end up even worse.

Antonio: Why did Homaira remain in detention for so long?

Judge: This question has two answers. At the beginning the prosecutor thought there was a possibility she might run away again. In the first hearing I did not order her

release for her own protection. If she had returned home before everything had been cleared up she might have been beaten or threatened.

Antonio: Was it dangerous for her to decline the marriage proposal of the man who had kidnapped her?

Judge: Certainly. If she had accepted the proposal, the entire affair would have been resolved. Instead, her responsibility in the story and that of the boy still had to be determined. Judging by the facts, it is improbable that the two ran away together. But in regard to the abduction, it is her word against his.

Antonio: After she was released and her testimony was deemed true, was it not implied that he had abducted her?

Judge: In certain cases the objective is not to condemn someone. The trial would have been long. Had Hossain been arrested problems would have surely arisen between his family and hers.

Antonio: The objective then was to avoid any further problems.

Judge: And also to protect her. But I don't think that all of Homaira's problems have been resolved. Her father will be more strict with her and most likely he will not allow her to leave the house for a long time. Or he will try to organize a marriage as soon as possible.

This brief exchange shows how the mediation conducted by the judge was inevitably conditioned by the context in which it took place: by customs and by preexisting social hierarchies. One might object that this is not the type of mediation that jurists have in mind. We should, however, observe how the judge did not place emphasis on the sentence. On the contrary, his main aim was to make sure that the all parties involved, including those connected to them or behind them were pleased by the settlement. Ultimately, this goal translated into an attempt at pacification, or at making sure the problem would not escalate or entail grave repercussions. Evidently, there might be more suited examples of mediation. However, when is an example ever ideal? Is there a specific or presumed real context in which legal models find a perfect correspondence? In the courtrooms, mediation can lead to the reparation of a wrongful deed, or to reconciliation, but also to the violation of the victim's rights and the reification of forms of inequality. Homaira was forced to pay for an acceptable settlement, which might have, as the judge believed, saved her life. The example of Homaira raises a few important questions: Who has the power to mediate? In which ways is this power conditioned? How are the weakest individuals protected through judicial mediation?

Within the judicial context of Kabul, mediation is the result of a legal praxis oriented at reparation and reconciliation, and the response to the very circumstances that inform the judicial system, and often drive judges to compromise.

Concluding Remarks

As Grande and Mattei (2008) explain, the main features of the mediation process within diffused power societies are as follows. Firstly, the mediation process is shaped by the dialectics between groups, rather than the conflict between individual rights established by the state's determine legal rules. Secondly, this is a political process that seeks to reestablish a balance now troubled by the conflict between individuals who enjoy the protection of their respective groups. Thirdly, the sense of justice itself, as shared by the members of a group, is adjusted and if necessary collectively modified to adapt to new circumstances that allow feuds to be avoided. Finally, far from being an alternative solution, mediation is often the most viable one.

Ritualized and professionalized mediation between individuals, as promoted in the West in the past decades, entails a different logic and necessarily introduces a model that betrays the ideal of justice as the protection of individual rights. Such a process produces a second-best outcome, as neither of the parties is awarded right or the recognition of unjust counter-party behavior. The individual who accepts or is forced into mediation knows that he/she will not be fully awarded right, will have to submit to a limitation of right, and will be the subject of a misuse of power (albeit partial) that will award advantage to the counter party for reasons that have little to do with justice and more with organizational necessities and reestablishing the equilibrium of the system (Grande and Mattei, 2008).

In contexts where power is unequally balanced, public power refuses to protect the weaker party on the basis of circumstances that have nothing to do with the responsibility of the parties involved. The industry of ADR attempts to conceal such underlying aporia behind criteria of reasonableness, docility, and pragmatic or realistic adjustment to circumstances that induce the weaker subject to accept compromise (the 'sacrifice of right' acknowledged in theory). A highly artificial environment is therefore created, which is dominated by the professionals of mediation, and wherein the sense of justice or injustice in relation to behaviors that originated a conflict are suppressed and substituted with standards of behavioral reasonableness that are evaluated in the course of the procedure. To advocate one's rights is considered a socially deviant behavior, often medicalized, and highly stigmatized by professionals (judges, attorneys, etc.) whose 'fair' solutions are rejected. To insist to be awarded full right following a severe injustice is to be at fault, to unreasonably reject professionally just compromise (Grande and Mattei, 2008).

In Afghanistan, judicial mediation rests on the fence between a professionalized (and largely criticized) system of justice and notions of justice rooted in the customary substratum. Judges adopt a judicial praxis of contamination in response to the existence of multiple normative models. An implicit negotiation between principles of justice emerges, which might be regarded as a form of resistance in the current reconstruction process, or a rejoinder to the affirmation of the Western rule of law as the exclusive model of justice for resolving problems. A close look at judicial mediation in these terms paves the way to a further reexamination of the current mechanisms that lie behind the establishment of standard judicial models. These mechanisms take little account of the common space available for re-elaborating the tools and rethinking the institutions whose task it is to rectify the injustices suffered by citizens.

In March of 2008, thanks to my friend Shahim – a senior student at the Faculty of Political Sciences – I was able to attend some of the classes held by the IDLO at the University of Kabul. During one of the last sessions, the teacher provided students with documentation of court cases and asked them to describe the procedure they would have used to resolve each one of the cases. Having been present at many actual court cases myself, I was struck by the discrepancy between the judicial practice witnessed in the courtrooms of Kabul, whose settlements are aimed at finding an agreement between parties in an effort to avoid undermining social stability, and the procedures outlined by the IDLO teacher, which were aimed at identifying the legislative provisions that will support a unilateral decision from the judge. The gap between the judicial practice (influenced by custom and external pressures) and the abstraction of class assignments reflected the general course objectives, these being to promote standard legal models in line with Afghan law and respectful of international agreements.

Those who work in the courtrooms cannot avoid taking into consideration the social context behind the hearings, or ignore its “specific social weight” (Garapon, 1997). Judge Abdul stressed this exact point: “Not only warlords and corrupted politicians, but also NGOs’ experts, international consultants and professors from abroad exercise a strong pressure on my job. The problem with rule of law programs is the political weight they transport ... If I were to talk about a court settlement in a classroom, it would be different from the decisions I make every day. Sometimes, the point is to avoid the worst. This is what is difficult. Because it is not like everyone imagines, it is not enough to just apply the law”.

If there does exist a significant relationship between the role of the global economy and the independence of the bench (McCormack, 2011), in a reconstruction context such as that in Afghanistan, this relationship is to be found in the ‘intrusion’ of international agencies into the work of judges. In effect, these agencies act as carriers of neoliberal economic models as well as legal and political standards.

Besides highlighting international interference, judge Abdul's statement raises other fundamental questions: Should judges be responsible for the consequences of their decisions? If the consequences are severe or dangerous for a person, should the judge proceed with the application of the law's provisions? In the so-called modern democracies, a similar discretion is rather limited; judges possess an undisputed power to judge that must always be symbolically founded on law. Their discretion is concealed behind the ideology of legalism. Conversely, mediation as a model (which continues to gain attention in the West) explicitly stresses not only the judgment itself but also the social dynamics related to the case. This being said, as we have seen in the case of Homaira, such an idea of mediation does not necessarily imply that all parties involved in a dispute will obtain justice. Very often the weakest party has to pay the cost of a socio-normative compromise intended to avoid the escalation of a conflict and its consequences.

Notes

- ¹ This article is based on fieldwork research carried out in Afghanistan since 2005. For the most part, the research was conducted at the Second District Court of Kabul, the Provincial Office and the Prosecutor's Office of District 11. Since 2010 I have also conducted several in depth interviews with international NGOs' experts and Afghan refugees in Rome, Milan, New York and Geneva.
- ² The same acceleration process has characterized the UN's global interventions. As noted by Amitav Ghosh (1994, p. 412): "Of the many dramatic consequences of the end of the Cold War, few as been as notable as the sudden expansion in the international role of the United Nations. Consider for example, that the UN has embarked on almost as many peacekeeping operations in the four years that have passed since 1989, as it did in the four decades that preceded it".
- ³ As explicitly remarked in the following statement, military interventionism is interlinked with both humanitarianism and national political propaganda: "The United States faces one overwhelming threat to its national security today: anarchy abroad. In lands where authority rests with whoever wins the latest battle and where outsiders come and go without any records kept, terrorists have an easier time concealing their presence and plotting their attacks. To maintain basic security throughout their countries, newly established governments in unstable societies need outside support so that their people can go about their daily business without fear of civil unrest. Keeping anarchy at bay requires well-armed and well-planned peacekeeping operations as a sign from the international community that the world is watching and ready to intervene—with force if necessary—to ensure stability. ... In the interest of U.S. security, Washington needs to

muster the political will to lead a serious, nationwide peacekeeping operation in Afghanistan” (Zisk, 2003, pp. 35-6).

- ⁴ Examples are found in the work of the Italian Provincial Reconstruction Team in Heart, as well as by participation of US military forces in the justice sector reconstruction (see Tondini, 2010).
- ⁵ On the historical roots of this dominant paradigm in Afghanistan, see Caron (2007), Cullather (2002), and Suhrke (2007).
- ⁶ As Chatterjee (1989, p. 623) has effectively outlined, “the practical implication of the criticism of Indian tradition was necessarily a project of ‘civilizing’ the Indian people: the entire edifice of colonialist discourse was fundamentally constituted around this project.”
- ⁷ With reference to Afghanistan, the dichotomy between ‘informal’ and ‘formal’ (or ‘unofficial’ and ‘official’) justice does not seem appropriate. Although some governmental officials and employees of the state justice system have been influenced by the categories of international political and legal thought, the majority of Afghans do not refer to custom and customary institutions in terms of ‘informal justice’. It is thus misleading to refer to institutions like the *Jirga* as informal. Every normative system is characterized by a continuous tension between abstract ideals and their concrete applications, which the dichotomy between formal and informal is unable to capture. The association of formality with governmental institutions and informality with customary organizations is poorly suited to the situation in Afghanistan. However, the majority of the reports, accounts, and articles that deal with the Afghan legal sphere make use of these expressions. See Barfield (2003, 2006, 2008), Nojumi et al. (2004), Norwegian Refugee Council (2007), USAID (2005), Thier (2004), and Wardak (2004, 2011).
- ⁸ Afghanistan’s legislative provisions allow for the use of various normative models, although as part of a hierarchical legal structure that is detached from daily praxis. The Civil Code states that when there are provisions relating to the *qanoon* (state law) one should not turn to the system of justice provided by the *Shari’a* in order to resolve the case. If there are no articles relating to the *qanoon*, the court should apply *hanafi* law; while if *Shari’a* law is insufficient for resolving the case, the court can judge on the basis of custom, as long as it does not go against the *Shari’a* and the law.
- ⁹ These assemblies are visible throughout the country, and are made up of important local figures. They are not permanent but are established when there are important community decisions to be made or conflicts to be resolved between families. In addition to their role in resolving disputes, assemblies also work as powerful communication networks for the Afghans. The assemblies have an important public role in times of peace

and war. At a local level, the opinions of the *Jirga* and *Shura* members regarding the construction of community infrastructures are considered important.

¹⁰ Literature on *Loya Jirga* is rich. However, it normally emphasizes the 'democratic' nature of *Loya Jirga* and does not consider its role in reproducing a certain socio-political hierarchy within the political arena. As recently pointed out by Afghan scholar M. Jamil Hanifi (2004, p. 296): "It seems as though this exotic Afghan mechanism for the production of the hegemony of the bourgeoisie has become the favorite consent-producing tool of American neocolonialism in the Middle East and Central Asia ... Euro-American scholars, local intellectuals, and politicians view the *Loya Jirga* as the highest source of legitimacy for the Afghan government and its policies and decisions ... Approached critically, the *Loya Jirga* has been the most important consent-producing, hegemonic prerogative of post-1919 monarchs and heads of government in Afghanistan ... Western views of the *Loya Jirga* as a legitimizing device are largely derived from the ideology promoted by the bourgeois interests of the Afghan government and the intellectuals it patronized".

¹¹ On the problems associated with the reconstruction in Afghanistan, see also Barakat (2002), Goodhand (2002), Harpviken et al. (2002), and Jones-Pauly & Nojumi (2004).

¹² Ali had been arrested at Kabul airport. His case was one of the rare cases in which I was able to see a defendant assisted by a lawyer (in the majority of civil and criminal cases there is no defense attorney present). Ali stated that he was carrying the bag for a friend and didn't know what it contained. During the trial, however, he refused to give the name of the people who had asked him to carry the bag and those who were supposed to receive it.

¹³ I was given access to courtrooms in Kabul after getting to know some of the judges. Only then was I allowed inside the courts. Even though almost all trials are public, it is difficult to find outsiders in the courts. My presence was not preceded by a formal authorization from the Supreme Court or a request by the Italian Embassy. Such permission would have in fact rendered my purpose there suspicious. It was the result of contacts I had established over the course of the previous months. For this reason I have decided to protect the identity of the judges by using pseudonyms.

¹⁴ Basir received a degree in law from the University of Kabul. His help has been crucial during my fieldwork in Afghanistan.

¹⁵ Conversation of 11 March 2008, Kabul.

¹⁶ The use of the term mediation in this article goes beyond the strict juridical conception of mediation that many jurists refer to. It includes here the normative negotiation that characterizes judicial practice in the courts of Kabul. It also refers to the condition by

which customary practices and social context override the judge's view of him/herself as merely representative of the state legal system.

- ¹⁷ The *pashtunwali* is the behavioral/value code of the Pashtun. It is an oral code that covers various aspects of the social life within the Pashtun communities: honor, dispute resolution, hospitality. The code has a conspicuous political-ideological character and can be understood as a mechanism of collective identity. On *pashtunwali* see Ahmed (1976), Atayee (1979), and Barth (1959).
- ¹⁸ Here the idea of the 'common good' refers to a conversation I had with Daud Popal, a member of the *Shura* of Langhar (Kabul province). The 'old *mujahid*', as he referred to himself, claimed the *Shura* "is necessary for the good of the community", adding that "if the village people have problems, they go to the *Shura*, not to the courts; they would not resolve the problem there because, in court, there is no honesty, no safety. The judges do not honor and respect the Quran in their work ... the *Shura* keeps the village united" (3 October 2006).
- ¹⁹ Conversation of 13 September 2006, Kabul.
- ²⁰ Conversation of 26 September 2006, Kabul.
- ²¹ Todorov (2002) also notes that forcefully imposed 'good' is never an indisputable advantage; if it is necessary to conquer a country in order to put it on the right path, its inhabitants are not likely to be grateful.
- ²² My conversations with the judge took place between March and April of 2008.

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