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Access to justice and human rights in Afghanistan

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Abstract In anthropological and legal literature, the phenomenon termed 'legal pluralism' has been interpreted as a co-presence of legal orders which act in relation to their own 'levels' of referring 'fields'. The Afghan normative network is generally described in terms of pluralism, where different normative systems such as customs, *shari'a* (Islamic law), state laws and principles deriving from international standard of law (e.g., human rights) coexist. In order to address the crucial question of access to justice, in this article, I stress the category of legal pluralism by introducing the hypothesis of an inaccessible normative pluralism as a key concept to capture the structural injustices of which Afghans are victims. Access to justice can be considered a foundational element of every legal project. Globally, the debates concerning the diffusion and application of human rights develop at the same time ideologically, politically, and pragmatically. Today in Afghanistan, these levels are expressed in all their complexity and ambivalence. It is therefore particularly significant to closely observe the work done by the Afghanistan Independent Human Rights Commission and to discuss the issue of human rights by starting from a reflection on what might be defined a socio-normative condition of inaccessibility.

Introduction

Together with the war that caused the fall of the Taliban regime, a massive international intervention started in 2001 with the declared aim to reconstruct the country. A few lines of action were identified at the core of this humanitarian project, such as the reform of the armed forces, counter-narcotics, the establishment of a police force, disarmament of militias, and legal reconstruction (see for example [74]). From the Afghanistan National Development Strategies to the National Justice Sector Strategy and so on, a series of legal interventions (i.e. codification, reconstruction of infrastructure such as tribunals and prisons, formation of judges and prosecutors) has been

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undertaken by foreign governments (e.g., the Italian Justice Project Office) and international agencies such as the International Development Law Organization (IDLO) or the United States Agency for International Development (USAID). Piles of reports have been written since then on how to build a new justice system in Afghanistan. What happened on the ground and what is the impact that these interventions had on the social fabric is a different story. Yet, though this paper aims at destabilizing certainties (e.g., the undisputed vantage of certain forms of human rights implementation), as many others focusing on what happens in Afghanistan, it is probably not totally immune from the temptation to say how it should be (so to say, how the reconstruction should have been implemented). The first goal of the article, however, is to stress the standard legal language which has been used by scholars and experts referring to the Afghan normative sphere, and to focus on the concrete instances for which the dimension of access to justice makes claims.

I thus suggest that the neutral category of legal pluralism is not useful to understand the actual normative scenario in Afghanistan, where a predominant condition of inaccessibility to legal institutions is the reality people have to confront. Neither can this situation be picked up through the dichotomy formal justice/informal justice that mainly re-proposes a state-centric perspective in which interconnected practices and values are re-stated in terms of alternatives.

Judicial institutions do not have to be considered in opposition to customary institutions such as *jirga* or *shura*. The word *jirga* is a Pashto term also used among non-Pashtun groups. Usually, however, non-Pashtun people use the term *shura* which derives from the Arabic word *mashwara* (to ask, to consult). These customary assemblies are spread throughout the country, with nearly the same role for all Afghans—even if they differ slightly in relation to some functions. *Jirga* is not a permanent institution but is created when there are important decisions to be made (at the level of the community) or conflicts to be solved (e.g., conflicts between families). Given the lack of trust of citizens toward state institutions and the problem of corruption within the judiciary and difficulties to access it for very poor people, customary institutions might be regarded as standard ‘locations’ to solve conflicts and obtain justice. Given that *jirga* and *shura* are deeply linked to dynamics of prestige, wealth and honor, in Kabul they are not very often set up to solve disputes involving marginal members of the community. The condition of inaccessibility that affects a marginalized (albeit larger) part of the population thus refers to both judicial and customary institutions. The (inter)familial sphere remains in many cases the only possible way to solve a dispute or to settle a quarrel. But where—like in Kabul—customary practices clash with other social phenomena such as unemployment, housing shortage, or alienation from one’s social group, the result is the detachment between social practices and the system of values recognized by the social group, with severe implications on the radicalization of certain solution methods and forms of compensation.

It is against this background that I address the issue of human rights, and I focus on the work done by the Afghanistan Independent Human Rights Commission (AIHRC).

This article is based on a long-term research conducted in Afghanistan. During fieldwork carried out in the country (mainly in the Kabul province) since 2005, I collected interviews with AIHRC’s staff, international organizations’ and NGOs’ workers, and officials of the Ministry of Justice and the Ministry of Women’s Affairs. I directly observed several court cases and prosecutors’ meetings, and occasionally assisted at *jirga* and *shura* gatherings.

Justice, injustice and inaccessible normative pluralism

In October 2007, while I was in Kabul doing some fieldwork, my friend Basir came to ask me some advice. An Afghan attorney who helped me during research in Afghanistan, Basir was also active with Afghan NGOs that provided free legal assistance. At his own initiative, he wanted to conduct a study concerning the criteria used in Afghanistan by international donors to devolve the hundreds of millions of dollars per year to the various agencies, NGOs, and civil society organizations involved in the 'reconstruction of Afghanistan'. It was a challenging and fascinating idea, but unfortunately we could not manage to develop it into a research project—because we did not have funds, time, and institutional support.

A few months later, while on a return trip to Kabul, Basir and I met again. I was pleasantly surprised when he placed the results of another survey in my hand. Over the intervening months, he had conducted an informal study in Kabul concerning people's opinions of justice in Afghanistan. Despite some possible methodological concerns, I found Basir's study to be of tremendous significance—not only for the answers he received but for the importance that he himself placed on defining concepts often seen by external actors as value-neutral. His questions were extremely open, ("What does justice mean to you?", "What do you think of justice in Afghanistan?", "What do you think about the judges' work?"), and his interview style was unstructured, allowing informants to explore their feelings and perceptions. Most interesting to me, however, was talking through the findings with Basir as he expressed his own opinions on the matter.

According to Basir, justice (*edalat* or *adalat*) cannot be defined as a formula—what justice *is* can never be said with certainty—although Basir's survey findings provided valuable insight into how informants set out to describe this all-important concept. In explaining his idea of justice, Basir provided a list of illustrations that would have fallen into Rawls' definition of 'justice as fairness' [58]. For instance, customary norms and values focus more on fairness (equity) than on application of rules. Basir gave me a concrete example: "Justice is when parents treat their sons and daughters in the same and correct way." More determinist, and surely sadder, was his opinion on the general situation of justice in Afghanistan: "You know, my friend, in Afghanistan they have deprived us of justice." 'They' would turn out to be a complex mix of fundamentalist regimes, Western military operations and other interlocutors, while Basir's understanding of justice boiled down to a terribly simple equation: "The fact is that I know what justice is because I have suffered from injustice." Almost a year later, another Kabul-based Afghan lawyer described it to me thus: "Justice is measured by the ability to make up for a suffered injustice." If justice (not only in the Afghan context) is often experienced—and thus describable—through the lens of injustice, it becomes imperative to find a way of defining 'injustice.' Given the complexity of the Afghan social and cultural environment, it is best to explain this through reference to a similarly complex, and particularly Afghan, situation. Many Afghans, with respect to their religious beliefs, consider the production, sale, and use of opium products to be *haram*—unjust or unlawful from an Islamic perspective. At the same time, cultivation of opium poppies is a clear violation of Afghan laws on counter-narcotics and, as a result, poppy fields are often targeted for eradication by

national and international forces. While this is 'legal' under Afghan law and 'just' in order to defeat drug trafficking, for an Afghan poppy farmer the destruction of his crops is seen as an injustice, as it deprives him of his only way of earning a living. From his point of view, the injustice corresponds to a deprivation—the abuse is not necessarily the destruction of the fields, but the lack of adequate compensation that follows in light of the farmer's need to feed his family. The satisfaction of respecting state law is not enough where the law has produced an outcome which is legitimately experienced as an injustice. Furthermore, complaint about poppy field eradication is also unjust because not all farmers are treated equally. Poor farmers without influence see their fields destroyed while neighbors who have political protection do not.

To the extent that justice can be understood through the lens of concrete circumstances, in Afghanistan—as it appears to be elsewhere—a series of religious, customary, legal, and moral implications intervenes simultaneously. Such analyses involve a complex substratum of values, rules, beliefs, habits, and procedures that, as my friend Basir might have said, are difficult to express definitively, but confirm the feeling of injustice as experienced by the farmer. What gives this sense of injustice its legitimacy, however, lies in its public acknowledgement. Lawrence Rosen has argued that justice—a vital concept within Muslim ideology

> is simultaneously an attribute of the person and of the times in which one lives. Justice therefore occupies a middle ground between the public and the private. For while it is possible that a man may be just (*'adl*) and the times unjust, it is thought that one needs just times in order for this personal possibility to be most fully realized ([60]: 68–69).

What is thus essential here is not the anger of the farmer himself, but the legitimacy of his sense of injustice in the eyes of his neighbors; while everyday Afghans would support the right of the farmer to appeal against the injustice he has experienced, a drug trafficker or warlord profiting from the farmer's labor would share no such support.

The result is that the sentiment of injustice is intrinsically bound to public acknowledgement. Injustice is an interpersonally-based sentiment, which is experienced through, and can be explained in terms of, social relations. Again according to Rosen, the Islamic idea of justice "depends on the good opinion, the proven trustworthiness born by a network of consequential social ties, the common design that is forged with other believers" ([60]: 69). This observation is borne out in reality—the practice of reciprocal recognition of injustice is enacted in the public arena. Interpersonal recognition represents, therefore, a kind of first step in trying to oppose injustice. Together with this recognition, however, must exist the opportunity for individuals to succeed in accessing the social and legal institutions responsible for the resolution of injustice—an opportunity which is highly limited in the Afghan context.

Following the work (from 2006 to 2008) of Saber Marzai, prosecutor for the 11th district in Kabul, I saw quite a few cases from the complaint until the hearings in court. Talking about the opportunity to access justice, on September 12, 2006, Saber said to me:

> It is improbable that a case is brought to the official legal system without having first passed through discussions and decisions of various members of the family and suggestions of elders. If a woman comes in this office because the husband

> beats her, the first thing that one asks her is if she tried to talk to her family, or to her husband's family. In this way the woman can avoid other problems. Solving a problem in court or in a *jirga* or within the family is not a question of choice. Sometimes it can be dangerous to tell others about a family problem, it can cause violent reactions—even very violent. Many people do not think it is a good idea to reveal family problems to strangers. It is better to talk to an uncle than a policeman, who might even ask for money. I saw many women who were beaten by their father, their husband or their brothers because they conferred with the police, or came here directly. […]. If you think about the problem of corruption and the fact that many prosecutors and judges have not even studied law you can easily understand how difficult it is for a poor person to have a just trial. I should not tell you these things. […]. If we speak of civil cases, then I can tell you that people come back and forth. Then they might solve the problem on their own, which is sometimes better. When something serious like a homicide occurs, it is a different story. […]. Think about your hand. When you catch something, all your fingers move. In fact, when a person has a problem to solve, a set of rules becomes active at the same time. Of course rich and poor people face their problems in a different way. Many people do not have a choice. In front of a crime they behave in their own way. It is as if their hands were in a plaster.

The subjectivity, relativity, and public nature of justice in Afghanistan is further complicated by a rich history of multiple and active normative systems operative in the country. The intertwining of different normative systems (customary, state, Islamic) has often been described by scholars of Afghanistan as a form of legal pluralism [10, 25, 43, 77–79]. Through the lens of legal pluralism, multiple modes of legal decision making and conflict resolution are held up as parallel, but this is constraining in that it often avoids examination of how people live with and experience each of these layers. Moreover, analyses often illustrated the co-presence of these normative systems rather than their interconnection. Authors such as Griffiths [34], Moore [46], Pospíšil [56], Roberts [59], Rouland [61], Santos [64, 65], Tamanaha [69, 70] and Vanderlinden [76] have all contributed to outline the sociological density of legal pluralism. They have also discussed and questioned the dynamics of power involved in the structuring of pluralism itself. Yet, the use of the category somehow compelled the unpredictable variability of social practice within the rigid borders of the legal order. 'Normative pluralism'—an expression which is, in my opinion, more ethnographically pliable than 'legal pluralism'[1]—seems therefore to be the most plausible alternative.

Though normative pluralism assumes different forms while respecting important historical and cultural variables, from a theoretical point of view it can be read as a contingent socio-normative condition which not only refers to the existence of

[1] From the Oxford Dictionary: Normative: "establishing, relating to, or deriving from a standard or norm, especially of behavior." Legal: "relating to the law"; "appointed or required by the law"; "permitted by law". As for the historical development of the category of 'normative', the conception of pluralism in normative terms appears to be more suitable than 'legal pluralism' to describe the intersection between social practices and represented and experienced values. 'Normative' as a category is more inclusive than 'legal', and thus it helps to emphasize the extra-legal importance of specific social phenomena such as reconciliation, vendettas, compensation, arbitration. On the relationship between normative pluralism and legal pluralism see also [73].

different normative orders within a presumed 'social space' (which might consist in a local context or the entire world) but also concerns the possibility of considering the person to whom the normative orders refer to in plural terms. Pluralism is bound by the subjects' ability to consider the extent to which they are a part of, or are affected by, the normative systems they confront while concurrently they perceive themselves beyond these systems. So, as state law corresponds to a particular structuring of normative order that supposes a peculiar vision of the world, at the same time the state corresponds to one possible form of political organization. Likewise, if an individual can think of himself/herself (i.e., he/she can be thought of) as beyond and independent of the state, at the same time he/she may consider himself/herself not contained solely by the law. This individuation needs not be seen necessarily in terms of diverging from the law, but in terms of multiple belongings to various forms and ways of experiencing normativity. In this sense, we can refer not only to the idea of plurality, but indeed to that of pluralism.

In order to concretely experience this idea of pluralism, the relevant normative systems need to be clearly identifiable and accessible for the majority of the population. In Kabul, however, pluralism is not inherent to this fundamental dimension of accessibility, but concerns the mixture of meanings, experiences, values, logics of power, and marginalization which occur at the very moment people face matters of normative order (e.g., conflict resolution, mechanisms of compensation, decision-making). To return to our previous example: following the destruction of his livelihood, the farmer's response is determined by the multiplicity of his individual and social experiences. This multiplicity is structured, in the first instance, as a space of negotiation where injustice is directly linked to a series of factors, which may include: (1) the impossibility of accessing judicial institutions in a free and autonomous way; (2) the impact of humanitarian policy on state institutions—in the sense that this 'aid' is perceived by Afghans as external interference; (3) the social hierarchies that both customary and state institutions tend to reproduce; (4) the link between state institutions and warlords' system [66]; (5) the corruption rampant in courts, prosecutors' offices and among policemen; (6) the inefficiency of justice sector institutions as a result of limited human and infrastructural resources; (7) the radicalization of certain customary practices determined by the logic of violence; and (8) the extreme politicization of religious dogma and of legal claims.

This list evidences how deeply these problems are connected to one another. When examining issues of normative pluralism, it is thus essential for researchers to reflect on the concrete options available to individuals in order to address perceived injustices. In Kabul, the inaccessible pluralism produces a lamentable consequence: that of compelling the weakest segments of the population to take the law into their own hands. For the many Afghans living in extremely disadvantaged socio-economic conditions, the recourse to the customary assemblies (known as *jirga* and *shura*) is hardly followed, and when it is, the decisions of their elders serve as a reminder of the importance of social status in the resolution of conflict. At the same time, in Kabul's courts, the Kafkaesque bureaucratic system has been further undermined by corruption and political pressure, exacerbating the distance between social-normative models, historically consolidated, and judicial decisions. Arguably, increasing recourse to (and often the radicalization of)

some customary practices at the family or inter-family level, is directly connected with the impossibility of resolving problems and disputes within the judicial and customary institutions (theoretically) set up with this aim. Alienation from the justice system indeed implies a lack of 'belonging' here, whereby for 'marginalized citizens' the impossibility of access justice is a projection of the impossibility of fully become members of the society. A reflection on the relationship between human rights, (in)justice and pluralism, could thus only develop in connection to this structural condition of inaccessibility.

It is worth mentioning here that the success of the Taliban originally was partly due to the emphasis they placed (and they still place) to justice in their rhetoric—and in their exercise of power. Nowadays, the issue of access to justice is not only a core element for legal reforms but it also represents a crucial theme within a political debate which opposes government and Taliban propaganda.

Afghanistan independent human rights commission

In the Constitution of 1977, issued during the Daud Government, the Charter of the United Nations and the Universal Declaration of Human Rights were referred to for the first time. Due to the turbulence of political events at the time, including the looming Soviet invasion and ongoing internal conflict, this first official step to the recognition of human rights in Afghanistan remained just a simple archive record. Not until the adoption of a new Constitution by the Loya Jirga in 2004, 3 years after the fall of the Taliban and the establishment of Hamid Karzai as President, did Afghanistan ratify its intent to be bound to the international human rights treaties had signed decades earlier.[2] The 2004 Constitution also established the existence of the Afghanistan Independent Human Rights Commission (AIHRC) with article 58:

> To monitor respect for human rights in Afghanistan as well as to foster and protect it, the state shall establish the Independent Human Rights Commission of Afghanistan. Every individual shall complain to this Commission about the violation of personal human rights. The Commission shall refer human rights violations of individuals to legal authorities and assist them in defense of their rights. Organization and method of operation of the Commission shall be regulated by law.

[2] Here is a list of international human rights related treaties and conventions Afghanistan has bound itself to legally. Some, in theory, were binding on the country even if human rights was not mentioned until the 1977 Constitution. It is important to note that Afghanistan did not list any reservations to these agreements and hence was bound them in their entirety from an international legal perspective. The Geneva Conventions of 1949; the Genocide Convention of 1948 (acceded 1956); the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 (acceded 1983); the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (acceded 1980); the International Covenant on Civil and Political Rights of 1966 (acceded 1983, but not to the optional protocol); the Convention on the Elimination of All Forms of Racial Discrimination of 1966 (acceded 1983); the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment of 1984 (ratified 1987); and the Convention on Rights of the Child of 1989 (ratified 1994).

Created by Presidential Decree on June 6, 2002, the AIHRC's principal aim is to protect and promote human rights and investigate violations throughout Afghanistan. It has often been maintained that

> While international observers have lauded the AIHRC commissioners for their independence and commitment, some have also noted that few of the members had previous experience in the human rights field and consequently their capacity was low. Commissioner Fahim Hakim observes: "None of us were human rights experts… we were all human rights activists but had no idea how to run a professional national commission, so it was really a challenge for us" ([63]: 429).

As underlined in its annual reports [2–8], the Commission has, with time, come to be seen as a more reliable and legitimate institution. Moreover, in the last years, the AIHRC has seen an intensification of programs with the aim of promoting and defending human rights.

In 2004, AIHRC members participated as surveyors in a nation-wide survey conducted by the United Nations Assistance Mission for Afghanistan (UNAMA) established by the Security Council in 2002. The study showed that a full 69 % of respondents identified themselves and their close relatives as direct victims of serious violations of human rights, including homicides, torture, and missing persons during the last three decades of conflicts (see also [1]). On the basis of these results, the Afghan Government launched an Action Plan of Peace, Reconciliation and Justice in 2005 in order to tackle the thorny question of past atrocities. Among the main objectives of the Action Plan was also the reform of state institutions in order to strengthen the rule of law, stimulate good governance, and prevent future violations of human rights.[3] Nevertheless, these priorities have given way to the Law of National Reconciliation approved in 2007, which has been subject to a lot of criticism.

> The National Reconciliation, General Amnesty and National Stability Law (hereafter, the Amnesty Law) has been in legal limbo since it was passed by the Parliament and approved by the President in March 2007. The proponents of the law have claimed that approval is enough and that it is actually already a law in force in Afghanistan, others have claimed that as long as it has not been published in the official gazette it cannot be considered a law in force. The Afghan government's report prepared for the UN Human Rights Council session of 7 May 2009 brought some clarity: It stated that the Amnesty bill was not a law in force as it had not been published in the official gazette. In December 2009, while nobody was watching, the situation changed as the Amnesty bill was published in the official gazette [41].

Maryam Rawi, activist of RAWA (Revolutionary Association of the Women of Afghanistan), outlined that this Law implied impunity for people like Khalili, Sayyaf, Rabbani, Fahim, Muhaqiq, Qanoni, Ranjbar, the mullah Rokitee, and many others. These people contributed to the destruction of Kabul and are responsible for horrible human rights violations and crimes such as rape, homicide, looting, kidnapping, and torture. Today, thanks to this Law, these people cannot be pursued anymore [31].

[3] See http://unama.unmissions.org

Beyond demonstrating the sheer number of Afghans who have been exposed to severe human rights violations, the UNAMA findings also create an opportunity to reflect on the process of how one comes to self-identify as a victim. The extent to which this self-definition might have been 'suggested' or overstated by AIHRC surveyors cannot be known. However, research offers evidence that promoting of human rights involves a change in consciousness at the individual level. Mark Goodale [33] has argued that social actors will no longer look outside themselves for both the causes and meanings of social change. Rather, once an individual gains an understanding of human rights, he/she effectively internalizes the impetus for change, and, in a way, circumscribes it within the boundaries of personhood itself.[4] According to Goodale, what is so interesting about the development of human rights consciousness—a phenomenon so important to much of the contemporary international and transnational political and social landscape—is that it occurs one person at a time, without any assumptions about how this internal normative revolution is expected to make sense.

Instruments and principles deriving from international law and human rights are part of the Afghan normative substratum. It is, however, difficult to articulate the phases of this progressive assimilation which flows into hybrid ideals of justice. And it is not simple to hypothesize future paths.

In an interview held at the AIHRC headquarters, Commissioner Mohammad Farid Hamidi explained that the numbers of people seeking to resolve their problems outside of the court system has increased in recent years.[5] The reasons for this shift, according to Commissioner Hamidi, are bound "to corruption, to the difficulty in accessing state justice and to the delays involved in taking recourse to a tribunal." (ibid.) A year earlier, the Commissioner had already alluded to these problems. In his words:

> Now the problem of corruption is greater than in the past. People do not trust judges because they are at the mercy of commanders and warlords. In fact, many problems are solved in the family with the opinions of the elders. For more serious problems, people address the *jirga* or the *shura*. Of course these decisions do not often respect human rights.[6]

The juxtaposition between widespread awareness of human rights violations, with its resultant rise in victim self-identification and that of increasing use of customary resolution methods, could imply that the process of internationalization and homogenization of law has implications less predictable than expected. In comparative terms, Robin Perry has observed that the majority of people in non-Western countries relies on customary normative systems

> as a means of resolving disputes and ordering life within their respective communities. The imposition of formal, state laws tends to alienate these

[4] Knowledge of human rights, however, does not solve the fundamental dilemma of having rights recognized through legal institutions, which are in dual and controversial relation with subjectivity. On the one hand, legal institutions bring the individual into focus as a legal entity, while on the other, they function according to a process that draws on as many similarities among individuals as possible, thereby universalizing the very idea of 'subject' before the court.

[5] October 6, 2007.

[6] September 18, 2006.

communities and exacerbates resentment towards the often-corrupt urban elite that administers them ([55]: 72).

In addition to the degeneration of the judicial structure and the rise of corruption, the impact of the international community on the Afghan justice system should not be excluded from this analysis. International organizations and foreign governments, in blurring the line between military and civil functions, bring a particular vision of the world to their legal and governance related interventions. Legal models are assuming more and more about what the shape and values of the justice system should be, likely with the aim of reproducing a specific transnational order governed by international profiteering and inequalities ([28, 48, 50, 51] .

The politicization and militarization of humanitarian aid has particular impact on access to justice. In fact, Afghan normative pluralism is heavily influenced by two interlinked processes: the statalization of justice based on a Western liberal rule of law model and the proliferation of international humanitarian and state-building actors, who have come to exercise some form of influence and control over the justice system through reform efforts, formation of judges, and state functionaries. These processes, when compounded by increasing political tension, facilitate a sense of alienation among the Afghan population with regard to judicial—and more generally state—institutions. A consequence is that people do not develop a sense of legitimacy toward tribunals, which are seen to be distant from Islamic and customary ideals of justice. They thus very often avoid resolving their problems in courts, where—as a lawyer in Kabul told me in June 2012—"judges are at the mercy of commanders and rich people and, at the same time, they wink to big international organizations—because of their money, of course". As the lawyer explained, "nowadays, tribunals do not represent a place where people may easily obtain justice."

Although access to justice is a fundamental right [29], receptivity to human rights in the Afghan context should be viewed through two important, and often competing, lenses: (1) the relationship between human rights and the Afghan normative system, and (2) the logic of power and profit intrinsic to Afghanistan reconstruction. While many Afghans may eventually desire full integration of human rights regime in the normative system, expansion is anyway inhibited by the interaction of these forces. As observed by Laura Nader [48], the delivery of human rights-related aid and awareness by donor governments often masks the ideological goals of an empire, as was seen particularly in the current wars in Iraq and Afghanistan. From this perspective, human rights and humanitarian militarism seem to be inextricably linked (as interventionist approaches in the name of a 'universal good' show-see for example [38]), though humanitarianism has the characteristic to reshape over time [24, 37]. In addition to questions "stressing out input—and output-legitimacy" ([40]: 2; see also [54]) like 'Is the external intervention in the Afghan legal sector right?' or 'Will it be a success, in the end', international organizations and governments (e.g., Italy and USA) that after the fall of the Taliban in 2001 have taken over the reins of the legal reconstruction, should have at least also asked themselves: What political and social implications will this specific form of interventionism put forward?

International donors, private corporations, and inter-governmental institutions, given the extent of the funding and political power they bring, make the possibility of identifying the priorities of people on the ground a difficult task. As the Chairperson of the AIHRC, Sima Samar, told me: "The program and strategies [of reconstruction]

should have been designed according to the situation in Afghanistan, rather than according to a pre-cooked, pre-made plan from the donor side." (23 June 2012).

Far from being motivated by an interventionist approach, the AIHRC leads an extremely delicate and important work indeed; as explained by Commissioner Hamidi:

> The main duty of the AIHRC is that to investigate and to give proof of the violation of human rights to competent institutions. Practices like *bad*[7] [a practice which entails giving a woman belonging to the family of an individual who has wronged another family—as a form of compensation—to the family who has undergone the injury] are still used in Kabul. Thanks to our campaign and to the work of other institutions and organizations, this practice is decreasing. But it is difficult to affirm so with certainty. Ethnic belonging seems not to play a significant role in it, even though there are many episodes among the Pashtuns. Sometimes policemen and judges are also involved. In the last episode in Ghazni, also the governor was involved. Two important families which had a problem went to the police, but the governor put pressure on the families asking them to solve the problem with *bad*. These things happen for many reasons, often in order to avoid feuds. The governor himself intervened in a case of rape where a boy had raped a little 8 year old girl. The *mullah*, the governor and the head of the police supporting the local *shura*, made pressures in order to solve the matter with the marriage of the aggressor and the 8 years old little girl. And more, the family of the boy gave to the victim's family a girl of six years old. As the family of the raped little girl decided to tell us the entire story, investigations are still being made at the moment. The governor has tried to apply pressure, but he has no authority over the AIHRC. Meanwhile, the six-year-old girl returned to her own family. […] The Commission also handles cases of illegal detention, illegal confiscation as well as cases related to the victims of the war on terrorism […] On many occasions there are no reasons to arrest a person, but the police and the governors exert an abuse of authority. The Commission has presented to Karzai the names of more than 2,000 people who have been illegally imprisoned.[8]

The Commissioner's words show that forms of authority, which appear somehow distant from each other, permeate in substantial ways. In the episode reported by the Commissioner, the governor, *mullah*, head of the police and *shura* have all reciprocally legitimated themselves. By this, I mean that although each directive to resolve this case was yet another violation of human rights, their deviations were politically aligned such that their responses were mutually reinforcing. Appealing to the AIHRC for the family of the raped girl was the only alternative to the kind of remedy proposed: marriage between the aggressor and the victim, and the exchange of an innocent, six-year-old girl to satisfy the wronged family. While the Commission has no authority to force judges or governors to fulfill its requests, the AIHRC often calls

[7] As the Afghan interlocutors told me, the word *bad* refers specifically to this kind of practice; "it literally refers to something that is not good to do" a member of the Afghan Judges Women Association told me in March 2008.

[8] October 6, 2007.

on the media and politicians to observe and report on judicial activity. Conflicts of power are frequent in relation to the realization of human rights and can lead to the aggravation of opposing positions; judges may not be willing to recognize the authority of the AIHRC, and, facing pressure from the Supreme Court or important religious figures, they frequently resort to strict positions based more on social/political restrictions than human rights norms.

Human rights and *shari'a*

Another particularly delicate issue concerning the work of the Commission and its relation to other national and international institutions is the relationship between *shari'a* and human rights. Within these debates, positions are often expressed in an essentialist, reductive and ideologically antagonistic way that does not only involve Afghanistan, but can be seen within a more general scenario from which different perspectives[9] may derive. These debates cannot be clearly synthesized into a vision of two 'blocks', fed by the widely presumed cleavage between the 'Islamic world' and the 'West'. Rather, as Mashood Baderin ([17]: 10) has argued, even if it is acceptable to affirm that international standards of human rights as they are known today originated in the West, universal notions of human rights have been influenced by the broadest cross-section of human civilization. According to Baderin, if the aim of international human rights law is the protection of individuals from abuses of state authority and the promotion of human dignity, then it is not possible to affirm that Islamic principles are inconsistent with human rights (ibid.: 14). Baderin's conciliating perspective seems to fit well with that of Commissioner Hamidi. Notwithstanding this, there are concrete circumstances in which the respect of human rights and *shari'a* principles appear to meet an effective fringe of incoherence. In these cases, the solution is not to be found with respect to principles, but rather with the purpose or function of those principles. According to many interviewees with whom I spoke in Afghanistan, the aim of human rights to promote respect and human dignity is also to be found within *shari'a*.[10] The point is not, therefore, to evaluate the instrument, but rather to evaluate how the instrument could be used—attention should be paid to what can be done in the name of human rights and *shari'a* and not on the mechanical reproduction of normative schemes. It is clear from the opinions of scholars and Afghan stakeholders that *shari'a* is protective of human rights when deployed to that aim. Again, in the words of Commissioner Hamidi:

> The Commission investigates human rights violations according to the requirements of Afghan law, which is rooted in Islamic principles. This means that *shari'a* is protective of human rights in that, through Afghan state law, it offers a mechanism to investigate and prosecute such violations. Human rights nevertheless continue to be violated. Abuses of women in relation for example to the crime of *zina* [extramarital sexual relationship] derive from the fact that the

[9] The literature on the relationship between human rights and Islamic law is quite extensive, see for example [12–14, 17, 42, 47, 57, 72].

[10] For example, Professor Qazi at the faculty of Political Science (Kabul University), and Commissioner Hamidi.

law is not properly applied. While a case of *zina* is solvable respecting *shari'a* and also human rights, it does not always happen.[11]

This statement made by Commissioner Hamidi referred to a particular aspect, such as the tendency—due to denouncements of *zina*—to consider the crime punishable with *hudud* (plural of *hadd*, literally 'limit') punishments even if it is not possible to fulfill the criteria provided by *shari'a*, which means the crime should be confirmed by four male witnesses, sane and considered honest by the judge. In the courts of Kabul, when a woman is accused of *zina* but there is no evidence, the crime should consequently not be punishable using *hudud*, which could mean being sentenced to death if she was married. The judge usually decides to keep her in prison for a while; very seldom, he may decide on lashing. As the AIHRC has denounced, in some cases of rape, women, instead of receiving help, are sentenced for *zina*. In these instances, it is possible to oppose unfair sentences issued by the judges,[12] appealing to the respecting of *shari'a* principles. It is more difficult to avoid that such cases will be solved by customary assemblies. In fact, while for civil cases collaboration with the customary institutions (*jirga*, *shura*) appears helpful and reasonable, for criminal cases it is mostly believed that crimes should be judged only in court (here the role of customary assemblies might be seen as a sort of 'consultative organs').

In contrast to the Commissioner's assertion that *shari'a* offers a legal basis for the protection of human rights in Afghanistan, these principles often fall prey to the political and social justifications of those in power. In these cases, recourse to Islamic principles can lead to an unfortunate paradox: use of *shari'a* to legitimize conviction of vulnerable parties where evidence of a crime is absent. A common example of this in the Afghan context is the prosecution of *zina* crimes alluded to above. In such cases a woman alleging rape can be convicted of adultery and sentenced to prison (or ordered to marry her attacker) when she lacks four respectable male Muslim witnesses to prove her claim. The result is an instrumentalization of religious discourse that can cut both ways: Islamic law is a useful source for those seeking to promote and protect human rights, while at the same time, *shari'a* remains a key element in guaranteeing the authority of religious and political actors to preserve the status quo.

Considered in terms of principle, the crime of *zina* and *hudud* punishments are hardly consistent with human rights. However, beyond a certain opposition approach that very often implies an excessive rigidity of *shari'a* dispositions, there are margins of compatibility, at least in terms of potency. Mohammad Hashim Kamali [39] has pointed out that there is quite a dose of exaggeration about *hudud* punishments, which often betray a sort of belief that *hudud* punishments are the whole *shari'a* and the ground proof of Islam. We all know, Kamali reminds, that Islam consists of five columns, and that *hudud* is not one of them.

[11] Interview, September 18, 2006.

[12] In a 2002 report the AIHRC states: "The findings of the report show that some of the judges lack having enough awareness about Sharia and human rights of women or don't have a full confidence on them. Lack of full information about the fair principles of religious law and lack of understanding of effective laws and their modifications, especially international human rights treaties which Afghanistan has acceded to, and domination of patriarchal customs of the society, and in the beliefs and attitudes of some judges, have exposed women to non-religious illegal discrimination and persecution. Therefore, the level of women's trust and reference to courts is low." (AIHRC [9]).

The extent to which *shari'a* can be used as an instrument to promote and protect human rights is illustrated again by the work of the AIHRC. According to the Commission, human rights and *shari'a* are compatible to the extent that they become useful instruments to protect the rights of people unjustly condemned. Therefore, the Commission practises a sort of trans-normative mediation rooted in the logic of pragmatism, using *shari'a* principles and human rights standards to protect people from abuse of power. The AIHRC promotes a form of human rights which uses cultural context and the normative systems of Afghanistan as a starting point, rather than reference to often unknown and less legitimate international instruments. In practice, this means that, even as the AIHRC condemns practices such as bad (AIHRC [3]: 8), the Commission plays an active role in family mediation involving these kinds of outcomes. Over the last decade, the Commission has given legal support to hundreds of women and mediated several family disputes, including cases of violence against women (ibid.: 24).

There are also scholars, media commentators, religious leaders, and politicians who argue that there are circumstances in which the distance between human rights and Islamic law is ultimately unbridgeable. Let us stress this argument and look for example at the Declaration of 1948, art. 16 [71]:

(1) Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

In pure legal-logical terms, while sub-articles 2 and 3 are also central to Islamic law, sub-article 1 does not adhere to Islamic principles given that, for example, a Muslim woman cannot marry a man who is not Muslim. However, a comparison of that kind may lead to the following reasoning: human rights and Islamic law correspond to unchangeable and inviolable entities, which individuals accept mechanically. Instead, if sub-article 3 is taken into consideration, it is clear how this, even if extendable to different cultural contexts, results as an arbitrary interpretation of social human articulation and the by-product of specific religious and cultural roots [67, 68]. From an anthropological point of view, the category of 'family' is interpreted according to various concepts which refer to different forms of family. Therefore, it is difficult to accept the idea that the family, in generic terms, represents the 'natural' unit of society because, first of all, the use of the words 'family' and 'natural' needs to be understood. To which family is the reference, the monogamous? Polygamous? In what sense is the family 'natural'? Would a polygamous family be considered 'natural' in a European country where polygamy is forbidden by law? Is the reference of sub-article 3 also made on families which are not based upon marriage? Are there other 'natural' and fundamental group units of society that should be protected by society and the state?

Many of the principles enshrined in the Universal Declaration of Human Rights (UDHR)—and likewise, in the frameworks of externally funded legal development programming—are enshrined in a sense of inviolability, timelessness, and most importantly, neutrality. They assume our implicit understanding and acceptance of a

set of values, which, many argue, are particularly Western. They are thus principles understandable in the frame of a particular historical-cultural conjunction. In just one example, despite the seemingly neutral language of sub-article 3, what constitutes a ‘family’ had a very specific meaning at the time when the UDHR was written, which consisted in the monogamous family, derived from a marriage between a man and a woman, so as it had been historically affirmed in Europe.[13] When the historical-cultural variables are considered in this way, what is implicitly asserted as ‘natural’ or definitive constructs becomes more pliable and arbitrary but yet still legitimate.

The same reasoning can be applied in relation to religious precepts, such as those within *shari'a*—while they are often represented as unquestionable and eternal, the demands of daily experience reveal their situational nature. According to Kamali [39], while *shari'a* law is fixed regarding its aims, it allows for flexibility regarding the means to reach such aims. Ultimately, norms and social change in Islam have always interacted in varying degrees and there is no historical precedent to believe that *shari'a* would not revive. Since the earliest days of Islam, the focus on active interpretation as a key to practice in daily life has shown that it is not a fixed and permanent entity, but rather it is able to change and adapt to new circumstances. This opportunity lies mainly in the ability to restore vigor to the *ijtihad*, which

> is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort. In other words, *ijtihad* is the maximum effort expended by the jurist to master and apply the principles and rules of *usūl al-fiqh* (legal theory) for the purpose of discovering God's law ([36]: 3).

Unless scholars revitalize *ijtihad*, Kamali states [39], the question of capacity to meet the challenges of *shari'a* in the contemporaneity will remain largely unsolved.[14] And in Afghanistan, scholars of Islam should move quickly—already shifts in social experience are being seen with more frequency. This point was made most clearly to me by Sitara, an Afghan woman working with a civil organization in Kabul, in April 2008:

> I fell in love with a man and 2 years later we married. He was a political activist. In 1994 he died because of an explosion in the center of Kabul […]. My family accepted the marriage although he was not Muslim. They knew how much we loved each other, so they decided to share those happy days with us.

Thus, even if ‘purist theorists’ speak about immutability of values and norms and incompatibility between human rights and *shari'a*, social experience is mired in the unpredictability and variation that inherently lead to social change. A normative system bound by unquestionable truths has very little chance to survive, while one that uses the tools it has been given to adapt, change, and grow, creates the possibility of dialogue and reciprocal influence. But the challenges to dialogue and adaptation are not confined to local normative systems alone. Rather, they also pose significant

[13] As observed by Alain Supiot [68], this Western matrix sees, first of all, the timeless and universal figure of a subject, to whom all human rights refer, which has all the features of that *imago dei* that has been recognized in the Western *homo juridicus*.

[14] It is worth mentioning that there is a fierce debate about whether the door of *ijtihad* remains open. The conservative view is that a jurist is prohibited from such innovation. See also [11, 36].

risk in the arena of international involvement in human rights. All over the world, human rights are represented by international organizations running development projects and operating in situations of emergencies. In many ways, these humanitarian agencies have come to embody the doctrine of human rights. During my experience in Afghanistan, I frequently spoke with human rights activists and humanitarian operators who did not hide their conviction concerning the superiority of the European and North American moral progress compared to the moral and normative systems of contexts like Afghanistan. Feminist scholar Susan Moller Okin [53], for example, somehow emphasized this aspect in her work by assuming that the dichotomy between individual rights and collective rights was a reflex of a universal moral progress undertaken by Western societies. This presumption of superiority very often seeks to legitimize itself in the shadow of the human rights doctrine. In a similar way, I also met professors at the University of Kabul, members of customary assemblies, and religious leaders who asserted the supremacy of *shari'a* law and the absolute primacy of its religious dogma as an irrevocable order of moral and normative reference. In the words of Sima Samar of the AIHRC, this is a "political interpretation of the *shari'a*" (23 June 2012), which is generally opposed to a political interpretation of humanitarianism.

If the process of transnationalization of political and normative models in the last decades has become more evident,[15] it is also true that the conflicts generated by the absolutization of specific moral and normative systems have become salient features of the contemporary age. Nowadays, a central challenge in addressing human rights is that of how to carry out these forms of political and normative negotiations in as egalitarian a way as possible, and where morality and faith are co-located above the conflict in a space where the plural harmony of being becomes a choice. In the inter-subjective instances, recognizing the humanity of one's choices, their cultural contingency and fluidity, does not imply a loss in absolute relativism but rather leads to the acceptance of human plural essence.

At this point, a crucial question arises: When speaking of creating a dialogue between the ideals of human rights, *shari'a*, and social justice, who are the possible interlocutors to whom one may refer? According to Italian jurist Orsetta Giolo [32], in Arab and Muslim countries the question of human rights has always gained attention in relation to the Arab-Islamic tradition as such, ignoring the experience of the citizens. The inclination has been to highlight interpretations of Islamic law and tradition as institutions, while avoiding thoughtful reflection on the political identity of the authors, the differences in the interpretations they promote, or distinctions between those sponsored by state governments and those put forth by independent intellectuals or movements. From this perspective, the tendency is to look at religion and human rights in Arab and Muslim countries starting from the position of those in power and assuming citizens spasmodic attachment to religious tradition without considering the work of the independent intellectuals and associations. For this reason, Giolo asserts that, when scholars consider human rights experiences and discourses in these countries, they should methodically distinguish between intellectual and pro-government associations on one side, and intellectual and independent

[15] Consider for example the 'explosion' of rule of law projects all around the world or the progressive transnationalization of religious ideas and movements—as outlined by Faizal Devj [26, 27].

associations on the other. This distinction is essential according to Giolo as it allows the extending of the point of view, opening up space for voices that are often bound to silence, and particularly those who claim the protection of human rights.[16]

While this shift from the rhetorical to the specific is of critical importance in understanding how human rights and Islam are interacting, a few problems remain with regard to this approach. Giolo points to a dichotomy between intellectuals and pro-government associations (which mainly seek to review a state's application of the principles of international conventions) on one side, and intellectuals and independent associations (which found their acts on the principles of human rights) on the other, which seems not to grasp exhaustively the political articulation which develops in relation to the questions taken into consideration. According to Giolo, pro-government intellectuals are given freedom to act based on their acceptance of the party line, yet they are often erroneously characterized in the international media as being representative of the majority of citizens; at the same time, independent intellectuals are often politically marginalized in a way that Western countries tend to ignore. This being said, the arbitrariness of concepts such as 'independence' must also be examined. The complexity of the political scene in countries where these debates most matter, such as in Afghanistan, cannot be underestimated. In the Afghan context, political articulation cannnot be reduced to a straightforward dichotomy between state authority (and those who accept it) and anti-state antagonism—the opponents of today's government may become the statesmen (and executioners) of tomorrow. Consider, for example, the story of Gulbuddin Hekmatyar, famous in Afghanistan for his cruelty and ferocity towards the population during the civil war as well as for his international military-political links. A student in engineering, Hekmatyar was a fervid opponent of the regime led by the People's Democratic Party of Afghanistan (PDPA) in power in the late 1970s as well as an opponent of President Daud's and Zahir Shah's regimes. He became part of the Islamist movement[17] giving life to a more radical fringe which developed in the late 1960s becoming more and more active: the Sazman-i Jawanan-i Musulman. A more decisive split occurred a second time when Hekmatyar himself founded the Hezb-e Islami party in the mid-1970s (except for Rabbani, which was Tajik, the Islamist leadership was composed mainly by Pashtuns, including Hekmatyar himself). Fierce commander against the Soviets, faction leader during the Afghan civil wars, prime minister from 1993 to 1994 and again in 1996, Hekmatyar –who also played a role in opium

[16] On this point see also Ben Achour [20, 21].

[17] Though the theoretical foundations of Islamism have been built by Abu 'Ala Maududi in Pakistan and by Sayyid Qutb in Egypt, Afghan Islamism has followed its own path [62]. The second half of the 1960s and the beginning of the 1970s were characterized by a strong political activism in Kabul University, where Islamist militants and leftlist students related to the PDPA were contending for space/power within the university. The Islamists opposed the politics of the PDPA, which they felt was guilty of wanting to look like the 'wicked West' and thereby forcing the country to come under excessive foreign influence. Rather than the reforms proposed by the PDPA, social changes were supposed to come from a re-Islamization of the social fabric and by taking over central power. The state of the Muslims had to be replaced by an Islamic state, through the imposition of *shari'a* to every aspect of public and private spheres. Starting from the 1970s, the Islamist movement moved out from the University space, above all thanks to social and economic activities which recalled the interest of many social groups, although, outside the urban centres, the movement did not find a significant following and only a few among the *ulama* decided to approach Islamism.

production [30]—still has many supporters and economic power today. The historiography of legal reforms and political antagonism in Afghanistan suggests that political and legal claims, as forms of activism and intellectual production, should always be read with an eye to the national historic-political and transnational situations that produced them. This means that we should possibly renounce to a meta-historical narration necessarily homogeneous. In short, a closer look at micro-historical processes and at their relationships to macro-history suggests the weakness of creating rigid dichotomies that aim to be valid everywhere at any time.

Human rights and structural injustice

When attention moves from ensuring the presence of articulating abstract human rights principles to concrete demands for rights in a given context, the observer cannot avoid dealing with injustice. In 1949, a year after the proclamation of the Universal Declaration of Human Rights, Edmond Cahn [23] wrote that the feeling of injustice is itself the foundation of law. Confirming this statement, Laura Nader [48] has proposed an analytical perspective that focuses on injustices rather than justice. The task of a scholar, according to Nader, is that of overcoming merely symbolic interest in justice, wherein the celebration of an ideal produces only a temporary sense of hope and often obscures the darker side of humanitarian intervention. As Costas Douzinas has maintained, for example, the military struggles for freedom and democracy in Afghanistan and Iraq "have been drowned in a human rights disaster for the local people" ([28]: 7). The books, conferences, and articles that uncritically follow from such efforts become ritual-like, offering a space where the myths and ambiguities related to justice and human rights are strengthened [48]. Attention to concrete instances of injustice, and the social, cultural, and political conditions which created them and thus dictate their possible solutions can lead to a much different approach to human rights and access to justice.

This sensitivity to the range of pressures and limited options for taking action on human rights violations in the Afghan context is built into the AIHRC's approach to its caseload. In April 2008, a young staff member of the AIHRC said to me: "Our first aim is to help people. This could mean negotiating between customs and human rights." The AIHRC's [8] annual report confirms a progressive capacity within the organization to develop ad hoc strategies in order to achieve results. While the AIHRC may be forced to deviate from international standards with respect to custom to achieve results in some cases, their presence and, specifically, their promotion of human rights principles in a way that feels appropriate and legitimate at the local level is leading to a process known as the vernacularization of human rights. Described by Sally Engle Merry [44], vernacularization occurs when, through mechanisms of legal transplant and cultural translation, otherwise foreign concepts become 'local'. Protagonists of such a process are those intermediaries, such as activists and NGO workers, who translate global ideas into local situations and re-translate local ideas into global frameworks. According to Merry, human rights must become part of the local legal conscience if they are to fulfill their emancipatory potential, and as many have observed, that in order to gain cultural legitimacy, human rights must conform to local normative structures. Vernacularization should, therefore, be a process of

appropriation and translation: those who are more vulnerable conceive the importance of this normative system only through the activists' mediation who frame their daily problems in terms of human rights. It is important to remember that in this perspective translation does not mean transformation. Once localized, the fundamental principles of human rights do not change. Here is thus the paradox of the vernacularization process: in order to be accepted, human rights must be seen to be cohesive with and respectful of local cultural systems; at the same time, to be part of a system of human rights, customary practices must be brought into agreement with internationally accepted standards and instruments. Hence, this is a complex negotiation requiring gradual change over time. Merry explains that whether or not this is the best approach remains an open question.

A look at the work of the AIHRC may correspond to Merry's conception of vernacularization. Nevertheless, I think it is important to outline that if activists and associations play an essential role in promoting human rights, we cannot take for granted that their work will really obtain the aspired results. More than appropriation and translation processes, I would speak about phases of resistance, conflict, hybridization, and assimilation. Between March and April 2008, I had the chance to speak several times with an officer of the Ministry of Justice. We carried on writing to each other until 2010, when the officer left Kabul and I was no longer able to contact him. During a conversation about human rights in Afghanistan he said to me: "The citizens of a weak state, like ours, are always troubled between the wish to refuse all that the international organizations promote and the attraction that these, after all, are able to provoke."

One aspect which must be further examined is whether the increasing role of international organizations in legal development/rule of law is producing the desired effect in promoting human rights, or whether international and state involvement is detracting from the local implementation of a legal conscience open to human rights. Top–down approaches to legal reconstruction are deeply linked with attempts to centralize legal power in Afghanistan, with a key objective being the control of the central government over the country. The notion of 'civil society' as part of a liberal view of the world has a particular relevance in this scenario. In fact, in the process of implementing a rule of law system, international organizations have built a specific form of civil society, which "is conceived as a zone of mediation between the upper level of the state and the ground level of local groups" ([45]: 566). By trying to reconfigure the relationship between the subject and the social group according to hegemonic exigencies of the state over the citizenship, the form of civil society promoted by rule of law programs redefines the system of practices and values in which the subject recognized him/herself. This process of sociopolitical construction, however, has produced conflicts in Afghanistan, mainly because of its lack of legitimacy among large parts of the population in rural areas, where political participation and local governance have traditionally been derived from a combination of sources such as non-state leadership, local Islamic authorities, and provincial institutions. Facilitating the redefinition of individual and collective identities through the transformation of local structures, family institutions, and social groups may lead to tension in the face of that change such as increasing the social/economic distance between Afghans involved in humanitarian circuits and the rest of the population, a response of heightened rigidity within customary mechanisms or a closing off to

'outsiders'. These oppositions, however, coexist with assimilating processes which progressively tend to change into re-localized forms of claiming.

Dealing with the matter of human rights, Slavoj Žižek [81] stated:

> what kind of politicization do those who intervene on behalf of human rights set in motion against the powers they oppose? Do they stand for a different formulation of justice, or do they stand in opposition to collective justice projects? For example, it is clear that the US-led overthrow of Saddam Hussein, legitimized in terms of ending the suffering of the Iraqi people, was not only motivated by hard-headed politico-economic interests but also relied on a determinate idea of the political and economic conditions under which 'freedom' was to be delivered to the Iraqi people: liberal-democratic capitalism, insertion into the global market economy, etc. The purely humanitarian, anti-political politics of merely preventing suffering thus amounts to an implicit prohibition on elaborating a positive collective project of socio-political transformation.

What was in the past an integrating part of the ideological system imposed by the colonial regimes (and the bourgeois class), Žižek ultimately recalled, presently has become an instrument used by colonized and working class people to articulate different forms of claiming.

In the context of humanitarian intervention and legal transplantation as currently ongoing in Afghanistan, legal reforms—best embodied in activities such as the training of judges [35]—are predominantly funded and managed by international agencies. Given the central role of legal tribunals in adjudicating violations of human rights, international efforts have focused a great deal on training judges and prosecutors in human rights principles and legal requirements. However, such training is based on the assumption that these principles, once delivered, will necessarily penetrate into the minds and actions of legal actors. In other words, it is somehow assumed that because they are operating in a state legal environment, judges and prosecutors will be more readily bound to a modernized conception of law rather than to customary norms, as if these were stand-alone and irreconcilable normative references. In contrast to this assumption, during my research in the courts of Kabul (2005–present), I have seen that Afghan judges are greatly influenced by international standards of law as well as by customary practices and traditional authorities (*jirgas*, *shuras*) in their decision-making. Yet this combining of legal sources is also evidenced in the reports of several humanitarian agencies (e.g., NRC [52]; USAID [75]). Through a survey of several provinces, USAID describes a scenario in which Afghan judges make explicit the interconnections between different normative reference systems (see also [18, 19]). Based on the experience of Afghan citizens and members of the customary assemblies, the report also states that an ad hoc relationship between the system of primary courts, *jirgas* and local *shuras*, emerges in everyday life despite the fact that such a dynamic is not officially recognized. At the same time, customary institutions act with an awareness that they are sharing a normative space in which the courts also operate.

The presence of international organizations is essential to measure those processes triggered by the promotion and implementation of alien models and principles of justice as part of a "liberal peace agenda" [16]. The judges' point of view is also

necessary in order to observe the mechanisms of negotiation which take place in the resolution of problems and disputes. In my observation, Kabul-based judges deploy a *dispositif* of re-appropriation of foreign models of justice, giving rise to a discretion in the application of law triggered by the overlapping of different normative references. Emblematic in this regard are the words of a Second District judge on the day we first met: "Human rights are present in my work as much as Islamic law and the values of the Afghan people. It does not matter what an expert tells me concerning human rights. It is important what I decide to do with them in order to promote social justice."[18]

The paradox which Merry [44] refers to forces the discussion about human rights to the following question: even if adapting to local contexts, do human rights have to remain unchanged? Or, changing the point of view, how can human rights adapt to local contexts if they have to remain unchanged? One needs to remember, however, that what is lacking, regarding our thoughts relating to matters of justice, is an explicit attention to the way people express their sense of injustice [48]. Still, while judges seek to increase their legitimacy and relevance through a blend of state law and customary practice, the general population's continuing distrust of judicial and government institutions presents a dramatic image of the Afghan normative system. Even though the important negotiation between the various normative systems is realized in courts, still, in Afghanistan, the 'do it yourself' form of justice is the primary means of solving legal problems due to most people's extreme difficulty in freely accessing judicial and customary institutions. Commissioner Hamidi argued that the problem of access to justice revolves around "the ability to create a space of coexistence and mutual influence for different forms of authorities such as the family, customary institutions, courts and civil associations."[19]

The inaccessible normative pluralism experienced in Kabul does not stem from insurmountable legal technicalities, but rather from deep political tensions and the hegemonic humanitarianism of international organizations and governments expressed in the language of legal modernization. Rather than using Afghanistan's pluralism as a starting point, external actors have pushed to the side that which does not conform to legal liberalism. The result has been the creation of a dichotomous view, in which fluid and interconnected elements are improperly placed in opposition —for example, 'formal justice' versus 'informal justice' or 'central power' versus 'traditional powers'. Such a dichotomous vision precludes understanding of the real dynamics acting in the country. As described by Faiz Ahmed [10], Kabul, provincial capitals, and other, larger towns are under the partial control of state institutions, while the rest of the country is politically and economically controlled by commanders and warlords. In these areas—and to the greatest extent in Kabul city—the presence of the state is perceived by the population and people act with reference to it. Outside these areas, however, decentralized forms of normative and political power dominate and the proliferation of armed groups is so significant that some provinces are in fact under the control of commanders. However, this may seem to be a simplistic dichotomy between state and decentralized powers. In fact, the freedom to act enjoyed by warlords, commanders, and armed groups closely resembles the

[18] October 15, 2007.

[19] Interview October 6, 2007.

current model of the state where foreign influence and abuse of extra-legal authority are rampant among members of parliament, government, and provincial institutions. Some members of parliament, Sayyaf[20] for example, are known to have small troops under their command [80]. In this construct, state power and extra-legal powers merge, over-determining local political cosmologies. If the presumed political dichotomy between state and decentralized extra-legal authorities makes the very map of power in contemporary Afghanistan less legible, the rhetorical dichotomy between 'formal' and 'informal' justice forces a purely state-centric conception of Afghan normative scenario, ignoring the multiple interconnections between the different normative systems. Every normative system is characterized by a tension between abstract ideals and practical applications, which cannot be captured through the simple juxtaposition of 'formal' and 'informal' justice. Associating formality with state institutions and informality with customary practice asserts a legal-political model that does not comport to the Afghan context.

Conclusion

As might be assumed, there are no analytical short-cuts to understanding the complexity of the normative-political context in Afghanistan. Yet, access to justice remains a crucial question, though this is a particularly complicated task in times of crisis [22, 49]. Attention to the challenge of inaccessible normative pluralism may produce a more engaged focus on the concrete normative problems that people face every day. For instance, investigating the global dimension of injustice with the aim of detecting socio-structural conditions means to invert the vernacularization process of human rights to concentrate not only on how the moral and legal order embodied in the human rights system can adapt to the local realities but above all on how the various forms of injustices are traceable to certain policies of marginalization and structures of inequalities at a global level.

Arjun Appadurai has maintained that "one crucial condition of possibility for deep democracy is the ability to meet emergency with patience" ([15]: 43). Following 2001 events and the beginning of the Enduring Freedom war in Afghanistan, patience has not very much characterized the reconstruction agenda. Interventions in the legal sphere mainly reproduced a top–down interventionist approach which only marginally addressed the problem of access to justice.

Although it may seem rhetorically unfruitful to conclude with a series of questions, many of course remain open, such as: Have human rights programs played a positive role in addressing the problem of access to justice? Are contemporary normative transformations in Afghanistan understandable through the lens of legal pluralism?

[20] Sayyaf, whom many consider to be a warlord, a fundamentalist, and a corrupt politician, is allegedly responsible for many crimes against civilians. A prominent exponent of the Islamist movement, he took part in the antagonism against PDPA during the 1980s. He also had relations with militants and men of power outside Afghanistan receiving weapons and money. During the Soviet invasion, he fought among the troops of *mujahidin* beside Ahmad Shah Massud. Since 2001, Sayyaf has played an important role in the new political order, gaining many critics among civil associations. To point out the extreme ambiguity of the process of reconstruction, it is sufficient to remember that, in 2003, Sayyaf was elected among the members of the Constitutional Loya Jirga.

Though such a category plays a relevant role in the scholarly and humanitarian discourse on the future of Afghanistan (and the future of human rights vernacularization), the most relevant effect of its use is to hide the inaccessible normative pluralism which people face every day. Distance between representation and concrete circumstances seems rather significant here, and requires further and serious interrogations on the conceptual instruments we use to describe the very factual dimension of normativity.

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