

Law as an anti-value

Justice, violence and suffering in the logic of becoming

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Fig. 1. Afghan election billboard, July 2009, showing the scales of justice promised.

‘Whoever believed in the reconstruction of the Afghan legal system?’ Nematollah, an Afghan refugee in Milan, managed to condense into this one question a host of question marks surrounding the military and humanitarian interventions initiated in Afghanistan in 2001.¹ I met Nematollah in September 2010, when he was thinking of returning to southern Afghanistan after spending four years – and experiencing a number of serious difficulties – abroad. My long conversation with him confirmed the following basic fact: each time we approach the issue of justice, we end up lamenting injustice.

In May 2013, Samiullah, a judge at the Kabul Court of Appeals suggested moving a step further, urging me to view injustice as an inevitable implication of judicial practice. As the conversation developed, the judge claimed that the best he can do, in the name of justice, is to seek a balance between concrete contingencies and abstract ideals. He then stated: ‘It is useless to hide ourselves behind man-made laws. Justice is something else’. This dialogue recalls a series of conversations I had in November 2006 and October 2007 with Abdullah, a former judge in Kabul. At one of our meetings he told me:

In certain circumstances, respect of the law is a secondary aspect compared to the importance of being honest. Honesty and common sense should always guide the work of a judge. Sometimes law simply reflects the corruption of the parliament. [...] A judge may not only relate to the law.

Having worked as a judge during the communist, Mujahedin and Taliban regimes, Abdullah was aware of the negative directions that the law can take when used as an instrument of control and repression – and therefore as an instrument of suffering. In this paper,² I reflect on law as a potential source of violence and as an anti-value – in the sense of being in antithesis to accepted social values – in the contemporary global scenario. My reflections are based on a study which began in 2005 involving ethnographic research in Kabul tribunals and prosecutors’ offices, as well as interviews and meetings over a period of several years with humanitarian operators, military officials and refugees in Milan, Geneva and New York (De Lauri 2013a; 2013b).

Anthropologists are chronologically only the latest to have adopted justice (and injustice) as an object of (critical) inquiry. Even among anthropologists, however, the radical critical cry that law is the instrument *par excellence*

of control and repression, has today fallen out of fashion. That legal interpretations are inevitably related to pain and death is obvious (Cover 1986). But my focus here is neither on the uses that can be made of law nor on the outcomes of its interpretation and application. Rather, I am interested in what law can generate when it betrays social values and sentiments of justice.

Justice and violence

Feelings of justice and injustice are intimately linked to historical processes as well as to cultural and social transformations. It is difficult to come up with a coherent definition of justice based on the history of Western thought, let alone to develop an organic and intercultural understanding of the meanings and empirical dimensions of the concept of justice that reflects the spiritual, psychological and social substrates of different human groups.

As the anthropological literature shows,³ there is not (or rather in the past there was not) a unique category of ‘justice’ explicative of all the attributes assigned to the concept by different cultures and societies. On the other hand, alongside this indispensable variability, the contemporary scene presents conditions of ‘togetherness’ and simultaneity among human societies that prompt non-localist reflections on justice and injustice in the current global historical conjunction.

Laura Nader has maintained that

Somewhere between large scale movements and the resistance or vulnerability of individuals lies the work of the anthropologist/ethnographer. We are in a privileged position to bring a critical approach to a jurisprudence of injustice. We can put familiar facts together in unfamiliar ways and thus provoke thought about fundamentals. And is there anything more fundamental to what makes humans human than ideas of right or wrong? (Nader 2010: 328).

But what constitutes ‘just’ justice? On the global scale, both acts of invasion by states and acts of violence by terrorist groups are carried out in the name of justice.

At a local level, a judge in Kabul told me in May 2013:

It is a kind of paradox that the government and international organizations implement their projects under the flag of justice while at the same time many Afghans reject these interventions and criticize legal reforms, arguing that they do not respect justice. [...] The profound dilemma judges have to face is the gap between justice and its legal and practical translation. Right

Fig. 2. Abdul Salam Azimi, Chief Justice of Afghanistan.



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Fig. 3. An inside view of the old Afghan parliament building. Men and women participate in the parliament discussion session in 2006.



now in Afghanistan it is possible to observe what happens when a government aims to create the bases of its legitimacy by monopolizing justice. It is a foundational moment, a starting point. But we still don't know where it will lead us. [...] For a Muslim, justice ultimately belongs to God; yet the problem remains if in order to implement a justice system we need to betray a sort of social feeling of justice and we eventually need to use force.

This last consideration on the part of the judge recalls an earlier debate that was shaped above all by Walter Benjamin and Jacques Derrida. For Benjamin, 'The task of a critique of violence can be summarized as that of expounding its relation to law and justice' (1969: 277). It could thus be argued that – conversely – the starting point for reflecting on justice must first and foremost be recognition of the affirmation of violence and its criteria of legitimacy. Derrida (1994) further asked: How can we distinguish between the force of law and forms of violence that we inevitably deem unjust? What is the difference between a force that is just, or at least considered legitimate (not only an instrument at the service of the law, but the very essence of the law itself), and unjust violence?

Derrida's perspective induces us to distinguish between law – and thus the legal order – and justice as 'other' than law. While the law may be subjected to a process of deconstruction, justice may itself be defined as a deconstruction process. So, what kind of violence is 'just' violence – and hence tolerable? What relationship exists between institutionalized violence and that practiced by an individual? Benjamin cautioned us to simplify the debate by breaking it down into an analysis of means and ends.

The meaning of the distinction between legitimate and illegitimate violence is not immediately obvious. The misunderstanding in natural law by which a distinction is drawn between violence used for just and unjust ends must be emphatically rejected. Rather, it has already been indicated that positive law demands of all violence a proof of its historical origin, which under certain conditions is declared legal, sanctioned (1969: 279-280).

Following Benjamin, we might see justice not merely as in opposition to the force of law or to legal violence, but more appropriately as the very dimension in which judgement is suspended. When justice is clearly distinct from the force of law, it emerges as the epilogue of violence. In this 'vision' justice is something desirable, but at the same time

unattainable. The experience of justice thus becomes 'an experience of the impossible' (Spivak 1999) that remains beyond the reach of everyday lived experience while yet defining its horizons of meaning. But just as the timeless impossible becomes realizable from a human perspective, so justice, immersed in history, sets the parameters of its own power, that is to say, of its ability to generate effects on social life.

Recreated in each individual fragment of social practice and celebrated in the places in which the law expresses its maximum power of determination (tribunals, prisons, customary institutions, etc.), the social sense of justice thus eludes the eternal and manifests itself in its temporariness, tied to a particular time and to a particular order of significance. In this way, justice as a 'vision' becomes actionable and applicable: embodied in a corpus of social rules and regulations, justice ceases to be a promise to become a force itself. However, justice takes the reverse path too: at a certain remove from human error, it stands as the ultimate truth and humanly impossible.

We can aspire to no more, therefore, than a tendency towards justice, a continuous tension between its absence and its presence. Justice does not belong to the univocal but to the manifold; not to one but to all. This results in an inevitable disintegration of the ideal of justice into countless different conceptions which, in the global political landscape may potentially be exploited for different purposes, each of which will inevitably be presented as demanded by a true and 'just' justice: this is how the manifold gives shape to the univocal.

Injustice and law as an anti-value

Now, given all of this, what is the role of law in the relationship between justice and injustice? At a foundational moment – as the judge suggested – such as that being traversed by present-day Afghanistan, how does the law relate to a collective sense of justice?

From the very outset of the legal reconstruction process initiated in 2001, all the actions undertaken in the legal sector by the Afghan government, international organizations and foreign governments have been presented as steps toward justice. In this perspective, the way of law is the way to reconstruction – and justice is possible only through the (rule of) law. This is fully consistent with the ideology of positive legalism that has historically framed

1. For an overview on the international intervention see the recent *Central Asian Survey* Special Issue 'The Afghan conundrum: Intervention, statebuilding and resistance', 32(3), 2013.

2. A preliminary version of this paper was presented in Chicago at the 112th annual meeting of the American Anthropological Association, as part of the panel 'Where are values? Exploring the "genuine" within the law'. Travel and accommodation expenses were part-financed by the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013), ERC Grant agreement n° 313737, project-acronym SWAB.

3. See for example Clarke & Goodale (2010); Nader (1969); Pospisil (1974); Rouland (1988).

4. For a different case on the social dynamics relating to the representation of values in Afghanistan, see for example Eggeman & Panter-Brick (2010).

5. In a recent and lucid analysis of America's war on terror, Akbar Ahmed (2013) emphasizes the fact that drones are nowadays an appropriate metaphor of globalization and – I would stress – democratization.

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- justice and injustice in antithetical terms, whereby the law has always been *the* instrument required to fight against injustice so as to obtain justice. This may be said to be the ultimate purpose of the law: to project events into the imaginary of justice and create the illusion that the promise of justice is being realized. Nevertheless, the justice/injustice dualism has also had the effect of making invisible the non-neutrality of the law (Frohmann & Mertz 1994) as well as the dispositives through which injustices creep into the practice of law. This was again made clear by the judge I met in May 2013:
- We cannot but confess that applying the law and aspiring to justice can be very different things. Nowadays in Afghanistan there are conflicting interpretations of justice. It is rather common that a decision made by a tribunal is seen by ordinary people as injustice. And this is not only because of the issue of corruption. Nor is it only because there are many problems affecting the application of law. The fact is that the law itself is sometimes seen as injustice. An example is the Law of National Reconciliation approved in 2007, which was seen as affording impunity to numerous criminals. [...] Perhaps it is a case of missed opportunity. Building a new justice system was the *leit-motif* of the years immediately after the fall of the Taliban. And what do we have today?
- The judge, who is 'on the other side of the fence' – as he himself commented in reference to his participation in trials as a legal and political actor (Lindroos-Hovinheimo 2009) occupying a position on the judicial chessboard that reflected his own specific ideas, ideologies, beliefs and expertise – is aware of the consequences of the current situation in Afghanistan, in which the government manages to celebrate the ideal of justice while concurrently removing it from the possible range of action of the law. These consequences are, namely, social conflict, social fragmentation and exposure to fundamentalist groups. We should not forget that the Taliban's success was originally determined in part by the emphasis placed on justice in their rhetoric – and in their exercise of power. In the current political context, the issue of access to justice is not only a key focus for legal reform and international relations but also represents a battleground opposing government and Taliban propaganda (De Lauri 2013a).
- If we enlarge our field of observation, the Afghan case suggests key elements for a broader reflection on justice in contemporaneity. In fact, to the extent that the law is seen as a source of injustice – in other words, to the extent that the law betrays its purpose and departs from its desirable tendency (which can never be completely satisfied) towards the collective ideal of justice – a practical and ideological short-circuit is generated whose main effect is that the ideal of justice becomes thinkable only outside of the law. The illusion of justice vanishes leaving a vacuum to be filled by forms of violence that are presented as necessary evils required to remedy the injustice being suffered.
- The force of law, at this point, is no longer legitimate (because it is no longer functional to the promise of justice), and to persist, must become even more violent, even more unfair. And when law is deprived of social legitimacy it no longer reflects accepted values, but only the force it can itself deploy. Here the anti-value potential of law emerges as a process that demolishes the promise of justice. The law is therefore emptied of its value content; and this emptying movement in turn alters the social construction of justice and values, that defines both the limits and the potential of human action. More specifically, what is altered are the limits to using the force (of law). Thus the violence that we can identify in law is directly proportional to the distance that we can identify between law and accepted values. What we take as 'accepted values' – understood here as multidimensional in nature (Eiss & Pedersen 2002) – are rooted in the micro-instances of social life as well as in the way we imagine life itself, given that values are what make the world recognizable for people.
- As Thomas Barfield has noted in the Afghan context, 'Governments like those of King Amanullah or the PDPA that demanded rapid universal changes found that this undermined their political power because they were accused of abandoning true Afghan values' (2008: 373).⁴ This is even more true in contemporary Afghanistan where legal reforms have generated both political conflict and an attitude of severe condemnation of customary practices and values, to the point of essentializing and delegitimizing it in favour of norms and values (considered by international actors to be) consistent with rule of law standards (De Lauri 2013b).
- The distance between values and law creates the conditions for institutionalized injustice. For instance, an unjust law, to be imposed, must be more violent, more compelling than a law considered socially legitimate. Of course a certain amount depends on the rigour with which a law is imposed, and the degree to which it inconveniences or harms. Generally, a law deemed unjust will be ignored if there is little chance of it being applied in practice and if the penalty for violating it is low. This is the case in Afghanistan, where the means required to enforce a law or judicial verdict on a large scale are often lacking.
- However, difficulties in covering the whole territory or in applying the law across the board concern a quantitative rather than a qualitative attribute of the legal system. The fact remains that whenever the force of law is seen as alien by social actors, it needs to exceed in order to be effective. This is how the law can become not only a manifestation of legal and political power, but also a source of violence: its violent imposition gives rise to violent reactions.
- Because values are 'not so much attributes of interpersonal sentiments or obligations as they are socially specific by-products of the roles and functions in which individuals find themselves' (Weiss 2011: 43), such a violent reaction may be more specifically understood as related to 'loss of self', or the inability to find oneself in what has become an unrecognizable world. This dynamic is a crucial factor in the current global context in which the use of the law appears to increasingly override collective sentiments of justice – in their various cultural expressions, and as distinct from *ad hoc* orchestrated justicialism, which is a valid instrument for winning consensus and exacerbating security and insecurity regimes (see for example Wacquant 2006).
- Examples of how the law can subvert the value systems and aspirations to justice from which it originally took form include: the increasing criminalization of the weaker party in the transnational mobility of individuals and groups (see for example the creation of the crime of illegal immigration in Italy); the exercise of violence in the name of 'citizens' security' (Goldstein 2010); and the creation of legal frameworks to ensure the profits of large corporations and major investors in the world economy at the expense of the environment and workers.
- David Graeber (2013) has recently pointed out that values are what make creative and social projects meaningful to actors. How then is the new legal order in Afghanistan gradually finding its own space in the normative landscape, despite not being accepted by the people? Not due to the development of a new legal consciousness among the population – as the rhetoric of rule of law and human rights would imply – but via the imposition of verdicts. To date, the reconstruction of the Afghan legal system has not provided any opportunity for the re-elaboration of commonly shared legal values. Laura Nader (2010) observes that 'in a time of breakdown of consensus about values, an emphasis on injustice can provide common ground for the betterment of the human condition', but this has not been the case in Afghanistan.



Fig. 4. Policing in Kabul, 2008.

Fig. 5. Law student, University of Kabul, 2008.

Yet the legal reconstruction in Afghanistan may not be simply defined as a hegemonic project. As observed by Sally Merry, '[hegemony] depends on legitimacy rather than on force, on the consent of the governed rather than on coercion. It is a product of the capacity to shape meanings and values by which the whole social world is organized and understood' (1990: 7). It is relevant to recall here that the current human rights and rule of law programmes in Afghanistan have been accompanied by military occupation.

Of course the hundreds of international organizations that have moved to Afghanistan since 2001 have played a role that is intrinsically hegemonic: by influencing every aspect of social life – from health to education, from justice to political organization – they have promoted a moral and salvific message that is functional to the economic and political interests of countries such as the US and the UK and large corporations such as KBR, the Louis Berger Group, Chemonics International, Bearing Point and Dyncorp International not to mention the industries serving the military sector.⁵ But the moral and salvific message alone has not been enough. It cannot work unless supported by military force on the one hand and the force of law on the other.

Having failed to identify itself with the hope generated by a collective sense of social justice and the 'maturation' of shared legal values, the legal reconstruction has affirmed itself in terms of the force it can exercise over the individual.

Suffering in the logic of becoming

'What more than punishment' a prosecutor in Kabul remarked to me in April 2008 'can teach people what is right and what is wrong?' In terms of a diachronic comparison, Foucault's (1975) reflection on the gradual elimination of torture and the exhibition of executed bodies provides some useful insights. The shift in how the bodies of the condemned were treated, 'observed' by Foucault, was one sign of the change of era that commenced in the early 19th century, when the macabre spectacle of death (or killing) and suffering at the hands of the law began to give way to more austere procedures and rapid and 'painless' methods of execution. A transition period that ushered in a well-mannered justice animated by 'good taste'.

Apparently, the law did not act on the body anymore, but rather on the soul. In a matter of decades, as Foucault put it, the body that was tortured, quartered, dismembered, symbolically branded on the face or shoulder, or exhibited alive or dead, all but disappeared. Since that time, when justice has required the bodies of the condemned to be violated and manipulated, this has largely been done from afar, with decency, in keeping with austere rules, and ultimately with the aim of striking a far 'higher' target. The process described by Foucault is of particular interest to the field of criminal law, but may be extended to a broader set of practices and discourses on the collective sense of

justice, ranging from rules of conflict to modes of detention, and from battlefields to courtrooms.

Given this historical change, how may we then interpret the torture witnessed today, along with the exhibition of dead bodies, the use of non-conventional weapons, segregation, martyrdom, mass graves and killings broadcast live on TV/Internet? How has the spectacle of suffering bodies once again found room for manoeuvre? In the so-called war on terror, for example, those killed or captured on either side are exhibited to the public as trophies. In the logic of political and ideological confrontation, the spectacle of suffering and death is the foundation and source of legitimacy for all kinds of 'necessary practices' that are apparently far removed from justice but yet are perpetrated in its name.

In such a scenario, suffering is not so much a subjective process of bearing, enduring or undergoing (Connolly 1996), as – far more significantly – a passage of social construction. Suffering becomes the cornerstone of the process of establishing an order that is (presented as) 'just'. Whatever sacrifices can be made in terms of lives and compromises are enacted in the logic of becoming. In this vision of a world that must be attained at all costs, the expendability of the person follows the path leading from necessary evil to the promise of 'real justice'. It is not surprising for example that Operation Enduring Freedom in Afghanistan was initially named Operation Infinite Justice. And consequently it is not surprising that the US – in both its military and civil guises – has played a leading role in the area of legal reform and 'promotion of justice'.

Understanding what vision of the world lies in the shadow of the law seems to be one of the key challenges of our time, requiring us to look carefully at what is being done in the name of justice, beyond its (often only rhetorical and instrumental) opposition to injustice.

What social project underpins the so-called reconstruction of the Afghan justice system? What idea of the world lies behind it? At what cost is this process of state-building (or perhaps it would be more accurate to say 'transnational-governance-building') taking shape?

Ultimately, understanding this means going beyond the cogency of the present. Post-2001 Afghanistan provides a field of observation within which to 'test' both the stability and the ambivalence of the rule of law model in transnational space. What is at stake, in the final instance, are the foundations on which the nation-state is laid, based on social compromise among citizens regarding the recognition of certain values and the fulfilment of shared social projects. Yet, the dramatic human condition characterizing the global scene today should lead us to question that which we have come to take for granted and to suspect that the political/legal model being imposed by international institutions in Afghanistan is not the only possible way to build an organized community that revolves around common ideals of justice. ●

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