

Afghanistan: Corruption and Injustice in the Judicial System²²

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Abstract:

The Afghan judiciary currently lies in tatters. This statement can serve as the starting point for a series of considerations. A modernized state justice system is emerging and is at a crucial and troubled stage of establishment that will determine its future effectiveness as an institution that provides the Afghan citizens with access to justice.

This article focuses specifically on the phenomenon of corruption inside the judicial institutions, which I see as arising from a structural condition in the state justice system. I argue that in Afghanistan, the phenomenon of corruption can be read in terms of "double institutionalization" whereby mechanisms of exchange and compensation, affirmed at the level of social practice, find a possibility of reaffirmation (of re-institutionalization) in the legal system.

My ethnographic work shows that the ongoing process of legal modernization (as part of the project of democratization) plays a fundamental role in re-institutionalizing corruption and radicalizing it. I adopt a non-legalistic perspective to explore some of the effects of corruption on the work of judges and the access to justice.

Key words: Afghanistan; corruption; legal reconstruction; judicial system.

Introduction

If it were not for corruption, people would not even know what tribunals are²³.

The reflections in this article developed out of the field research I carried out in Afghanistan between 2005 and 2008 to examine the process of legal reconstruction by the international community after the military operation Enduring Freedom in 2001. During this period I was able to directly observe twenty court cases (both criminal and civil) and follow the work of some prosecutors²⁴ in order to study the ordinary daily practice of law. I also conducted several meetings and interviews with police officials, NGO experts, and members of the Ministry of

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22 For helpful discussions and comments on previous drafts of this article, I am grateful to David and Tori Rosen, Monica Fagioli, Philippe Gagnon.

23 A carpet seller in Shar-e-now (Kabul, March 2008).

24 The ethnographic work took place in the Court of the Second District, in the Prosecutor Office of District 11 and in the Provincial Office.

Justice. Their respective point of view emerged as being crucial to understanding the “life” of judicial institutions and the implications of the legal reconstruction process.

The primary goal of this article is to show that the phenomenon of corruption is intrinsic to the process of legal modernization embodied today in the “reconstruction project”. This process of legal modernization is ongoing, though it has a long history, with roots dating back to the early 19th Century. The expression “legal modernization” in this paper refers to two interconnected phenomena: the affirmation of a “global rule of law”²⁵ and the process of institutionalizing and centralizing justice as a function of the state.

Undoubtedly, the term “corruption” does not lend itself to one univocal definition, since it can refer to different causes, contexts and social dynamics. In Latin languages, the term derives from the verb *rumpere* (to break, to alter). The verb *corrumpere* (*cum – rumpere*) implies that with the act of corruption something is broken, and that the thing being broken can be the moral integrity of a person, a code of moral rules or, more specifically, administrative laws. In Dari, one of the two official languages in Afghanistan, the term *fesad* (which derives from the Arabic word *fasad*) is generally used to indicate corruption. The term *reshwa* has a more specific meaning, similar to “bribery” in English. In the courthouses of Kabul, the term *bakhshish* is heard often. It can be translated into “gift,” “present,” or “favour.” *Bakhshish* can be the gift a father gives his son for having obtained good results at school. But it can also be used as a synonym for *reshwa*²⁶. While one can make an ambiguous inference with the term *bakhshish*, or an inference can be made from this term in such a way that “one means an act of corruption without using an expression that is too harsh”, as *reshwa* it has a negative connotation²⁷. Certainly the term *bakhshish* is not limited to the sphere of the judiciary but rather to a larger criticism of government and other activity that involves this kind of practice.

Studies²⁸ on the phenomenon of corruption have traditionally been linked to the analysis of social mutation, the role of the state and its institutions, and political

25 Mattei and Nader explained that “the expression ‘rule of law’ has gained currency well outside the specialized learning of lawyers, where it displays a long pedigree, having been used at least as far back as the time of Sir Edward Coke in late sixteenth-century England. In recent time, however, it has reached political and cultural spheres, and entered everyday discourse and media language. Pronounced in countless political speeches, it promenades on the agendas of private and public actors, and on the dream-lists of many activists” (2008: 10). As outlined by Ehrenreich Brooks: “In an increasing number of places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves” (2003: 2280).

26 Conversation with a member of the Afghan Women Judges Association (28 September 2006).

27 *Supra* note 4.

28 Raffaella Coppier explained that the phenomenon of corruption can be studied both at the level of the system in which it develops and at the individual level. The first is the *functionalist* approach and the second is the *Political Economy* approach. The first refuses to see corruption as a pathological phenomenon, or as an obstacle to economic development, but considers corruption as having structural roots, such that it should be explained in the context of the historical and economic development of a country. From this point of view, corruption is “functional disfunction”. This approach, which was dominant during the 50s and 60s, has subsequently suffered from significant criticism, especially for its view that the role of corruption is not

and economic bargaining – issues that have highlighted the social and political relevance of corruption rather than relegating it to the sphere of deviance.

Syed Hussein Alatas has posited that there are three diverse phenomena linked to the term “corruption” including graft, extortion, and nepotism. In general, one can associate a series of characteristics to corruption: a) at least two persons have to be involved; b) secrecy is generally implicit; c) elements of reciprocal interest and mutual obligation are implied; and d) those who practice acts of corruption try to disguise them using some form of legitimization (1999: 6-8). In the specific context of a state bureaucratic organization, additional elements are involved, including the use of institutional functions, and the relationship between citizens and state institutions.

Some elements emerge from an examination of the complex of structural conditions, “individual carriers” and contingent factors in Afghanistan, which can be considered the roots of the phenomenon of corruption: exchange, gift, and return mechanisms; forms of patrimonialism; and structures of nepotism and clientelism.

Practices linked to the exchange of “soaps” (favours and circuits of “friendship” connections), which are spreading through all levels of the Afghan judiciary, make the problem of corruption a constitutive reality of the state apparatus, rather than a residual aspect that can be eliminated through a more rigid system of sanctions. This evokes the possibility of an even deeper radication in the process of reconstruction.

To examine the controversial issue of corruption in the bosom of Afghan justice, I will use four interconnected levels of analysis: legal reconstruction and corruption; narratives of corruption; judicial practice and “poetic of the compromise”; and inaccessible pluralism.

Legal reconstruction and corruption

Shortly after the military operation Enduring Freedom, the international community, led by the United States, launched a process of reconstruction of Afghanistan, with the (apparent) objective of “democratizing” the country²⁹. However, such reconstruction has revealed itself as a political-humanitarian intervention with the primary objective of ideologically supporting a political-economic expansion functional to a specific geopolitical structure³⁰. The reconstruction process has consequently only marginally been able to give a new impetus toward stability to a country tormented by war and endemic poverty.

necessarily negative, and for the idea that corruption could simply disappear spontaneously as a country moved through the evolutionary phases of economic and political development. The functionalist approach has mainly given way to the methodological individualism of the economic approach of *Political Economy* which sees corruption as the result of a rational calculation that weighs costs and benefits (2005: 25-26).

29 See for example the speech of Colin Powell on the 23 March 2004, www.9-11commission.gov
 30 Afghan scholar M. Jamil Hanifi spoke about an “American neocolonialism in the Middle East and Central Asia” (2004: 296).

In the sphere of justice in Afghanistan, the language of legal modernization has been used as the frame for attempting to standardize and institutionalize justice at the state level. This process, however, has not been able to overcome the dyscrasia between laws in force, the Constitution of 2004 and the values recognized by the Afghan social fabric (Ahmed 2007). To further complicate the picture, the presumed convergence between Islamic law and rule of law has not yet been translated into a defined judicial procedure.

Eradicating corruption from the judicial system is one of the primary objectives of the international community, represented by foreign governments, international agencies and non-governmental organizations. From their perspective, the judiciary is the arena apparently most deeply affected by systemic corruption (ARGO 2008).

The international community, and consequently the Afghan government, has identified the problem of corruption as a degeneration of state institutions: a crime resulting from the absence of “public discipline”³¹. The governmental and international rhetoric has taken on tones of condemnation towards the corrupted and has linked the phenomenon of corruption to a counter-governance dimension. The Vice President of Afghanistan himself, Mohammad Karim Khalili, affirmed before the London Conference of 2006 that one of the most urgent issues to confront should be “the fight against corruption”³². This anti-corruption rhetoric firstly ignores the fact that, in Afghanistan, the system of corruption can be seen as a modality of governance³³. It also fails to consider the profound social dimension of a system that is moulded by a concatenation of socio-cultural factors linked to dynamics of power, of privilege and responsibility and to exchange mechanisms such as reciprocity and economic bargaining.

Internationally, in the recent past, the ideology of post-war reconstruction has been the external trigger for the fight against corruption in countries receiving international “aid”. In many post-war contexts, the result has been a system of interlinked processes combining political, economic and legal expansion of certain countries to the detriment of others³⁴; the establishment of anti-corruption agencies (de Sousa 2010, Passas 2010) is the most evident sign of such mixture.

Certainly, the economic havoc triggered in 2001 did not adjust well to the governmental and international rhetoric of anti-corruption. In recent years the cost of living in Kabul increased exponentially. Many judges I interviewed underlined the

31 In comparative terms, see Hasty 2005.

32 unama.unmissions.org

33 As observed by Thomas Barfield “Corruption that perverts justice is condemned by all, but payments made to keep the process working fall into a class of less objectionable practices that are considered inevitable in all dealings with government officials. As one such official once explained to me thirty five years ago, 'A corrupt official accepts money not to do his job or to do it wrongly, a good official accepts money to do what he is supposed to do anyway, but to do it for you and do it now.'” (2012)

34 As outlined by many scholars (i.e. Shahrani 2002), the political instability that reigns in Afghanistan is not a unique and isolated phenomenon. Rather, it must be understood within a transnational network concerning recent transformations in post-colonial countries.

impossibility of meeting their day-to-day expenses with the stipend they earned. The dislocation of the economic system is also due, among other things, to the strong economic impact of the presence of agencies of the international community. The sudden and non-regulated influx of humanitarian agencies, non-governmental organizations, and intergovernmental and private companies has generated an unsustainable increase in rent in the capital city, a twist in stipends, an increase in the cost of certain primary goods, and the creation of a parallel economic system. For those who manage to enter (temporarily, as is typical for humanitarian agencies) the grassroots of the international system, economic conditions improve substantially; for all the others – the great majority – poverty becomes more extreme.

Another effect of this economic havoc is that a competent judge is able to leave his lower salaried job to become a consultant to an international organization committed to the implementation of the rule of law in Afghanistan. (For judges, this means going from a monthly wage of approximately \$60 to a salary of at least \$500). This phenomenon, in the long run, contributes to the weakening of judicial institutions that are already structurally devastated.

These economic conditions become gangrenous inside the actual political system, which is unable, among other things, to manage the international interference and govern the process of reconstruction. Moreover, the political system is “invaded” by warlordism³⁵ and becomes enslaved to nepotistic mechanisms.

Finding a disconnect between anti-corruption rhetoric and the creation of an economic system that is favourable to corruption is not rare in a reconstruction context such as that in Afghanistan. But there is more to the story. It must be emphasized that frequently, in the humanitarian-international language, the fight against corruption becomes a founding element in the attempt to export/import the Western rule of law³⁶. The fight against corruption can be seen, in other words, as a *dispositif* of legitimization of movements of legal expansion³⁷ carried out in the context of the particular geopolitical structure that, in Afghanistan, showed its most violent face³⁸.

35 In 2004, among twenty-seven ministers, four were warlords or heads of factions: Mohammad Fahim, Mohammad Mohaqeq, Sayyed Hussain Anwari, Gul Agha Shirzai. At least another three where in some way linked to the *warlords* system: Mirwais Saddiq (son of Ismail Khan, first undisputed leader in Herat, then governor of the same city and ultimately Minister of Energy), Yunus Qanoni, and Abdullah Abdullah. Out of thirty-two governors nominated in 2002, at least twenty were commanders inherited from civil war. At the administrative level the situation mirrored that of high ranks, with persons without competence who covered posts, more or less important, only because affiliated to this or that personality (Giustozzi 2004).

36 See for example Wiler, Katzman 2010. In comparative terms, see “*Combating Corruption for Development: The Rule of Law, Transparency and accountability*” (United Nations Public Administration Network, 2002).

37 The expression refers to “the enduring influence of legal systems introduced by powerful nations into nations or regions subjected to colonial control or strong economic penetration during the past five centuries” (Schmidhauser 1992: 221).

38 From this perspective, transnational expansion of the rule of law can be read as a further sign of the process of reconfiguration of the sovereignty of the nation state; a process that is governed by specific relations of power on a planetary level (Escobar 2004) in relation to which state institutions are restructured.

The culture of rule of law (Kahn 1999; Ehrenreich Brooks 2003) is seen as an anti-corruption culture, which proposes again the dominant legalistic discourse that posits law and corruption as antithetical. However, it has been observed on several occasions that the two are, in fact, linked and indeed reciprocally constitutive (Anders, Nuijten 2008), and that the corruption system becomes intelligible when understood in its tight relationship to the practice of law. The current judicial reform in Afghanistan has been accelerated since 2001, but its roots go far back to the early 19th Century. It is important to point out that the imposition of the Western rule of law by overdetermining the relation between socio-normative procedures and the ideology of legalism contributes to the structuring and institutionalization of certain forms of socio-normative re-adaptation. Trying to re-write the relation between the individual and the social group on the basis of monopolistic exigencies of the state over the law (Grande, Mattei 2008), the order imposed by the rule of law aims at releasing the subject from the system of practices and values in which he/she recognized him/herself, and in its place establishing an apparatus of justice that embodies an international set of standards of rights. However, this hegemonic apparatus immediately appears to be inefficient in being able to satisfy the sense of justice invoked by the citizens, and so bends itself to reaffirmation practices of compensation and abuse of power. In these circumstances the phenomenon of corruption takes root, through a process that, to borrow Bohannan's expression (1965), we could define as "double institutionalisation": that is, exchange procedures, social hierarchies and practices of the exercise of power that are affirmed at a level of social practice, find again, in the judicial system, a possibility of reaffirmation (of re-institutionalization) assuming a legal connotation.

Narratives of corruption

In Kabul, it is almost impossible to hold a conversation with someone regarding the judicial system without repeatedly hearing the word "corruption" (in its various declinations). Stories about corruption, it could be argued, dominate the discourse on state justice.

As Akhil Gupta reminded us, the phenomenon of corruption cannot be understood outside the narratives of corruption. The experience of corruption takes place in a space over-determined by stories linked to corruption, stories whose repetition allows the social actors to make sense of their experience inside the social drama in which they are involved (2005: 6). The narratives of corruption can even assume an importance that Turner calls "religious" but which could perhaps be more appropriately defined as "occult"³⁹ "in the sense that they operate with concepts of secret powers controlling the material world" (2008: 128). Narratives of corruption articulate themselves on various levels, from rumours to international rhetoric.⁴⁰ Thus, they have a strong influence both on ordinary practices and on institutional politics. The power of the stories of corruption has, for example, pushed my friend

39 From the Latin *occultus* (hidden), referring to the knowledge of what is hidden, not visible.

40 The rhetoric of anti-corruption can at times reach a level of exasperation: socio-biological programs, for example, are actually formed that promote the hiring of more women in public institutions because it is believed they are more apt to act ethically (see Alhassan-Alolo 2007).

Basir⁴¹ to affirm “*Een qazi fased ast*” (“This judge is corrupt”) at the moment in which a judge of the Second District refused to let us attend the hearings he chaired.

In a hearing on 22 October 2007, at the Court of the Second District, after having heard the involved parties in a dispute related to land, the judge Sayed⁴² stated:

Mr Faid presented many documents. But I recommend Mr Faid, do not give anybody money to try to close this case. If anyone asks you for money tell me who it was. Here we represent the law and whatever we do we do in front of God, and then we will answer Him, and how will we justify our dishonesty?

With the intent of informing all those present (including the researcher) that what is normally done in tribunals in that case would not have been tolerated, the judge reasserted in an institutional site the widespread occurrence of an illicit practice. Thus, narratives of corruption permeate the judicial discourse even when, at least in appearance, such practice is not accepted. The presence of an “external figure” (myself) apparently played a relevant role in pushing the judge to take a position about the dialectic “corruption *versus* anti-corruption”.

This climate of corruption seems to expand rapidly and runs through not only the judiciary, but all the state institutions. The following statement, made to me by judge Sayed in a conversation at the end of the hearing, was very significant:

With the wage we have, it is difficult to maintain one’s family. To become a judge I have studied, worked a lot, and my wage does not even reach one hundred dollars a month. There are people who earn much more than a judge without being trained or qualified. Young people prefer to work for international organizations. A guard within an organization or a driver earn much more than a judge. So, it is not strange that many cases end when one agrees with the judge or the prosecutor (...) I never took money. But in Afghanistan, if you need something you have to pay. Some years ago my father needed a document. He went several times to the Ministry office [Sayed did not tell me which ministry] and they told him to go back, that there were problems. My father needed it, so I went, I made a deal with an employee and few days later my father held the document in his hands. Without doing so you do not obtain anything.

Judge Sayed seemed to distinguish between bribery at the level of “Justice” and the Kafkaesque bureaucratic system that characterizes the governmental and provincial administrations. In his opinion, it is one thing to bribe a judge, and another thing to get hold of a document by getting around the inefficiency of the system. In this way, the judge put his job at a superior moral level; in fact he stated:

41 Basir received an education in Law at the University of Kabul. His help during my research in Afghanistan has been crucial for accessing judicial institutions.

42 Fictitious name to protect the identity of the judge.

Being a judge is not a job like any other. It is not a job that involves the state solely, but it involves faith, justice. It is easy for a Muslim judge to end up in hell, because only Allah is right. (...). The judge has to work for justice. If one counts the names of honest and competent judges one does not cover the fingers of one hand.

Sayed was obviously conscious of the context within which he has to work and described his role in terms of an attempt to “do his best for justice”. This implied, from his point of view, that on one side one has to adapt to the “system” (that is, to exploit the weaknesses in issues of little relevance; live together with colleagues considered highly corrupt and corruptible; and comply with certain consolidated practices), and on another side it is necessary to emancipate oneself from it (that is, abstract one’s work in terms of “justice and faith”). This abstraction is translated daily in a personal “common sense”, in a discretion that tries to satisfy the recognised ideals.

The judge thus underlined two important aspects linked to the phenomenon of corruption: the will to answer to an ideal of justice that is, to him, indissolubly linked to religious belonging; and the necessity to face certain economic realities. Regarding the latter, judge F.H. working within the Provincial Office, stated:

For a woman it is even more difficult to be a judge, because the political context is what it is. I know several colleagues who decided to abandon their assignment. Until now, I resist, because I am convinced that this effort will lead us to something; the objective is to build an equity system for women and men in this country. (...). Corruption is related to survival. If you are a judge or a teacher in Afghanistan you cannot support your family with the state stipend. Nowadays it is impossible to live in Kabul with the little money that the state acknowledges. (...). Apart from working in a dangerous context, we are in no way protected by the government. In fact, I suffered several threats in the past few years. Little money and no protection. Is very difficult to carry out one’s job with such conditions⁴³.

Such economic conditions become fertile ground for the practice of corruption, insofar as they create a social context that is rife with tension between processes of nationalization and mechanisms of resistance. The expression used by the judge of the Provincial Office “corruption is related to survival” can refer to a logic of *savoir faire* within a context where neoliberal economic models are programmatically re-proposed, and where, at the same time, scarcity of resources and political tension are the reality. In tribunals, even in those cases where there is no act of corruption, the weight of the climate of corruption (apart from the pressures, direct or indirect, of the national and international political system) introduces this logic of *savoir faire* in the sphere of judgement, reformulating a judicial practice that, as we will see, is articulated in a practice of compromise. An easily imaginable consequence is that for those who do not have money and

43 Interview of 31 March 2008.

important friends, the possibility of solving daily injustices through the judicial system becomes an ever blurrier mirage.

Thus, the climate of corruption plays an important role in making it difficult to gain access to justice, in a double sense: on one hand, the stories of corruption precede judicial experience and mould people's prejudice (characterised by mistrust) so that they have even less incentive to turn to judicial institutions (which people already consider to be distant from value-regulatory references to which they refer daily to solve problems and sort out controversies); on the other hand, the high percentage of judges who are involved in acts of corruption (affirmation based on the declarations of judges and prosecutors interviewed and the testimony of persons met who have had judicial experiences in Kabul), as well as the impact of the political system on the work of the judges, exacerbates the inherent social inequities that play out in judicial practice, reifies social hierarchy and penalizes the weakest in society who are unable to afford the bribes necessary to get the action by the court.

Many people I interviewed complained that they lost their lawsuit because the judges (or others acting on their behalf) were bribed by the opposing party in the case. These complaints do not prove whether in specific cases the judges had actually made illicit agreements with one party, but they are in any event indicative of uneasiness, mistrust and disrespect towards judges and judicial institutions. We should not exclude the fact that where a civil case is not concluded with an acceptable agreement for both parties involved in a dispute, but with the “victory” of one, the damaged party accuses the judge of having been bribed. Thus, the idea of corruption is compounded by the difficulty experienced by many Afghan citizens to understand the “rules” of judicial institutions and accept a model of justice that is perceived to be distant and imposed externally.

In Kabul courts, prejudice, structural decline, hegemonic impositions and corruption are found, exposing as myth the ideology of legalism that would represent judicial practice as mere exercise of jurisprudential nature⁴⁴. Judicial practice, instead, emerges as a form of institutionalized social bargaining through which is possible to observe the complex socio-political negotiations that characterize the process of the centralization of justice underway in Afghanistan.

The narratives of corruption are structured through a lexicon of institutionalisation. Corruption, in other words, becomes so in the moment when the

44 In March of 2008, thanks to my friend Shahim, I was able to participate in some classes held by the International Development Law Organization at the University of Kabul. During one of the last lessons, the teacher gave students documentation of some court cases and asked them to describe the procedure they would have used to resolve each one. Having been present at many actual court cases, I was struck by the gap between the judicial praxis which one witnesses in the courtrooms of Kabul, whose settlements are aimed at finding an accord between the parties involved in an effort to avoid disturbing preexisting social stability, and the settlements laid out by the IDLO teacher, which were aimed at identifying legislative provisions that will support the judges unilateral decision. The gap between judicial praxis (influenced by custom and external pressures) and the abstraction common to the classes was reflected in the objectives of the class itself, one of which was to promote standard legal models, in line with Afghan law and respectful of international agreements.

state imaginary of justice attempts to impose itself as the primary form of collective imaginary of justice, circumscribing normative practice within the borders of law.

Discourses on corruption can, in brief, be seen as collective narratives that, on the one hand, deny the dichotomy between “state discipline” and “individual desire” (Hasty 2005) by defining and politicizing the actual historical-national conjuncture of Afghanistan, while on the other, they tend to expose the tight relation between the imposition of a model of justice and its potential drifts.

Judicial practice and the poetic of compromise

In the civil cases that I observed in the courts of Kabul, the culture of settlement emerged as a fundamental characteristic. Usually, the court plays a mediating role, with the objective of finding an acceptable solution for all the parties involved without upsetting the pre-existing social equilibrium. In the daily application of judicial procedures, the order of reference of law is grounded upon customary references and historically rooted social practices. Generally speaking, a single case may be tackled in different contexts such as the court, domestic environment, the office of the prosecutor, and sometimes even in the office of an organization or of a lawyer. The inter-familiar settlement does not represent an alternative to pursuing a case in court but remains the fulcrum of the process of conciliation. The courts, on the whole, do not act as a safeguard against conflicts. Instead, they attempt to mitigate the conflicts and/or to preserve a certain equilibrium. Moreover, it is not at all certain that the parties involved in a dispute will respect the decision of the court (the enforcement mechanisms are often ineffective). As a result, mediation and the culture of settlement emerge as the primary features of the civil process.

In criminal cases, on the other hand, it seems that a precise hierarchical order between judges and the accused is being re-established: the search for agreement leaves space to the judge’s authority, who attempts to legitimize himself through the *force of law*⁴⁵. This authority does not emerge only in the moment of the sentencing but is evident in the spatial arrangement of the protagonists (the accused in criminal cases sit at the back of the room, sometimes chained at the wrists and ankles), in procedures that involve the way the body is used (in criminal cases, the accused are made to stand while talking), and in language (the way to address the judge shows reverence, while the judges talk to the accused in a more severe manner). Further, while in civil cases the negotiation is already evident in the procedure of composition of the quarrel, in criminal cases negotiation is manifested in the implicit criteria the judges use to reach the verdict. The complex relationship between theory and practice in the judicial field gives way to careful legal discretion not to betray the forms of authority and respect recognised within the social context in which the judge works. By ignoring these aspects and pushing away the entrance of consolidated values and customary practices, the fragile and unstable social legitimacy of the judge would fail completely.

45 The use of such expression initially refers to the reflection by Derrida (1994). The ethnographic analysis pushes then to consider the *force de loi* not only as one of the constitutive elements of power that imposes itself in the name of law, but also as a condition built daily through negotiation practice.

The government and international agencies, for their part, condemn resorting to customary practices and to *do-it-yourself* justice, trying to affirm the priority and supremacy of the judicial system as a useful instrument to extend central political power⁴⁶. Nevertheless, the promotion of the state system of justice is not accompanied by an adequate attempt to solve the problem of the inaccessibility to judicial institutions; nor does it rectify a structure worn out by interests and powers which find in the actual process of reconstruction the possibility of reaffirmation, even as their shape and language have mutated.

In any case, despite the position expressed by the government and international agencies, the resolution of cases appears decipherable within a poetic of the compromise. The judges, on the one hand, represent an instrument of extension of the project of centralization of justice, in relation to the project of stabilization of the state system (considered within the reformulation of sovereignty in the transnational “space”); on the other hand, they constitute the point of convergence between different normative systems that result in a form of negotiated justice that strongly reflects the influence of Islamic principles, Western models of justice and practices and values linked to the customary sphere.

Keeping these aspects in mind, insofar as the climate of corruption becomes a constitutive element of the Afghan judiciary, the work of the judges in the actual system consists of looking for a balance between moral ideals, social relations, economic means and forms of bargaining. This inevitably weighs upon the resolution of controversies and the definition of the verdicts. From this point of view, the culture of settlement, resorting to customary practices, and the interaction between forms of authority and strategies of legitimization configure the field of action of judges, which is consumed in a poetic of compromise in which the sacrifice of the ideals of justice is justified by the grammar of survival.

Inaccessible pluralism

In Kabul, the complex fabric of customary practices, state judicial mechanisms, references to principles of Islamic law, and absorption/imposition of Western models of justice constitute the normative substratum that connotes daily practices to which individuals and families resort to solve problems, resolve conflicts and take decisions. Such interweaving does not imply, in practice, a clear distinction between the several normative reference systems. In short, empirical evidence leads one to view each in strict relation to the others.

By following the work of Saber Marzai, a prosecutor in District 11 of Kabul, I was able to observe several cases, starting from the accusation to the hearing in court. Discussing the issue of access to justice with him, Saber told 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

46 Issue that, moreover, poses serious questions regarding the independence of the bench.

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 (...). It is difficult 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 story⁴⁷.

In Kabul, pluralism is not inherent in the possibility of choosing to which reference system to resort to, but pertains to the mixture of meanings, practices, logics of power and values that intervene when persons face matters of normative order. The normative space is thus configured as a space for bargaining that implies, among other things, the inability to address judicial institutions in a free and autonomous way. This inaccessible pluralism produces an inevitable effect in Kabul: that of leading many people to take law into their hands. For the multitude of people forced into dire socio-economic conditions, the resort to customary assemblies such as *jirga* and *shura*⁴⁸ is a difficult road to take, and, when it is taken, it only confirms the importance of such conditions even in the resolution of problems and disputes. In courts, on the other hand, corruption, external pressures and lack of resources put the system at the mercy of the most powerful. In this sense it is possible to affirm that the resort to (and for certain aspects the worsening of) certain customary practices at a familiar and inter-familiar level is a consequence of the actual system of justice and of the politics that have guided it. The parallelism of tradition-customary practice is not, as a consequence, sufficient to explain the implications and value of certain practices that do not simply represent a legacy of the past but rather a contemporary tension between forms of power, models of justice and structural injustices, the resonance of which goes much further than simple local dynamics.

The phenomenon of corruption is certainly relevant in this context and is directly linked to the problem of access to justice. In fact, although recourse to corruption can, in some cases, mitigate the barriers and delay imposed by the judicial

47 Conversation of the 12 September 2006.

48 Social institutions spread all over the country and made up of important men at the local level. They are not permanent institutions but are created when there are important decisions to be taken (at the level of the community) or conflicts to be solved (for example, conflicts between families). However, the assemblies are not only functional to the resolution of disputes but also play an important role as communication channels among the Afghan population. The assembly carries out a relevant part in the production of public consent, both in times of peace and war. At the local level, the members of the *jirga* and the *shura* can take positions on issues regarding the construction of infrastructure; they can mobilize a protest or negotiate with international organisms. There are several "levels" and forms of assembly, for a synthesis see Hanifi 2009.

system (i.e., difficulty in understanding the legal language, the ability to fill in documents or whatever is requested by the institutions, very lengthy waiting times for the conclusion of cases, the lack of sufficient numbers of defence attorneys, etc.), it also has the consequence of exacerbating social-economic asymmetries. Very poor families, always more numerous in the capital, are increasingly turned away from judicial circuits because they do not have the financial means or important “friends” who could give them easy access to the system. Without the possibility of illicitly getting around the extreme bureaucracy of the system, illiterate and poor people (very often completely unaware of the way judicial institutions function) are put off from turning to state justice, which is structurally unable to take the responsibility for these people. The (inter)familial sphere remains in many cases the only possible recourse to solve a problem or settle a quarrel. But where customary practices clash with other social phenomena such as unemployment, lack of accommodation, 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. A consequence is the radicalization and strengthening of certain solution-methods, like the use of forced marriage in terms of compensation⁴⁹. For these reasons, I believe that the common expression “legal pluralism”, used to describe the normative Afghan scenario, is losing any meaning. In Kabul, an inaccessible normative pluralism is in force which has to be tackled if one wants to confront the problem of corruption.

Conclusions

The four levels of analysis introduced here are evidently interlinked; the distinctions are merely analytical ones, to help highlight the complexity of the phenomenon of corruption within the Afghan judiciary.

With the Karzai administration, which seems to be ever more corrupt (ARGO 2008), certain measures have been adopted to “moralise the state apparatus” (ibidem). Among these there are: the institution of the General Independent Administration of Anti-Corruption in 2004; the approval of a law against administrative corruption also in 2004; the signature of the UN Convention against corruption again in 2004, which the *Wolesi Jirga* approved in August 2007; the decree of 2008, amended in March 2010; and the creation of the High Office of Oversight. At the same time, the international community has increasingly expanded its technical and financial support for anti-corruption actions, and several civil society organizations have stepped up their engagement in the big fight against corruption (Gardizi, Hussmann, Torabi 2010). However, until relevant actors acknowledge the complex dynamics involved in the processes of legal modernization and the role played by the politics of centralization of justice in re-institutionalizing corruption, the “paladin anti-corruption agencies” and international agreements will not properly address the problem of corruption.

49 There are also cases where customary assemblies, frequently with the support of local governors and/or *mullah*, resort to this type of practice. In these cases, what is at stake is the political role of customary institutions as well as their socio-normative function.

The phenomenon of corruption, even if it enjoys a certain fame, carries the toll of legalistic interpretations that obfuscate its historical roots and its social and political importance. In this article I analyzed corruption as an interstitial moment of the encounter between processes of statalization, legal transplanting, and re-adaptation of local socio-normative practices. Within what we might call the reconstruction scene, the paradigm of legal pluralism, widely used to describe the Afghan legal system, loses its pertinence, since the asymmetric overlapping of different normative reference systems eventually results in an inaccessible pluralism with the exclusion of certain strata of the Afghan population both from customary and from judicial institutions. It would therefore be worth considering the complexity of corruption as a liminal phenomenon that reflects (like a mirror on the doorstep) the mechanisms of inclusion and exclusion from the so called palace of justice.

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