

Corruption, Legal Modernisation and Judicial Practice in Afghanistan

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Abstract: *Afghanistan's justice system is currently at a crucial and troubled stage of development that will determine its effectiveness. This article focuses on the phenomenon of corruption inside judicial institutions. By integrating the analysis of narratives of corruption with the observation of judicial practice and a critical approach to the reconstruction process, I argue that in Afghanistan, the phenomenon of corruption can be understood in terms of its "double institutionalisation", whereby mechanisms of exchange and of compensation, both already affirmed at the level of social practice, find a possibility of reaffirmation (of re-institutionalisation) in the legal system itself. The creation of an economic system that depends on international aid, the consolidation of a state apparatus over-determined by warlordism and foreign influences, and the process of legal modernisation itself all play an important role in the re-institutionalisation and radicalisation of corruption. By taking into consideration this scenario, I adopt an ethnographic perspective to explore some of the effects of corruption on the work of judges and on the access to justice itself.*

Keywords: *corruption, Afghanistan, legal modernisation, rule of law, reconstruction, judicial practice*

Introduction

For the past 12 years, the reconstruction of the Afghan legal system has captured international attention. Countries such as Italy and the United States have played a major role in the implementation of a new justice system in Afghanistan by promoting and coordinating a number of projects. International organisations have also contributed significantly. Broadly speaking, there is no doubt that contemporary Afghanistan is a

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privileged site in which to explore the effects of transnational humanitarian interventionism and the emergence of new forms of normative pluralism that result from processes of modernisation and hybridisation. The expression “legal modernisation” used in this article refers to two interconnected phenomena: the affirmation of a global rule of law and the process of institutionalisation and centralisation of justice as a function of the state. As Thomas Barfield (2003) has maintained, on-going attempts to reintroduce a state legal system and centralise the judiciary are more than a restoration of an administrative *status quo ante*: they are implicitly part of a contested process of state building that has long remained unfinished.

A consideration of the link between corruption and legal modernisation is crucial in developing an understanding of the nature of state-building processes in a case such as Afghanistan. According to Jonathan Goodhand (2008, p. 407), the effects of post-conflict corruption on peace-building

depend on a range of context-specific factors. These include: the structure of power relations (pre- and post-conflict); the nature of resources (licit and illicit) available to different groups; the social capital upon which leaders can build constituencies; the intensity, duration and legacies of the conflict period; the nature of the “grand bargain” or peace settlement; and the role played by international and regional actors.

The main point of my argument in this article, however, is that corruption is intrinsic to that process of legal modernisation embodied today in the reconstruction of Afghanistan. I will develop my discussion by connecting broad legal and political questions (e.g. transnational circulation of rule of law) with ethnographic materials I have collected during fieldwork in Afghanistan since 2005. During my research I have studied the ordinary daily practice of law and have been able to observe first hand several court cases (both criminal and civil) and follow the work of some prosecutors. I have also conducted numerous meetings and interviews with police officials, NGO experts and members of the Ministry of Justice, who have been de-identified in this article.² Their respective points of view were crucial to developing my understanding of judicial institutions and the implications of the process of legal reconstruction. This experience allowed an examination of judicial practice and current legal transformations as concretely observed in specific contexts: the tribunals and prosecutors’ offices. Hence legal actors’ interpretations, interaction between judicial and customary forms of authority, and citizens’ perceptions of judicial institutions came to the forefront.

This ethnographic approach is useful to understand the social and cultural context in which people make their choices and elaborate a nuanced and rich analysis of alternatives, but the study of corruption in the judiciary offered a series of significant complications. The most relevant was related to the fact that corruption by its nature deals with secrecy. While everyone generally has something to say about corruption, detailed and verifiable information is normally difficult to access. Whatever the context, dealing with secrecy and silence is never easy for an ethnographer (Austin and Carpenter, 2007; Kidron, 2009; Pagis, 2010; Taussig, 1999). During fieldwork in Kabul, however, discussions on corruption were characterised by on-going tension between the desire of someone to keep a secret, the fear of someone else of being silenced, and a bulk of

general opinions, anonymous complaints, rumours and intimate confidences that produced a sort of “excess of words” on corruption.

The reflection proposed by German philosopher Georg Wilhelm Friedrich Hegel in the *Phänomenologie des Geistes* (1807) is particularly appropriate for the study of corruption: what is well known in general, exactly because it is well known, is not known. In an attempt to move from the surface to a more profound level in the study of corruption, in this article I will canalise this excess of words through the analytical framework of narratives of corruption. To analyse the contingent dimension of corruption in the judicial arena, I will discuss corruption in relation to what I call a dialectic of compromise – which characterises the work of judges – and to the possibility for Kabul citizens to access justice. I also provide a critical understanding of the legal modernisation of Afghanistan and of the methodology that international agencies and the Afghan government are applying as they try to address the phenomenon of corruption.

Rule of Law and the Double Institutionalisation of 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) goal of “democratising” the country.³ Reconstruction, however, turned out to be a political-humanitarian intervention with the primary goal of supporting a political and economic strategy that has been described by one Afghan scholar as “American neocolonialism in the Middle East and Central Asia” (Hanifi, 2004, p. 296). As a consequence, the reconstruction process has been only partly effective in giving a new impetus toward stability.

Since 2001 the process of legal reconstruction has rested on the principle of the rule of law, in itself the basis for a larger project of democratisation propelled by the international community. Mattei and Nader (2008, p. 10) have explained that

the expression “rule of law” has gained currency well outside the specialised 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 times, 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.

In the sphere of justice reform in Afghanistan, the language of legal modernisation – i.e. rule of law – has been used as a frame in which to standardise and institutionalise justice at the state level. This process, however, has not been able to overcome the legal dyscrasia between different sources of law. In addition, it has stretched out the distance between the values of the Afghan social fabric and realities of state justice (Ahmed, 2007). To further complicate this picture, the presumed convergence between Islamic law and rule of law has not yet been translated into a defined judicial procedure. Rosa Brooks (2003, p. 2280) has outlined how, in an increasing number of places, promoting the rule of law has become a political form of dominion “in which foreign administrators backed by large armies govern societies that have been

pronounced unready to take on the task of governing themselves”. For instance, the global/hegemonic notion of rule of law does not necessarily conform to the way Islamic law is understood and practised in Afghanistan as a unique blend of Islamic principles and custom.

In the wake of a legal interventionist approach,⁴ the eradication of corruption from the judicial system has become one of the primary objectives of the international community, represented here by foreign governments, international agencies and non-governmental organisations. The international community, and consequently the Afghan government, has identified the problem of corruption as something that assails state institutions; as mentioned in a recent report, “corruption contributes significantly to the erosion of state institutions and to undermining the authority of the central government” (UNODC, 2010, p. 30). Yet this conclusion is misleading because it presumes a legalistic understanding of corruption that, in the words of Hasty (2005, p. 271), “tends to view the practices of corruption as alienated, self-interested acts by greedy public servants poaching on national resources and as selfish crimes of calculated desire in the absence of public discipline”, leading to the assumption “that a more pervasive public exercise of social discipline through state institutions will work to prevent corruption by stifling the selfish greed of individuals”.

Before the 2006 London Conference, the Vice President of Afghanistan, Mohammad Karim Khalili, affirmed that one of the most urgent issues to confront was “the fight against corruption”.⁵ Governmental and international rhetoric has taken on tones of harsh condemnation towards the corrupted officials. In line with the idea of corruption that international anti-corruption programs disseminate (HOOAC, 2007; UNODC, 2010; UNPAN, 2002), they have linked the phenomenon of corruption to a counter-governance dimension whereby they regard it as something extrinsic to the practice of governance, something that works against governance *per se*. This anti-corruption rhetoric ignores the fact that, in Afghanistan, the system of corruption can be seen as a modality of governance. Writing about corruption generally rather than specifically in Afghanistan, Rosen (2010, p. 79) puts it thus: it is always the “local pattern of corruption – its connections among a wide range of distinctive social, religious, economic and political factors – that shapes its meaning and public policy implications”. As Thomas Barfield (2012, p. x) has observed writing specifically of Afghanistan,

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”.

International and governmental anti-corruption propaganda also fails to consider the profound social dimension of a system that is moulded by a cluster of socio-cultural factors linked to dynamics of power, privilege and responsibility and to exchange mechanisms such as reciprocity and economic bargaining.

Internationally, in the recent past, the ideology of post-war reconstruction⁶ has been the external trigger for the fight against corruption in countries that are the recipients of

international “aid”. In many post-war contexts, humanitarian actions have taken the form of a system of interlinked processes combining political, economic and legal interventions to modernise (Suhrke, 2007) unstable and corrupted states. The establishment of anti-corruption agencies (de Sousa, 2010; Passas, 2010) is one of the forms that this legal-humanitarian interventionism has taken. In recent years, while these agencies were working for efficient strategies to be implemented in Afghanistan against corruption (HOOAC, 2007; UNODC, 2010), the cost of living in Kabul increased exponentially. Many judges interviewed for this study have confirmed the extent of economic burden on their work and livelihoods, and have underlined the impossibility of meeting their day-to-day expenses with the stipend they earn. The dislocation of the economic system is due, among other things, to the strong economic impact of the presence of international agencies. The sudden and unregulated influx of humanitarian agencies, non-governmental organisations, and intergovernmental and private companies has generated an unsustainable increase in rent in Kabul, an upheaval of stipends, an increase in the cost of certain primary goods, and the creation of a parallel economic system. For those Afghans who manage to enter the international system, economic conditions improve substantially, even if temporarily; for all the others – the great majority – poverty becomes more extreme.

Another effect of the economic disruption has been the migration of Afghanistan’s most qualified personnel from the public to the private and humanitarian sectors. One common example of this can be seen in the judiciary, where a competent judge is incentivised to leave his/her low-salaried government job to become a consultant for an international organisation committed to the implementation of the rule of law. (Nowadays, for judges, this typically means going from a monthly wage of approximately US \$300 to a monthly salary of around US\$3,000). This phenomenon, in the long run, will contribute to the weakening of the already structurally devastated judicial institutions. In this regard, Judge Fatima, working within the Provincial Office said:

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... Despite 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. It is very difficult to carry out one’s job with such conditions.

Such economic conditions become fertile ground for the practice of corruption because they create a social context that is rife with tension between processes of centralisation and mechanisms of resistance toward foreign interference. The expression used by the judge of the Provincial Office “corruption is related to survival” is of particular importance to the extent that it situates the practice of justice within an unstable context in which 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 introduces such a form of uncertainty in the sphere of judgment, influencing a judicial practice that is characterised by social and normative compromise. One consequence is that for those who do not have money and important friends, the possibility of solving daily injustices through the judicial system becomes an ever blurrier mirage.

Harsh 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, caught amid nepotistic mechanisms, is dominated by a complex architecture of individual leaderships, armed groups and local security arrangements (Schetter, Glassner and Karokhail, 2007). In 2004, among a group of 27 ministers, 4 were warlords or heads of factions: Mohammad Fahim, Mohammad Mohaqeq, Sayyed Hussain Anwari and Gul Agha Shirzai. At least another 3 were linked to the warlord system in some way: 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. Of 32 governors nominated in 2002, at least 20 were commanders during the civil war (Giustozzi, 2004). At the administrative level the situation mirrored that of senior ranking officials, with persons without competence covering posts, more or less important, because of their affiliation with a certain personality (Dietl, 2004; Giustozzi, 2004). To be sure, corruption is not limited to administrative officials. A recent survey of the Afghan trucking industry reported that “the governors, provincial office chiefs, district police chiefs, and local commanders for the National Directorate Security, in addition to local deployments of the Afghanistan National Army and Afghanistan National Police extorted bribes for amounts ranging from \$1,000 - \$10,000 per month” (Gang, 2011, p. 10). Furthermore, corruption is also evident within the aid system itself (Independent Joint Anti-Corruption Monitoring and Evaluation Committee, 2012), an aspect that has not only contributed to increased scepticism towards international organisations and NGOs (Waisová, 2008), but has also aggravated internal corruption through a vicious circle where the controller needed to be checked.

The tacit approval of the international community for the participation of warlords and commanders in post-2001 processes of reconstruction gave new legitimacy to the presence of these figures in the political life of the country. This has caused the consolidation of a “hybrid model of governance” where warlords have assumed the role of bureaucrats (Mukhopadhyay, 2009). Nevertheless, in their rhetorical discourses international observers and the Afghan government have begun to situate warlordism more and more often at an anti-governmental level, as an obstacle to the implementation of an international agenda (Schetter, Glassner and Karokhail, 2007).

After all, finding a disconnection between anti-corruption rhetoric and the creation of a political and economic system that is favourable to corruption is not rare in a reconstruction context such as that of Afghanistan. But there is more to the story. It must be emphasised that frequently, in the international humanitarian language, the fight against corruption becomes a foundational element in the attempt to export/import the Western rule of law.⁷ The fight against corruption can be seen, in other words, as an instrument of legitimisation of movements of “legal expansion”, an expression that 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, p. 221). In the case of Afghanistan, the face of legal expansionism by the forces of “occupation” has been particularly brutal. As outlined by several scholars (Hyndman, 2003; 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 that concerns recent transformations in post-colonial countries. From this perspective, the 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; Ong, 2006) in relation to which state institutions are restructured.

According to a general consensus, the Afghan judiciary is the arena most deeply affected by systemic corruption (ARGO, 2008). The culture of rule of law (Kahn, 1999; Brooks, 2003), on the contrary, is seen as an anti-corruption culture, which presents again the dominant legalistic discourse that posits law and corruption as antithetical. It has, however, been consistently observed that the two are, in fact, linked and indeed reciprocally constitutive (Anders and Nuijten, 2008), and that networks of corruption become intelligible when understood in their intimate relationship to the practice of law. The current judicial reform in Afghanistan has accelerated since 2001, but its roots go as far back as the early nineteenth century, with a strong impetus received during the reigns of Habibullah and Amanullah at the beginning of the twentieth century (Gregorian, 1969; Schinasi, 1979; Vafai, 1988). A focus on the actual reconstruction as part of a broader project of modernisation (Suhrke, 2007) is useful here to outline an on-going and unfulfilled process of state building that has repeatedly been the cause of conflicts.

In order to establish a specific relation between socio-normative procedures and the ideology of legalism, the current implementation of the Western rule of law contributes to structure and to institutionalise certain forms of socio-normative re-adaptation. By reconfiguring the relationship between the individual and the social group on the basis of monopolistic demands of the state over the law (Grande and Mattei, 2008), the legal order affirmed through the rule of law aims to release the subject from the traditional system of practices and values in which he/she recognised him/herself. The intended result is to establish an apparatus of justice that embodies an international set of standards of rights, but this hegemonic apparatus appears to be inefficient in satisfying the sense of justice invoked by the citizens,⁸ and hence lends itself to a reaffirmation of the traditional practices of compensation and to the abuse of power. Under these circumstances, the phenomenon of corruption is exacerbated through a process that one could define, to borrow Paul Bohannan’s expression (1965), as “double institutionalisation”: that is, the exchange procedures, social hierarchies and practices of the exercise of power that are already affirmed at the level of social practice find again, in the judicial system, a possibility of reaffirmation assuming a legal connotation. According to Bohannan (1965, p. 36),

Law is ... a body of binding obligations regarded as right by one party and acknowledged as the duty by the other which has been re-institutionalised within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained.

Similarly, corruption undergoes a re-institutionalisation process that provokes the mutation of a socioeconomic act into a legal fact. The already-mentioned UNODC (2010, p. 31) report states: “Amongst the factors feeding corruption, one cannot forget the significant role of traditional social structures where individuals’ needs and entitlements are often negotiated in a patron-client relationship”. What is at stake here, however, is the re-institutionalisation of corruption rather than an appreciation of its “traditional” worthiness. On 15 October 2007, Judge Ajmal of the Second District of Kabul told me:

Something happens in the collective perception of justice when a person finds that within the tribunals corruption is a common way of solving a quarrel. It is like assuming that the state apparatus is nothing more than a system where the law of the jungle becomes the rule.

Not only does corruption influence the judicial practice; it also determines people’s understanding of legal institutions. Since “the public service dimension of the legal system involves multiple interactions with the social environment” (Alou, 2006, p. 141), the process through which social practices become institutionalised legal practices affects the way people see the role of the judiciary – and more broadly of state institutions – within the whole society.

Narratives of Corruption

One carpet seller in Kabul, in March 2008, told me: “If it were not for corruption, people would not even know what tribunals are”. Indeed, it is almost impossible to hold a conversation with someone about the Afghan judicial system without repeatedly hearing the word “corruption” (in its various declinations). Stories about corruption circulate heavily and, it could be argued, dominate discourses about state justice.

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 what is broken can either be the moral integrity of a person, a code of moral rules or, more specifically, administrative laws (Coppier, 2005). 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. According to Lawrence Rosen (2010, p. 79),

[t]he very terms for corruption in Arabic convey its capacity to disrupt: *fasad*, which means to dirty or prostitute, may originally have implied something so rotted from within that it can no longer be used as a support, while a common term for a bribe, *reshwa*, originally meant water drawn from a well with a bucket, in contrast to the more natural flow of a stream.

Therefore, the term *reshwa* has a more specific meaning, similar to “bribery” in English. In the courthouses of Kabul, the term *bakhshish* is also often heard. It can be translated with the English “gift”, “present” or “favour”. *Bakhshish* can be the gift a father gives his son for his good achievements in school, but can also be used as a

synonym for *reshwa*.⁹ As such, it can also hold a more implicit negative connotation: one can make an ambiguous inference with the term *bakhshish* or use it to describe an act of corruption without using an expression that is too harsh. Moreover, the term *bakhshish* is not limited to the sphere of the judiciary but rather to a larger criticism of government and other activities that involve this kind of practice.

Studies on corruption¹⁰ have traditionally linked this phenomenon to the analysis of social mutation, to the role of the state and its institutions, and to political and economic bargaining, and have highlighted the social and political relevance of corruption rather than relegating it to the sphere of deviance. Syed Hussein Alatas (1999) argued that there are three diverse phenomena subsumed under the term corruption. These include: graft, extortion and nepotism. In its more general sense, the following features are associated with 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 practise acts of corruption try to disguise them by using some form of legitimisation (Alatas, 1999, pp. 6–8). In the specific context of a state bureaucratic organisation, 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 complexity of structural conditions, personal interests and contingent factors in Afghanistan, which can be considered the roots of the phenomenon of corruption in this specific context: exchange, gift and return mechanisms; forms of patrimonialism; and structures of nepotism and clientelism. As Rebecca Gang (2011, p. 10) comments, “Afghan citizens are now forced to pay illicit fees in almost every arena of daily life”. For instance, practices linked to the exchange of “soaps” (favours and circuits of “friendship” connections), which are spreading at 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 entrenchment of institutional corruption in the process of reconstruction.

The phenomenon of corruption cannot be understood outside the narratives of corruption (Gupta, 2005). The experience of corruption takes place in a space determined in advance 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 (Gupta, 2005, p. 6). Narratives of corruption can even assume an importance that Turner calls “religious” but that could perhaps be more appropriately defined as “occult”¹¹ “in the sense that they operate with concepts of secret powers controlling the material world” (Turner, 2008, p. 128). Narratives of corruption take different shapes and forms and are present at different levels of society, ranging from rumours to international rhetoric.¹² Thus, they have a strong influence both on ordinary practices and on institutional politics. The power of stories of corruption has, for example, pushed my colleague and friend Basir¹³ to affirm “*Een qazi fased ast*” (“This judge is corrupt”) when a judge of the Second District refused to let him and me attend the hearings he chaired.

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

Mr Faïd presented many documents. But I recommend Mr Faïd, 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 to Him, and how will we justify our dishonesty?

With the intent of informing all those present (including the researcher) that what normally occurs in tribunals would not have been tolerated on that occasion, the judge confirmed in an institutional site the widespread occurrence of an illicit practice. Narratives of corruption therefore permeate the judicial discourse even when, at least in appearance, corruption is not accepted. The presence of an “external figure” (myself) apparently played a relevant role in pushing the judge to take a firm position in the dialectic of “corruption *versus* anti-corruption”. In other words, my presence might have destabilised the silent balance that lies underneath a practice that everyone knows about but nobody is willing to discuss in detail openly.

This pervasiveness of corruption seems to expand rapidly and runs not only throughout the judiciary, but throughout state institutions as well. The following statement 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 organisations. A guard within an organisation or a driver earns 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 one] 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 a 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 characterises 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. By establishing a difference, the judge placed his profession at a superior moral level; in his words,

Being a judge is not a job like any other. It is not a job that involves the state solely, but it involves faith and 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 well aware of the dynamics that regulate his work environment, and described his role as an attempt to “do his best for justice”. This implied, from his point of view, that on one side the judge has to adapt to the “system” (that is, to

exploit weaknesses in the system in issues of little relevance; work with colleagues considered highly corrupt and corruptible), and on another side it is necessary to emancipate oneself from it (that is, to abstract one's work in terms of "justice and faith"). This abstraction is translated daily in personal common sense, in discretion oriented at satisfying the recognised ideals while not succumbing to such a system. The judge's words thus underlined two important aspects linked to the phenomenon of corruption: the necessity to face certain economic and social realities and the will to answer to an ideal of justice indissolubly linked to religious belonging.

From the point of view of the majority of the population, the pervasiveness of corruption plays an important role in making it difficult to gain access to justice, in a double sense. On one hand, narratives of corruption precede judicial experience and mould people's prejudice (characterised by mistrust); this further reduces the incentive to turn to judicial institutions, which people already consider to be distant from customary values and practices. 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 on the testimony of persons who have had judicial experiences in Kabul) exacerbates the inherent social inequities that play out in judicial practice, reifies social hierarchy, and penalises the weakest in society who are unable to afford the bribes that are necessary to set the court procedures in motion.

Many people I interviewed complained that they had lost their lawsuit because the judges (or others acting on their behalf) had been 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 indicative of uneasiness, mistrust and disrespect towards judges and judicial institutions. We should not discount the fact that whenever a civil case is not concluded with an acceptable agreement for both parties involved, but with the "victory" of one of them, the damaged party accuses the judge of having been bribed. As a consequence, the very idea of corruption is compounded by the difficulty experienced by many Afghan citizens in understanding the "rules" of judicial institutions and accepting a model of justice that is perceived to be distant and imposed externally.

In Kabul's courts, prejudice, structural decline, issues with the implementation of legal transplant programs and corruption are found. Together they reveal the inherent mythological nature of an ideology based on the idea that a culture of Western legalism would translate judicial practice into a mere exercise of jurisprudential nature (De Lauri, 2013b). Judicial practice in Kabul, instead, emerges as a form of institutionalised social bargaining through which it is possible to observe the complex socio-political negotiation that characterises the process of centralisation of justice under way in Afghanistan.

On Compromise

The civil cases I have observed in the primary courts of Kabul have led me to conclude that the Afghan judicial practice is shaped by a "culture of negotiation", which emphasises the ideals of reconciliation. 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 law procedures, judicial practice is grounded upon customary references and historically rooted social practices.

In other words, a single case is often discussed in different contexts such as the court, the domestic environment, the office of the prosecutor, and sometimes even the office of a legal aid organisation or a lawyer. The inter-familial settlement (e.g. meeting between elders in order to resolve a problem/dispute) does not represent an alternative to pursuing a case in court but remains the fulcrum of the process of reconciliation. Overall, the courts' primary objective is not to safeguard a specific right or to pronounce a sentence. Instead, they attempt to mitigate the conflicts and/or to preserve social equilibrium. Moreover, it is not granted that the parties in a dispute will respect the decision of the court as enforcement mechanisms are often ineffective. As a result, mediation and the culture of negotiation turn out to be the primary features of the civil process.

In criminal cases, the judge attempts to legitimise him/herself through the *force of law*. The judge's authority is evident in the spatial arrangement of the protagonists in the courtroom (during criminal cases, the defendant sits at the back of the room, sometimes chained at wrists and ankles), in procedures that involve a particular posture of the body (in criminal cases, the defendant has to stand while talking), or in the specific use of language (the way to address the judge shows reverence, while the judge talks to the defendant in a severe manner). Further, while in civil cases the negotiation is already evident in the procedure through which disputes are settled, in criminal cases negotiation is implicit in the criteria judges use to reach the verdict. The articulated (and often conflicting) relationship between theory and practice in the judicial field gives shape to a legal discretion that does not betray the forms of authority and respect recognised by the broader social context in which the judge operates. If these are ignored, the fragile and unstable social legitimacy of the judge is at risk of complete failure.

Although customary practices and compromise are at the heart of the Afghan notion of justice, these are being undermined by international programs designed to sanitise/Westernise legal procedures, as well as by justice sector actors who want to preserve their authority against the "elders". Government and international agencies condemn the use of customary practices and *do-it-yourself* justice, and try to establish the priority and supremacy of the judicial system as a useful instrument to extend central political power. The promotion of state justice is not, however, accompanied by adequate attempts to solve the problem of the inaccessibility of judicial institutions to large sections of the population; nor does it rectify a structure put under serious stress by interests and powers that affirm themselves through the very process of legal reconstruction. In spite of the position expressed by the government and international agencies, the resolution of civil and criminal cases is linked to what I call a dialectic of compromise. The judges are caught in the midst of contrasting processes. On the one hand, they have become an instrument through which the state extends its project of legal centralisation; on the other hand, they have to mediate between different normative systems and authorities. The by-product is 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. This interaction between normative systems (Berti, 2007; Dupret and Burgat, 2005) interconnects with the multiple interactions between the politics of centralisation via state authority and re-composition of religious and customary forms of authority.

Keeping these aspects in mind and insofar as the climate of corruption becomes a constitutive element of the Afghan judiciary, the work of 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 negotiation that resorts to customary practices and the interaction between forms of authority and strategies of legitimisation configure the field of action of judges, which is consumed in a dialectic of compromise in which the sacrifice of the ideals of justice is justified by the grammar of survival. The judges, for instance, carry out their work according to “rules” that do not correspond to the official rules of the Afghan government and to the training of international organisations (Guhr, Moschtaghi and Afshar, 2009). This situation has developed because the externally supported project of centralisation has historically been implemented by keeping a substantial distance between itself and traditionally respected forms of authority and customary norms. In the end, a profound understanding of normative interconnections is absent in those who are implementing justice reconstruction projects, but just such normative interconnections are firmly embedded in the judicial and investigative practices as they are applied in the real world.

Inaccessible Normative Pluralism

In Kabul, the interconnection of customary practices, state judicial mechanisms, references to the principles of Islamic law, and the absorption/imposition of Western models of justice constitutes the normative substratum that connotes the daily practices of individuals and families that seek to solve problems, resolve conflicts and take decisions. Yet this normative network does not seem to be understandable in terms of “choices of law” (Michaels, 2005). By following the work of prosecutor Saber Marzai in District 11 of Kabul between 2005 and 2008, I was able to observe several cases, starting from the initial 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 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* [assembly] 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.¹⁴

In Kabul, the so-called legal pluralism is not inherent to the possibility of choosing the normative reference system, but pertains to the mixture of meanings, practices, and the 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 where a variety of legal and political powers (i.e. international agencies, the judiciary, customary assemblies and religious actors) attempt to affirm their normative force to the detriment of others. As for the dynamics of power and social hierarchies that this situation involves, the by-product is an inaccessible normative pluralism (De Lauri, 2013a) that provokes an inevitable effect: that of leading many people to take the law into their own hands. For the multitude of people forced into dire socioeconomic conditions, the resort to customary assemblies such as *jirga* and *shura*¹⁵ is a difficult road to take, and, when it is indeed taken, it mostly reiterates the relevance of such conditions 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 to some extent the worsening of) certain customary practices at a familial and inter-familial level is a consequence of such inaccessible normative pluralism. The parallelism of tradition-customary practice is not, as a consequence, sufficient to explain the implications 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 the access to justice. In fact, although recourse to corruption can in some cases mitigate the barriers and the delays imposed by the bureaucracy of the judicial system, it also has the consequence of exacerbating social and economic asymmetries. Very poor families are increasingly pushed away from judicial circuits because they do not have the financial means or the important “acquaintances” to provide them with 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. The (inter)familial sphere remains in many cases the only possible avenue to solve a problem or to 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 recognised by the social group. As the owner of an electronics shop in Shar-e-now (Kabul) told me in April 2008,

as long as a man keeps a distance from the values he has learned since he was a child, he becomes a tree without roots... A friend of mine is in jail now because he killed a man named Massud. He said Massud insulted his honour by asking my friend’s wife to clean Massud’s office. The truth is that my friend was just desperate because he didn’t have a job and he couldn’t provide food for his

family. His family claimed he did so to protect the honour of the family, but this is not the idea of honour we learnt to appreciate.

A consequence of this situation at a macro-sociological level is the radicalisation and strengthening of certain solution-methods, such as the use of forced marriage as a form of compensation.¹⁶ For these reasons, I believe that the common expression “legal pluralism”, used to describe the Afghan normative scenario (Choudhury, 2010; Meininghaus, 2007; Yassari, 2005), lacks any tangible meaning. In Kabul, an inaccessible normative pluralism is in force, which has to be tackled if one wants to confront the problem of corruption.

Conclusion

It is by definition complicated to quantify corruption in any meaningful way: “corruption mainly victimises people indirectly and without their knowledge” (Green and Ward, 2004, p. 11). The narratives of corruption show that when corruption becomes systemic, even those episodes not directly affected by acts of corruption *per se* are adversely influenced by the environment that corruption has created.

Narratives of corruption are structured through a lexicon of institutionalisation. Corruption, in fact, becomes such when the 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. The re-institutionalisation of corruption not only has deep practical consequences, but also has an impact on the elusive idea of justice. This means that corruption becomes an integral part of the very idea of state justice, which aims at being at the core of state-building processes.

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 normative pluralism with the exclusion of certain strata of the Afghan population from both customary and 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.

With the Karzai administration, which seems to be the most corrupt Afghan administration ever (ARGO, 2008), certain measures have been adopted to “moralise the state apparatus” (ARGO, 2008). Among these measures 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; and the creation of the High Office of Oversight and Anti-Corruption. At the same time, the international community has increasingly expanded its technical and financial support for anti-corruption actions, and several civil society organisations have stepped up their engagement in the fight against corruption (Gardizi, Hussmann and Torabi, 2010; HOOAC, 2007; UNODC, 2010). Yet unless relevant actors acknowledge the complex dynamics involved in the process of legal modernisation and the role played by the politics of centralisation of justice in re-institutionalising corruption, the veritable paladin

of anti-corruption agencies and international agreements will not properly address the problem of corruption.

The phenomenon of corruption carries the toll of legalistic interpretations that obfuscate its historical contextualisation as well as the social and political network in which corruption is entangled. In this article I have analysed corruption as a moment of encounter between processes of centralisation, legal transplanting and re-adaptation of local socio-normative practices. Such an encounter creates the context in which legal ideologies interconnect with social practices and moral values and where the very idea of legal modernisation becomes an essential ground of inquiry for understanding the causes and implications of corruption.

Notes

1. I am grateful to anonymous ASR reviewers for insightful comments. An earlier preliminary version of this work appeared as 'Afghanistan: Corruption and injustice in the judicial system'. Further research and fieldwork has been undertaken within the framework of activities of the Fernand Braudel International Fellowship for Experienced Researchers (Paris) and Rechtskulturen Fellowship (Berlin). I discussed some of the ideas illustrated here in a presentation at the Faculty of Law of Humboldt University (Berlin) in January 2013.
2. I have assigned fictitious names to all my interviewees.
3. See, for example, the speech of Colin Powell on 23 March 2004, available at the website of the National Commission on Terrorist Attacks Upon the United States at <http://www.9-11commission.gov>, accessed 29 September 2012.
4. See, for example, Captain David R.D. Nauta, Legal Adviser of Allied Joint Forces Command NATO, *The judicial reform process in Afghanistan: In everyone's interest*. Available at the NATO website at <http://www.nato.int>, accessed 22 August 2012.
5. United Nations Assistance Mission in Afghanistan website at <http://www.unama.unmissions.org>, accessed 28 September 2011.
6. Since the end of the Cold War humanitarian interventions mediated by the use of force and post-war reconstruction projects have increasingly become salient features of international political relationships. In the Afghan case, countries fully involved in the post-war reconstruction have serious responsibility for the destruction that occurred during past and present wars, from the first Anglo-Afghan war to Enduring Freedom.
7. See, for example, Wyler and Katzman (2010). In comparative terms, see *Combating corruption for development: The rule of law, transparency and accountability* (UNPAN – United Nations Public Administration Network, 2002).
8. This involves a series of problems concerning privacy, adversarial approaches, values of objectivity versus subjectivity, the inclusion of customs as legitimate sources of law, the inclusion of elders as fundamental authorities for normative decision-making, and so on.
9. Conversation with a member of the Afghan Women Judges' Association, 28 September 2006.
10. See, for example, Coppier (2005), Gupta (1995). As Ruth Miller (2008, p. ix) has maintained, "In the 1990s, the menace that corruption apparently posed to 'developing' democracies grew to such a degree that nearly every international aid organization devoted a department, an office, or at least a conference to combating it. The academic literature on corruption likewise burgeoned over this period, leading scholars of the subject to designate the 1990s and their academic activity during this time as the 'corruption eruption'. Although this mania for defining, analyzing, and combating corruption came to peak in the 1990s, however, the turn of the twenty-first century was not the only moment in the modern period that such an obsession with the issue arose. Throughout the previous two centuries, the bureaucratic or financial deviance that is the hallmark of corruption literature was gradually becoming a subject of increasingly intense – even prurient – interest".
11. From the Latin *occultus* (hidden), referring to the knowledge of what is hidden, not visible.

12. Anti-corruption policies can at times reach a level of exasperation: socio-biological programs, for example, are actually formed to promote the hiring of more women in public institutions because it is believed they are more apt to act ethically (see Alhassan-Alolo, 2007).
13. 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.
14. Conversation, 12 September 2006.
15. 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). As composition of customary assemblies is directly linked to dynamics of prestige and honour, their decision-making mechanisms are very often unfavourable for marginal members of the community. 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, in times of both peace and war. Composition and function of *jirga* and *shura* have changed over time, especially as a result of radical political upheavals of the last decades. There are several “levels” and forms of customary assembly; for a synthesis see Hanifi (2009).
16. 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.

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