

Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan

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On 2-3 July 2007, a conference co-chaired by Afghanistan, Italy and the United Nations focused on the strengthening of the rule of law and justice in Afghanistan.

As to the background: the Bonn Agreement of 2001¹ was successfully concluded in December 2005 with the opening of Afghanistan's bicameral National Assembly. During this four-year implementation phase promising developments seemed to be prevailing in Afghanistan as such. The GDP per capita increased significantly. Millions of children were enrolled in school for the first time in their lives. The prevalence of menacing diseases such as tuberculosis was considerably reduced.

Since 2006 the situation has changed dramatically.

The implementation of the Afghanistan Compact, a new five-year blueprint for cooperation between the international community and the government of Afghanistan, was launched at the London Conference in

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¹ The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement) of 5 December 2001 aimed at the creation of the Islamic Republic of Afghanistan. This process ended after the Loya Jirga's acceptance of the country's new constitution and the subsequent establishment of state institutions in 2005. The presentation of this report was unfortunately taken from the agenda of the Rome conference.

2006. Still, since its adoption,² Afghanistan seems to be more deeply mired in difficulty than ever, since the fall of the Taliban.

Confronted with increasing insurgency, terrorist attacks and general crime, the government has turned out to be weak and barely capable to develop and implement sustainable policies.³ Apart from this the international community's support in the rebuilding of the Afghan state did not have the expected impact, and quite a few failures have occurred.

Under the Bonn Agreement of 2001, G8 countries had been assigned lead nation responsibility for particular sectors. However, this strategy did not sufficiently foster change. The Afghan National Army, for example, which is mainly supported by the United States of America and France, and the police trained by Germany have proven to be unable to counter the guerilla war strategies of a militant opposition. The United Kingdom, as the lead nation for Afghanistan's counter-narcotics programs, was faced with a record harvest of opium in 2006. A total of 6,700 tons was produced last year, enough for the fabrication of about 670 tons of heroin, or 90 per cent of the world's supply of the drug. Only the Disarmament, Demobilization, and Reintegration (DDR) initiative, part of the Japanese-led Afghan New Beginnings Program, seems to have been more successful. Although the true size of the militia forces remains unknown and some 200 warlords still control wide parts of the country, the UNDP reports that some 50,000 of the warlords' followers have been reintegrated into society so far.

Concerning the rule of law sector, one has to state, however, that here the lead nation, in this case, Italy, has not met expectations either. The Afghanistan Human Development Report of June 2007⁴ suggests that more than 80 per cent of disputes are still settled outside the state courts. The majority of legal professionals has no access to up-to-date legal sources. Legal norms must be described as a patchwork rather than a system. The discrepancy between Islamic and secular provisions

² Available under: <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&cc=Page&cid=1132599286730>>.

³ Cf. in this respect Doc. S/2006/935 of 4 December 2006, Report of the Security Council Mission to Afghanistan.

⁴ Center for Policy and Human Development, *Afghanistan Human Development Report. Bridging Modernity and Tradition: Rule of Law and the Search of Justice*, 2007. The report suggests, among others, a more collaborative relationship between formal and informal institutions of justice.

remains unresolved and a highly political issue.⁵ New codes like the Interim Criminal Procedure Code of 2004 even worsened this situation. Italian legal reform consultants had streamlined the five-hundred articles of the 1965 criminal procedure code to just ninety-eight provisions. However, Afghan judges seem to find the new code too abstract – if they have ever seen it at all – and resort to its predecessor. Accustomed to the civil law tradition, they prefer more detailed legislation. In this case, foreign support turned out to be counterproductive. Two special ambassadors from Italy were unable to orient support programs in one direction. Donors and implementing agencies set up other coordination mechanisms to fill the gap. In fall 2006, the Italian Justice Project Office (IJPO) was downsized and committed to the First Secretary of the Italian Embassy in Kabul.

Other barriers to the rule of law are the extensive lack of sufficient education of Afghan law professionals and poor remuneration resulting in widespread judicial corruption and an alarming absence of attorneys.⁶

In addition to the already existing difficulties, new ones result from unnecessarily duplicated structures and a lack of coordination. Already in 2003,⁷ Amnesty International as well as others have criticized “a lack of coordination by the international donor community ... and delays ... in initiating regular donor coordination meetings.”⁸ Moreover, a financial shortfall on the part of the Afghan state and delays in securing and

⁵ The Rome conference coincided with the call of a group of 200 Afghan clerics from the Western province of Herat for the nationwide enforcement of Islamic Sharia including punishments such as executions and the stoning of adulterers.

⁶ UNAMA (United Nations Assistance Mission in Afghanistan) mentions a number of 223 attorneys in Afghanistan, a country with roughly 30 million inhabitants. See the discussion paper of the working group on Legal Aid, Access to Justice and Human Rights on the conference website, available under: <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gli_uffici>.

⁷ Rome Conference on Justice in Afghanistan (19-20 December 2002), available under: <http://www.esteri.it/mae2000/eng/archives/arch_events/cards/21/home.htm>.

⁸ Amnesty International (ed.), *Re-establishing the Rule of Law in Afghanistan*, available under: <<http://www.web.amnesty.org/library/index/engasa110212003>>.

distributing international assistance have to be mentioned. This analysis is still valid.

Concerning the rule of law sector the Italian government did not re-establish its lead at the Rome Conference in July 2007 but restricted itself to the role of a host and moderator. The three co-chairs (Italy, Afghanistan, and the United Nations), the European Union and NATO were represented by high-ranking officials.⁹ In contrast, donor countries sent vice ministers and state secretaries instead. Delegates from development organisations and research institutes brought in legal and technical know-how.

The results on the political level remained vague. Participants promised to support Afghanistan on its path towards the rule of law and justice. The co-chairs proclaimed new pledges from diverse donors amounting to US\$ 360 million. The lion's share came from the European Union¹⁰ which has established itself as one of the top donors in Afghanistan.

On the technical level, developments are increasingly dominated by the United States which has stronger financial resources and more specialised staff available than other donors. The intention of the United States to push progress by filling coordination gaps came to the fore in many of the seven technical working groups.¹¹ For instance, one working group prepared and co-chaired by the United States agreed upon the installation of a Provincial Justice Coordination Mechanism (PJCM) by the end of this year. Field offices in eight provincial capitals

⁹ Afghanistan was represented by President Hamid Karzai and Foreign Minister Rangin Dadfar Spanta, the United Nations by Secretary-General Ban Ki-moon and the Special Representative of the UN Secretary-General for Afghanistan Tom Koenigs. NATO by Secretary-General Jaap de Hoop Scheffer, the EU by Portuguese Foreign Minister Jorge Amado (Presidency of the Council) and Benita Ferrero-Waldner (Commissioner for External Relations and New Neighbourhood Policy).

¹⁰ Commissioner Ferrero-Waldner confirmed a conference package worth 200 million euro for 2007-2010. This support will focus institutional reform in the justice sector, especially recruitment and grading systems, and co-funding of judicial and police salaries.

¹¹ The working groups discussed: (1) Legal Education and Training; (2) Provincial Justice Coordination Mechanism; (3) Legal Aid, Access to Justice and Human Rights; (4) Effective Police-Prosecutor Coordination; (5) Criminal Justice Task Force; (6) Constitutional and Legislative Process; (7) Institutional Strategies.

and a main office in Kabul are supposed to assess the need for support outside of Kabul and monitor ongoing programs. The United States pledged funding for the main office and two field offices; Germany and France for one field office each.

New concepts were also presented and approved in the working group on legal education and training. The main focus was put on university education, which represents a good setting of priorities, as trainings for legal professionals only seek to correct deficiencies in their basic legal education. The traditional division between Shari'a faculties and Law and Political Sciences faculties, which leads to great difficulties in practice, was addressed with the idea of a compulsory core curriculum for students of both faculties.

Another problem derives from diverging professional preparation courses for judges, prosecutors and attorneys. So far, a legal traineeship has existed for judge-applicants alone. The Office of the Attorney General has recently launched an inception training of its own. In the future, the National Legal Training Center (NLTC) is planned to host these classes and to streamline the contents in order to ensure a coherent understanding and implementation of the Afghan legislation. By this, the NLTC will gain the status of a legal institution *sui generis*. Participants in the Conference also called for more translation of teaching materials from Dari into Pashto and for more training in this second official national language.

These and other results of the meeting have been combined into Conference Joint Recommendations.¹² The Afghan justice institutions¹³ intend to develop, with the help of donors and the UN, a Justice Sector Strategy by October 2007, which will also include their own five-year strategies. This strategy is supposed to coalesce into a comprehensive National Justice Program in 2008.

It is hoped that the existing deficits will be overcome by that strategy as soon as possible, as Afghanistan is still at a crossroads and facing lots of challenges. The proposal of the Afghanistan Human Development Report 2007 to move further towards a hybrid model of justice

¹² Cf. under: <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Am_basciata/La_rete_consolare>.

¹³ I.e. Ministry of Justice, Supreme Court and Office of the Attorney General.

embracing legal, transitional, distributive, and restorative approaches should be carefully considered.¹⁴

¹⁴ See note 4, 5 and 126 et seq.