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WAR, CRIME, JUSTICE AND SOCIAL ORDER IN AFGHANISTAN¹

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Introduction

Thomas Hobbes lived through the terror and security dilemmas of the English Civil War. His conclusion was that life is nasty, brutish and short until a Leviathan (Hobbes, 1651) emerges who can be granted legitimacy to pacify a space by dominating all other armed factions inside it. The Leviathan could be a monarch or some other authority that takes central control of a state. Afghanistan has since 1978 suffered much worse violence from various warring factions (including those who formed states) than England endured during Hobbes's lifetime. After 2001, a Leviathan, President Hamid Karzai, backed by the NATO-led International Security Assistance Force (ISAF), increased security at first in the way predicted by Hobbes (Braithwaite & Wardak, 2013).

This chapter views Afghanistan less as a war and more as a contest of criminalized justice systems. The Taliban came to power because they were able to restore order to spaces terrorized by armed gangs and Mujahideen factions. After the Taliban's 'defeat' in 2001, their resurgence was invited by the failure of state justice and security institutions. The Taliban returned with a parallel court system that most Afghans viewed as more effective and fair than the state system. Polls suggest judges were perceived as among the most corrupt elements of a corrupt state. Police were widely perceived as thieves of ordinary people's property, not protectors of it. While the US diagnosis of anomie in Afghanistan up to 2009 was aptly Hobbesian, its remedy of supporting President Hamid Karzai as a Leviathan was hardly apt. The West failed to ask in 2001, 'What is working around here to provide people security?' One answer to that question was jirga/shura (for more about jirga/shura see Chapter 1 of this book). A more Jeffersonian rural republicanism that learnt from local traditions of dispute resolution defines a path not taken (Braithwaite & Wardak, 2013).

Part I of this chapter is limited to the Hobbesian part of our analysis and Part II to a Jeffersonian analysis, which gives priority to empowering and reforming traditional rural justice. In Part I, we first provide a Hobbesian analysis of the rise of Islamist and other forms of tyranny. Then we connect this to the criminalization of the state, the criminalization of the justice system and the criminalization of war, all of which in Part I are seen as Hobbesian maladies. Part II discusses possible Jeffersonian paths to escape those maladies.

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Part I. The Hobbesian Analysis

1. *Pacification as a Modern Path to Islamist Tyranny*

In 1998, terrible Christian–Muslim violence broke out in two hotspots of religious political competition in Indonesia: Ambon and Poso (Braithwaite Cookson, Braithwaite, & Dunn, 2010). It subsequently spread more widely across the provinces of Maluku and Central Sulawesi at a cost of more than 10,000 lives. At both hotspots, the conflict took two disastrous turns that escalated the conflict. One was that, in response to rallies organized by radical Islamists in Jakarta, thousands of young men joined Islamist militias such as Laskar Jihad and sailed to Ambon and Poso, armed to the teeth, sweeping into villages, burning them to the ground, killing Christians who had not managed to flee. The second disaster was that elements of the security forces took sides. For example, large sections of the local police in Ambon sided with the Christian community; large sections of the military sided with the Muslim cause. Some professional military snipers sold their assassination services to both sides (Braithwaite & Wardak, 2013).

A Hobbesian war of all against all prevailed in these two provinces for a time, allowing the most radical Islamic groups to establish terrorist training camps there, assisting Indonesia to become the country with the highest frequency of terrorist bombings in the world until 2002, after which Iraq, Afghanistan and Pakistan took over this mantle. At these terrorist training camps in Maluku and Central Sulawesi, the Bali bombers, who took 200 lives, were trained. These camps are now closed. Christian–Muslim violence still exists but has returned to the low levels that prevailed prior to 1998. There were three main factors in this accomplishment. One was that religious leaders pleaded with the fighters to return home peacefully. These included leaders in Saudi Arabia, who issued a Fatwa for the cessation of fighting, and local Muslim leaders in Javanese and Sulawesi villages from whence the young militiamen had come, and from the villages they had gone to defend in Ambon and Poso. Second, Muslim leaders joined with Christian leaders in inter-faith reconciliations that connected to bottom-up village-level traditions of reconciliation that were pre-Christian, pre-Muslim. Third, the security sector stopped taking sides and started enforcing the peace against spoilers from all sides. In the course of the 2000s, an imperfect but fairly firm peace consolidated in both provinces (Braithwaite & Wardak, 2013).

Bangladesh from 1998 saw a rather parallel story with the rise of a Salafist group, Jamaat-ul-Mujahideen Bangladesh (JMB), which organized hundreds of terrorist bombings across Bangladesh, peaking in 2004–05 (ICG, 2010; South Asian Terrorism, Portal, 2012). JMB saw a state of sectarian violence, police failing to do their jobs, lawlessness, weak governance and a general condition of citizens feeling unsafe within certain rural hotspots of disorder, particularly in Rajshahi Division. It grasped this anomie as an opportunity to consolidate its movement. It enforced a rule of Shari'a law, allowing people to feel safer, and then used these rural areas as bases from which terrorist training and operations could be mounted across Bangladesh. As with the Indonesian militias of the late 1990s and early 2000s, in Bangladesh, a multidimensional state and civil society response from the mid-2000s has effectively eliminated JMB as a source of terrorism in recent years (Fink & El-Said, 2011, pp. 5–7), though it is a threat that could return. Indeed, Indonesia and Bangladesh—the largest Muslim-majority nations—are today not terrorist hotspots in the way that so many other Muslim-majority societies such as Afghanistan, Pakistan, Yemen and Somalia have become. Bangladesh security experts whom John Braithwaite interviewed said that the *modus operandi* of JMB was the same as that of the Taliban: to build a base from rural areas with a rule-of-law vacuum that are being terrorized by gangs (Braithwaite & Wardak, 2013).

This observation led us to this chapter's focus on a Hobbesian analysis of the rise of the Taliban. We conclude that the international community's response to the Taliban has also been Hobbesian:

to install Hamid Karzai as a Leviathan. In 2001, the international community was still obsessed with the Yugoslavia breakup scenario, for which there was no historical precedent or basis for fear in Afghanistan. Nevertheless, international support for a highly centralized Leviathan was justified by 'the assertion that the country would break apart without firm control at the top' (Barfield, 2010, p. 8). In Woodward's (2011) *Obama's Wars*, he quotes US President Barack Obama as saying in meetings with his national security team that his objective is not to build 'a Jeffersonian democracy' in Afghanistan (Braithwaite & Wardak, 2013).

The conclusion we develop in Part II of this chapter is that the tragedy that is Afghanistan is a product of decades of policies that have been altogether too Hobbesian and insufficiently Jeffersonian. We must remember that Jefferson's republican vision was of rural, decentralized, deliberative checks and balances on challenges of domination and violence. The alternative we develop is of the kind of rural village republicanism supported by a democratic state—the Panchayat vision that we also see in the political thought of Mahatma Gandhi (see also Braithwaite, Charlesworth, & Soares, 2012). Village justice, according to this analysis, is more important than state justice, though state justice is also interdependently important to securing a world freed from terror and violence (Braithwaite & Wardak, 2013).

2. War, Society and Criminalization of State in Afghanistan

Prior to a Communist coup in 1978, Afghanistan had many problems but remained generally peaceful for about five decades under King Mohammad Zahir Shah and President Mohammad Daoud Khan. During this period (especially between 1973 and 1978), Afghanistan was slowly beginning to consolidate state institutions. It was gradually becoming a freer society, especially for women. Compared with other developing nations at a similar level of development, there was promise in the education system. The tragedy of Afghanistan was partly born of the latter strength. Like many educationally free universities around the world in the late 1960s and early 1970s, Kabul University was vibrant with student radicalism (Barfield, 2010 p. 213). What distinguished the radicals of Kabul University from those at the Sorbonne or Berkeley was that its radical factions of the left came to be backed by the full might of the Soviet empire (or of Mao's China), and its Islamic radicals came to be backed by radical circles in Pakistan, Iran and other parts of the Muslim world. After the Soviet invasion, the latter were also backed by Pakistan's Inter-Services Intelligence Directorate (ISI), the US Central Intelligence Agency (CIA) and money, men and munitions from Saudi Arabia and some other Arab nations (Braithwaite & Wardak, 2013).

With this backing, the Communists and then the Islamists were able to take over the Afghan state. Between them, they managed to destroy the fragile promise of Afghanistan. In a succession of wars in which the Communists and the Mujahideen were the main protagonists, more than 1.2 million Afghans are estimated to have lost their lives. In the course of these wars, Afghanistan's economic, political, educational and cultural infrastructure was decimated. Successive classes of warlords captured corrupted institutions, while smaller gangs and militia groups were allowed to carve up the countryside. Eventually, the destroyed promise of the state education system meant that the only way many young Afghans could get an education was in *madrassas* (Islamic seminary schools). Many *madrassas* were funded by the likes of Osama bin Laden in the border areas between Afghanistan and Pakistan and in some Pakistani cities (Braithwaite & Wardak, 2013).

When the Soviet Union decided that sending guns and advisers was no longer enough to prop up its chaotic Communist client, it invaded Afghanistan, in December 1979. The Mujahideen were then able to draw in countervailing support from the United States, Western Europe, Pakistan, Saudi Arabia and Osama bin Laden. This was enough for them to defeat the Soviet Union and contribute greatly to the collapse of global communism. The last ruler of the former Communist regime of Afghanistan, Dr Mohammad Najibullah, renounced communism in the same way that Russia did,

declaring instead support for Islam and democracy. The regime remained a Russian client and managed to hang on with Russian military aid. Though Gorbachev's and then Yeltsin's Russia was no longer its Cold War adversary, the United States did not seize the opportunity to work with Russia to support the transition from communism to democracy in Afghanistan. Instead, the United States wallowed in satisfaction at its expensive Cold War triumph there, refused to take responsibility for cleaning up the mess Cold War rivalry had created and jumped at the fiscal opportunity to sever the flow of funds to Afghanistan. The United States outsourced regional security for Afghanistan to Pakistan. The vacuum where great powers had once competed opened up a world in which Afghanistan could become a key site of a dangerous rivalry between regional powers—especially India and Pakistan. This cocktail of instability was further compounded by the state on its western border, Iran, arming Afghan Shi'ite militias inside Afghanistan (Braithwaite & Wardak, 2013).

Not only has the United States suffered terrorism as a result of its decision to abandon Afghanistan after the Soviet withdrawal (Wardak, 2002), Pakistan and India have also suffered ravages of terror as a result, while Russia now loses 14,000 young people a year to heroin sourced from Afghanistan—a number close to that of the young soldiers it lost throughout its Afghan war. Iran likewise bleeds from heroin trafficking out of Afghanistan, typically accounting for more than one-quarter of the world's opiate seizures (Paoli, Greenfield, & Reuter, 2009, p. 238). Between the Soviet withdrawal from Afghanistan and the early 2000s, it had already lost no fewer than 3,700 police killed in fights with drug traffickers (Ashouri & Rahmdel, 2003; Paoli et al., 2009, p. 238). At the end of the war with the Soviets, the Afghan state was much more salvageable than it was in 2001, when the West finally re-engaged with Afghanistan (Braithwaite & Wardak, 2013).

This is the Hobbesian lesson from Afghanistan. If the short-term interests of neighbouring states allow a war of all against all within a lawless state, all manner of sinister forces might incubate inside that space. This poses longer-term threats, even nuclear ones around the Pashtun belt that straddles Afghanistan and Pakistan, where the risk of Pakistan's nuclear weapons falling into the hands of terrorists is one of the greatest threats the world faces. This is no less than the lesson of Somalia, of Yemen and of other parts of Pakistan. While the Hobbesian diagnosis of disorder is perceptive, we seek to explain why the Hobbesian remedy of a Leviathan with a strong police and military made things worse in Afghanistan, just as it has in Pakistan (Braithwaite & Wardak, 2013).

While fighting among Mujahideen groups backed by different neighbours and regional powers delivered the most decisive blows in recent history to the Afghan state, it built on a longer history of state fragmentation as a result of civil war, clientelism of external powers, the geopolitical reality that Afghanistan was a buffer between competing empires (Russian, British) and competing alliance systems (Soviet, American) (Rubin, 2002), unstable succession from polygamous rulers (Saikal, 2004) and other causes. Some past military decimations were even more fragmenting than recent ones; for example, Genghis Khan destroyed many towns and most irrigation infrastructure in the thirteenth century, turning most of the surviving population back to nomadism (Rubin, 2002, p. 22). Propping up Hamid Karzai's government with the Northern Alliance warlords/leaders as a Leviathan without an effective separation of powers served to further erode state legitimacy. This led to a weak-state-strong-society pattern of Afghan development (Migdal, 1988). The renowned hospitality of Afghan civil society flourished by ordinary people learning to depend on their village and clan for security, justice and economic opportunities. They learnt not to depend on the state. Among the most critical of the supportive non-state civil society institutions were jirgas (for more, see Chapter 1 of this book).

The collapse of the Taliban at the hands of the US military campaign supported by the Northern Alliance warlords did not at first deliver a massive injection of Western support for state building. Once the initial rout of the Taliban was accomplished in 2001, the attention of Western powers was focused mostly on what was seen as the more difficult challenge of Iraq. The Bush administration had come to power with a platform averse to state building, so the priority in Afghanistan was killing or capturing remnants of al-Qaeda and the Taliban (Braithwaite & Wardak, 2013).

In the years after 2001, the realization began to dawn that former Northern Alliance warlords/leaders and relatives and friends of President Karzai were pillaging the state. The authority of that state to monopolize the use of force did not extend much beyond Kabul, and even within Kabul, its legitimacy was plummeting. Progressively, Western support for state building poured in more voluminously. It poured into a bucket with holes controlled by a Leviathan who captured the leaks. It was a Leviathan unchecked by an effective separation of powers. The fatal mistakes were made early of putting criminals in charge, bedding down a culture of impunity and creating an electoral system that was winner-take-all and stunted the development of political parties. Worst of all, the constitution and the occupation concentrated power in the hands of one person: the president. That president then doled out positions with discretionary power to buy support from corrupt powerbrokers (Braithwaite & Wardak, 2013).

The Bonn agreement in 2001 did not usher in an effective 'constitutional moment' (Afsah, 2011, p. 157) because it enabled a personalized division of spoils rather than an institutionalized division of powers. Key ministries and other important positions in the first two crucial post-Taliban administrations were given to those anti-Taliban warlords who were involved in the destruction of Kabul, the killing of hundreds of its innocent residents, rapes and widespread looting (Afghanistan Justice Project, 2005; Grossman, 2006; Nordland, 2012). These ministries—especially Interior, Defence, Foreign Affairs and the National Directorate of Security—were then staffed by the warlords' factional followers and have become major networks of institutionalized abuse of power, corruption and nepotism (Grossman, 2009). More importantly, all these have had negative implications for the legitimacy of the post-Taliban Leviathan and its international backers, who promised to promote human rights and democracy in the new Afghanistan (Braithwaite & Wardak, 2013).

The Afghan state failed to secure inclusiveness, to deliver security and justice, to prevent corruption, address the issues of war crimes and crimes against humanity and to control the drug trade. Taliban fighters who had fled or surrendered in 2001 mostly sought to reconcile and submit to the Karzai government, right up to the level of Taliban military commander and minister of defence (Afghan, 2011, pp. 308–309; ICG, 2011, p. 6; Ruttig, 2011, p. 6). While Karzai himself wished to reciprocate reconciliation overtures from Taliban leaders in 2001 and 2002, his American overlords were at best indifferent to this as a priority. At worst, the United States was sympathetic to dominant Northern Alliance elements in the government who killed, imprisoned and persecuted Talibs with whom President Karzai or provincial leaders had reached reconciliation agreements (ICG, 2011, p. 11).

3. Criminalization of the Justice System After 2001

The Afghan government is a savage criminal enterprise that a few people run (Former member of parliament quoted in Nixon, 2011, p. 11). Prisons are full of people who have committed no crime but are too poor to bribe their way out of trouble, while serious criminals can pay enough to avoid ever serving their sentences. Just over half of Afghans fear for their safety in the local area (Asia Foundation, 2009), and many feel more secure and are more optimistic about justice prevailing in areas controlled by the Taliban (Mason, 2011, p. 1).

Mason's (2011) book *The Rule of Law in Afghanistan: Missing in Inaction* documents the ways the Afghan state has failed to compete with the Taliban in offering rule-of-law services. David Kilcullen, at the launch of the book in Canberra, described the Taliban as an 'armed rule of law movement'. His chapter (Kilcullen, 2011) describes the greater appeal of Taliban Shari'a courts in comparison with corrupt state courts for resolving disputes that matter locally, such as land conflicts, and for making the resolution of agreements stick, albeit brutally at times. These Shari'a courts consist of one *qazi* and two *ulema* and are part of the Taliban's administrative structure (Ruttig, 2010, p. 17). Kilcullen (2011) describes how the Taliban have an ombudsman (see also Peters, 2009, pp. 108–109)

to whom citizens can complain about the shadow state services offered by the Taliban, including its courts. Peters (2009, pp. 108–109) found a sudden increase in wealth by a Taliban member can result in an investigation and in demotion or physical punishment if illicit bribes or kidnapping are the reason. A recent field study of the Taliban justice system—*Shadow Justice: How Taliban Run Their Judiciary*—further confirms these observations (Giustozzi, Franco, & Baczko, 2012). The 6 January 2012 ISAF State of the Taliban Report, based partly on interrogations of 4,000 arrested Taliban, leaked to *The New York Times* (2012), concludes that there is independence in the administration of this ombudsman function and in its enforcement of the Taliban Code of Conduct, the integrity of which ordinary Afghans have come to respect (at pp. 3–6).

Kilcullen (2011) contrasts the Taliban's justice services with the vicious and procedurally unfair Islamic justice meted out by al-Qaeda in Iraq, which the people of Iraq could not wait to turn on and evict. At the opposite extreme, Kilcullen (2011) finds the rather reintegrative justice and welfare services of Hezbollah in Lebanon, which support people in solving problems of injustice more holistically than the services provided by the Taliban. Finally, Kilcullen (2011) takes us on a journey across time and space to show from the writings of the ancient Greek Herodotus (1954) how military commanders with a small local base could expand that base during periods of Hobbesian anarchy by providing quality justice and security services to ever-widening circles of frightened citizens (Braithwaite & Wardak, 2013).

While it would be wrong to say there are no pockets of good policing practice, the consensus among commentators has been that the billions in American and European aid have built a tyrannical policing culture with weak community policing capabilities (Bayley & Perito, 2010; ICG, 2007, 2008; Murray, 2007; Wilder, 2007). Community policing has been the casualty of a policing culture corrupted and militarized by its leaders. In 2006, the Ministry of the Interior launched the Afghanistan National Auxiliary Police (ANAP) with international funding, which was intended to build community policing capability. Rather than realizing this intent, 'the program was used to regularize existing militias' (Lefèvre, 2010, p. 1). Another reason it did not work as a community policing initiative was that recruits overwhelmingly came from outside the areas they were assigned to police (Lefèvre, 2010, p. 6). ANAP was closed in 2008, only to see similar initiatives launched with the same weaknesses: the Afghan Public Protection Program and Local Defence Initiatives. These programmes may in reality discourage recruitment by the Afghanistan National Police, becoming their rivals rather than their auxiliaries. The training is less arduous than joining the police. ANAP recruits received the same pay and uniform as regular police after ten days' training (ICG, 2007, p. 13). The successors to ANAP have been led by the US military and have drawn their inspiration from the 'Sons of Iraq' arming of 100,000 local irregulars in the fight against al-Qaeda in Iraq starting in 2006. They also harnessed the tradition of the *arbaki*. The *arbaki* were unpaid militias formed by the tribal *jirga*, which have operated in specific cultural tribal settings for centuries. The auxiliary militias formed by the US military since 2006 differ from the *arbaki* in not being under the regulatory influence of the *jirga* and being paid, meaning that they are 'uncontrollable when payments stop' (Ruttig, 2010, p. 10). They are harnessed to the military objectives of one side in a war as opposed to having community policing objectives. Therefore, the auxiliaries neglected 'the *jirga*'s inherent principle of mitigating conflicting interests and rather tend to deepen conflicts' (Ruttig, 2010, p. 10).

Another problem is that peaceful areas where militias have handed in their weapons to support democratic policing do not benefit from these aid programmes. Leaders from these peaceful areas complain that the American funding for auxiliaries goes to the most criminal gang leaders who have dragged their feet on handing in weapons. This is a direct contribution to the criminalization of the state: '[T]he government ends up rewarding criminal jihadi commanders instead of peaceful members of the community. To some, this may form an incentive to take up arms in the hope of accessing government funding and employment (Lefèvre, 2010 p. 22).

Accessing government funding and employment illegitimately is closely connected to institutionalized corruption in the Afghan justice 'system' and in other state organs. One reason for the greater appeal of Taliban courts is that 'unlike the state courts, their decisions are not dependent on the ability to pay bribes' (Ledwidge, 2009, p. 7). Ladbury and CPAU (2009) found that: "The general perception was that the Taliban had indeed captured the justice market and were perceived to be reasonably efficient and fair—at least when compared to the formal system which was neither. There was no mention of unreasonable or unjust punishments" (p. 24).

Another problem is the patrimonial form of rule Hamid Karzai put in place. It is not that Karzai is personally one of the more corrupt individuals in Afghanistan. His style is genteel, and he seems to aspire to an Afghanistan that is an independent, democratic and prosperous society. It is not that he is a corrupt or brutal tyrant, more that he is a weak leader enjoying enormous control over a highly centralized presidential system. He uses that control in a patrimonial fashion to buy personal support from any powerbroker who threatens him or demands booty; his government is referred to by many Afghans as *hokomat-e-maslahati*—a government formed on the basis of a 'marriage of convenience' among rival individuals and groups each serving their personal and/or factional interests. President Karzai seems to allow a small circle of corrupt individuals at the political centre to build their wealth and power by expanding factional patronage systems. Ironically, this small circle also includes some smartly dressed, secular, Western-educated 'advisers' who advocate democracy and human rights but are deeply involved in patronage, nepotism and corruption (Braithwaite & Wardak, 2013).

Corruption has been particularly acute in the judiciary. There is perhaps no place in the world outside Afghanistan where it is nearly impossible to buy urban land without bribing a judge. Afghanistan is one of the few places in the world, if not the only place, where you can find a national survey that shows citizens are more likely to experience having to pay a bribe in their dealings with the judiciary than in their dealings with the police, the military and customs officials (the 2008, 2009 and 2011 Asia Foundation surveys, though with more mixed results in 2006 and 2010; see Asia Foundation, 2011, p. 102). Equally unusually, citizens are more likely to view the judicial branch as acting in 'their own interests' than members of the legislative or executive branches (Asia Foundation, 2010, p. 101, 2011, p. 112). On the positive side, these same surveys do show a little improvement across time in citizen attitudes to the judiciary. Even more positively, Afghanistan after 2009 became the only country in the world about which one could say hundreds of judges have been punished or dismissed for corruption (Braithwaite & Wardak, 2013).

4. The Criminalization of War

When UK Prime Minister Tony Blair justified the 2001 intervention in Afghanistan, he gave great prominence to the need to control the narcotics trade out of the country. A decade later, NATO had surrendered not only to 'bribery for peace' but also to a 'narcotics for peace' philosophy that was accepting of Afghanistan continuing to supply most of the world's heroin. NATO's philosophy became much worse than tolerating impunity for the corruption, drug deals and war crimes of the warlords it supported. Led by the Bush administration, 'torture for peace' became part of the philosophy of the 'war on terror'. The detention and torture of suspected insurgents at Guantanamo Bay and at the notorious Bagram prison, 'extraordinary rendition' of detainees and the repeated killing of civilians in night raids and in the CIA's drone attacks are well documented (BBC, 2009; Centre for Constitutional Rights, 2006; Human Rights Council, 2011; *The Guardian*, 2011; UNAMA, 2011). In Afghanistan, extrajudicial execution by NATO forces increasingly displaced arrest and trial (Braithwaite & Wardak, 2013).

The criminalization of NATO justified in the minds of the Taliban further criminalization of their *jihad*. The Taliban had never engaged in or approved suicide attacks on civilians until 2002; right up to the level of their foreign minister, and up to Mullah Omar, they strongly condemned the

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suicide attack on New York of 11 September 2001 (also see Strick van Linschoten & Kuehn, 2012). From 2002, the Taliban took a leaf out of al-Qaeda's book and, with technical support from them and from ISI-protected suicide bomb factories in Pakistan, the Taliban turned to terror. Armed gangs on all sides turned to funding their fighters partly through the heroin trade. This leads us to hypothesize that *the longer a war continues in stalemate, the more criminalized it becomes, especially if visible precedents of impunity abound early on*. This is hardly an original insight; it is a Hobbesian one. It is also Durkheimian, about anomic spaces where the rules of the game are no longer settled, where openings are created for all manner of sinister forces, not just those of the principal war makers and not only the brutishness of organized criminal groups. Hence, for example, personal revenge murders in Afghanistan are passed off as war killings or accommodations between armed factions (von Biljert, 2009).

We further hypothesize that the remedy is not so much in shifting the balance back from the war model to a criminal law-enforcement model for fighting terrorism and insurgency, though that is also needed. Rather, the more fundamental solution we advance is grounded in a restorative justice approach to defeating impunity. It can be built peacefully from the fabric of surviving traditional community justice institutions—jirga and shura—that are deeply grounded in Afghan culture and society (see Chapter 1 of this book).

Part II. Jeffersonian Alternative

Part I of this chapter (Braithwaite & Wardak, 2013) argued that insurgents sometimes grab power when they build legitimacy through restoring order to dangerous, anomic rural spaces. This is an alternative path to legitimacy to that provided by Hobbes's Leviathan. It is a path to power that exploits limitations of the Hobbesian solution. Part II of this chapter is about the Afghan path initially not taken—complementing Hobbes with Jefferson: state building combined with the strengthening of traditional rural ordering that delivers security.

1. State, Society and Social Order in Afghanistan

While state formal social control at the macro level has historically been weak and problematic (Shahrani, 1996), social order in Afghan society has mainly been maintained through the exercise of informal social control at micro and meso levels (Barfield & Nojumi, 2010; Glatzer, 1998; Wardak, 2002). One important consequence of this has been that when the Afghan state collapsed following the Soviet invasion, social order continued to exist in Afghan rural villages, where the overwhelming majority of Afghans live. Even today, there exists a higher level of social order in Afghan rural villages compared with large urban centres, where tens of thousands of Afghan and NATO-led International Security Assistance Force (ISAF) from nearly fifty countries concentrate. Ironically, the main sources of violence and disorder in Afghan rural villages are the very forces—the Taliban, the ISAF and the Afghan state—that try to impose order. But their imposed orders have proven fragile, artificial and unsustainable (Wardak & Braithwaite, 2013).

Afghan and international strategists over the past twelve years failed to restore lasting order and stability in Afghanistan because they did not understand the complex relationships between the Afghan state and society at various levels. They failed to understand that the state and various non-state institutions contribute to the formation and the maintenance of social order in Afghan society in different spheres of life and at different levels. Importantly, there has also been a lack of political will on the part of the Afghan state and the international community to fully explore the complexities of this kind of understanding and translate it into policy. Drawing on Wardak's (2006) work on the formation and maintenance of social order in Afghan society, we identify the main agencies of social control as the extended family, kinship groups, tribes, ethnic groups and the state (for more see Chapter 1 of this book).

2. Finding a New Path to Non-Violence and Justice in Afghanistan

A cease-fire in a war President Karzai, NATO and the Taliban cannot win (Braithwaite & Wardak, 2011) is the last best hope to lay a foundation for all sides to work to disempower themselves in favour of village jirgas/shuras and a plural, inclusive republican constitution. Most Western military commanders have held to the view that, even if they cannot defeat the Taliban militarily, killing Taliban fighters maintains military pressure, and this might help them cut a better peace deal. Braithwaite and Wardak (2011) argue that this approach is wrong, particularly where it counts most: for high-level Taliban. The military pressure that *high-level* Taliban members feel most is from the Pakistan ISI, who assure them that if they do not keep fighting the Americans, they will hand them over to the Americans to be sent to Guantanamo Bay or be killed. In the past, the ISI has quite often won credit from the United States by advising them of the whereabouts of senior Taliban commanders who were suing for peace. NATO military pressure on *mid-level* commanders has led to the replacement of older Taliban who long for peace and who fight for their valley and their people with young men who are more radical, more bloodthirsty and more disconnected from their valley and their people. This is because they have been indoctrinated in Pakistan-based religious schools and further radicalized by drone attacks and the repeated killings of civilians in Afghanistan and Pakistan (Wardak & Braithwaite, 2013).

Killing *low-level* Taliban members is also counterproductive because of Pashtun revenge culture: 'If you kill me, my brothers will kill you'. One way they do this is by joining the Afghan Army and Afghan National Police and killing their foreign trainers—known as 'green-on-blue' attacks. The evidence is that low-level operatives who are killed have their places taken by younger relatives. Moreover, night raids that kill members of the Taliban also kill innocent citizens in collateral damage; resentment over this also fuels the insurgency (Wardak & Braithwaite, 2013).

Criminologists should be capable of seeing killing in Afghanistan through a broader lens than just a war lens. They should be able to see it through the eyes of victims, for example. Oxfam survey (Waldman, 2008, p. 12) results show that ordinary Afghans certainly fear being killed by the Taliban, but fears of warlords, criminal gangs, international forces, drug traffickers (which, were they combined with 'criminals', would be perceived as the top security threat), Afghan police and armed men hired to do the bidding of Afghan government officials are all extremely high; and fears of the Afghan Army, family violence and inter-tribal violence are also quite high. What is needed is a paradigm shift that responds to this fear of violence and war-weariness as a political resource to motivate a multidimensional cease-fire combined with concrete steps towards disarmament and replacement of militarized policing with community policing and with regulation of violence by both jirgas and courts (Wardak & Braithwaite, 2013).

3. Expanding Pacified Spaces and Democracy via Village/Town Moots

Afghanistan is a case study of how hard it is to build a democracy from the top down via a state executive, even with unprecedented support for that state from all the world's major powers and initially with the overwhelming support of the relieved citizens of Afghanistan in 2001. Insecurity is a central reason democracy is not working in Afghanistan. The Asia Foundation (2010, p. 4) found that the percentage of Afghans afraid to vote in national elections is rising and, in mid-2010, was 60 per cent, 83 per cent in the south-west of the country. Most flourishing democracies started to build democratic institutions first in towns that were very small by contemporary standards—towns like Lubeck in Germany and Bruges in Flanders, which remain small today, and like Hamburg, Boston, York and Florence, which have become large cities. Most people prefer democracy to autocracy, yet they must learn to be democratic before they can enjoy its benefits. Throughout history, citizens have learnt to be democratic in sub-national institutions like guilds, town councils and village moots. Among the things these institutions delivered was space for citizens to settle disputes and allegations of crime

without autocratic edicts from the courts of feudal masters. These feudal courts fused judicial and executive authority. It proved more possible to break away judicial authority than executive authority (particularly to wage war) from the courts of kings and feudal overlords (Wardak & Braithwaite, 2013).

Through this prism, it is hard to understand why the discipline of criminology has not been more theoretically assertive in debating the possibility that criminal adjudication has always been a key site where citizens learn to be democratic. The institution of the jirga/shura (see Chapter 1 of this book) shows that, in conditions of a Hobbesian war of all against all; it is in local crime control that citizens most crave a democratic voice. Yet the Afghan case also shows how forces of tyranny—local Taliban tyrants and local NATO and Afghan military commanders—can co-opt this craving for participatory, reconciliatory local regulation of crime. Even when they do, a little local space is still created with the possibility that citizens at the periphery can learn to be democratic. There is no simple, straight path from tyranny to democracy. Just sending in peacekeepers to hold a national election is not such a path. Top-down peacemaking and constitutional development are important but will only take root if the soil of democracy is cultivated locally and spreads out from ‘islands of civility’ (Kaldor, 1999).

Conclusion

Our conclusion is that criminologists need to be part of a debate about the path to democracy that starts at the periphery of a society rather than at the centre. This debate sees it as important to jump-start the journey to democracy in the judicial branch within rural and small-town spaces as much as in the executive branch in the capital. In mature democracies where citizens feel increasingly remote from and cynical about their government, criminology can lead a debate about whether the judicial branch rather than electoral politics provides the more fertile soil for democratic renewal. The argument is that most young citizens might enjoy better prospects of learning to be meaningfully democratic in participatory restorative justice conferences in schools and neighbourhoods than in Labour Party branch meetings. If movements of scholars like the Taliban continue to be more open to this insight than communities of liberal scholars, more poor nations may be co-opted to tyranny by Islamic and other armed rule-of-law movements (Wardak & Braithwaite, 2013).

The reality of Afghan society is that it has historically resisted the imposition of social order from above: the drastic failures of King Amanullah Khan’s modernist, Western-inspired radical reforms in the 1920s and the Afghan Communists’ Soviet-inspired ‘socialism’ in the 1980s are lessons not to be lost. Both tried to impose modernity on a very traditional Afghan society. Similarly, the imposition of different versions of theocracy by the Mujahideen and Taliban in the 1990s and early 2000s drastically failed. In order for Afghanistan to live in a lasting peace with itself, its neighbours and with the rest of the world, its local traditional institutions need to be bridged with modernity. It may not be too late for the United States and its Western allies to help build peace and promote justice in post-Taliban Afghanistan from below—through an Afghan form of rural republicanism—supported by a Hobbesian Leviathan from above. This Afghan *bottom-up and, at the same time, top-down* approach is more likely to deliver effective justice and provide lasting peace to all Afghans. Peacekeepers may be required to protect both the Afghan state and its society, including those involved in bottom-up reconciliatory work. Top-down imposition of a new social order supported by Western military power and night raids to search for and kill Taliban fighters are likely to prove counterproductive in the long run (Wardak & Braithwaite, 2013).

Note

- 1 This chapter is a revised version of two previous articles of the authors: 1. Braithwaite, J., & Wardak (2013). Crime and war in Afghanistan: Part I: The Hobbesian solution. *British Journal of Criminology*, 53(2), 179–196. doi: 10.1093/bjc/azs065; 2. Wardak, A., & Braithwaite, J. (2013). Crime and war in Afghanistan: Part II: A Jeffersonian alternative? *British Journal of Criminology*, 53(2), 197–214. doi: 10.1093/bjc/azs066. Republished with permission.

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