

# Coordination of International Assistance to Justice Reforms in Afghanistan

Wolf Plesmann and Tilmann J. Röder<sup>1</sup>

## Abstract

The authors analyse the coordination of international assistance to justice reforms in Afghanistan based on their experience as German government and civil society actors. Such coordination must take place at two levels. First, close collaboration with the partner country's government is essential. Second, coordination with other international actors is necessary to maximize efficiency. In practice, however, coordination at both levels presents significant challenges, which become more pronounced when local government capacity is low and multiple international actors seek to contribute to rule of law development. Afghanistan was and remains a particularly difficult case. This paper analyses the coordination efforts of various actors and explores the reasons for their failure between 2002 and 2014. It concludes with insights on how legal cooperation coordination can be improved.

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<sup>1</sup> Dr. Tilmann Röder is Senior Researcher at Freie Universität Berlin and Adviser to the German Federal Foreign Office. Previously he organized numerous rule of law assistance projects in behalf of the Max Planck Institute for Comparative Public Law and International Law and the Max Planck Foundation for International Peace and the Rule of Law. Wolf Plesmann, who currently serves as Head of the Federal Affairs Department of the State of Berlin, worked with the German Agency for International Cooperation (GIZ) in Afghanistan. He supports the Max Planck Foundation's management and Afghanistan team as an adviser.

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# Table of Contents

- 1. Challenges of Justice Sector Development in Afghanistan..... 201
- 2. Provisions of the Bonn Agreement and the Afghan Constitution ..... 201
- 3. Coordination Between Donors and the Afghan Government..... 202
  - 3.1. Judicial Reconstruction as Intervention: The Lead Nations Approach (2002-2006)..... 203
  - 3.2. Bilateralisation and Decentralisation (2006-2009)..... 203
  - 3.3. The US Diverges and the Beginning of Withdrawal (2010-2014)..... 206
- 4. Coordination On the Implementation Level..... 207
- 5. Coordination of German Initiatives..... 208
  - 5.1. Agreements with Afghan Partners ..... 208
  - 5.2. Coordination among German Stakeholders ..... 209
- 6. Insights on Coordination in Rule-of-Law Promotion..... 209

## 1. Challenges of Justice Sector Development in Afghanistan

In hardly any other partner country more German ministries and implementing organisations were involved in rule of law promotion than in Afghanistan. Justice reforms, which are the primary focus of this contribution, proved to be a particularly difficult challenge after decades of war, during which state institutions had largely disintegrated.

Additional difficulties arose from the coordination of the multitude of actors who sought to contribute with diverse goals and approaches. On the one hand, they all required the approval of the Afghan government. On the other hand, they had to coordinate with other actors to avoid duplication or even contradictory approaches and to achieve the greatest possible efficiency collectively. However, in practice, coordination at both levels presented significant difficulties.

The coordination of measures to promote the rule of law must take place on two levels. Firstly, the consent of the government of the respective partner country or other legitimate actors – such as a *de facto* regime<sup>2</sup> – is required; otherwise, such measures could constitute a violation of international law. Secondly, they must be coordinated with other external actors to avoid duplication or even contradictory approaches and to achieve the greatest possible efficiency together.

In practice, coordination at both levels presents significant challenges. These difficulties increase when the capacity of the local government is low and when multiple international actors seek to contribute to strengthening the rule of law. In this regard, Afghanistan has been and remains a particularly challenging environment.

## 2. Provisions of the Bonn Agreement and the Afghan Constitution

The Bonn Agreement of December 2001 already identified the rule of law as a goal in the reconstruction of the Afghan state.<sup>3</sup> However, given the enormous challenges that arose, the path to achieving this goal was long. During the civil war (1992-1996) and the Taliban regime (1996-2001), judicial institutions had largely collapsed. Islamic scholars (*'ulama'*) assumed judicial responsibilities based on Islamic law, and human rights were frequently disregarded. All three branches of the state had to be almost entirely rebuilt. A key milestone was the introduction of a new constitution in 2004, which emphasises in its preamble:

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<sup>2</sup> Jochen A. Frowein, "De Facto Regime," in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, last updated March 2013.

<sup>3</sup> *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement)*, Art. II 2, U.N. Doc. S/2001/1154 (5 December 2001).

*"We, the people of Afghanistan, have (...) adopted this Constitution (...) based on the rule of law, social justice, the protection of human rights, and human dignity (...)."*<sup>4</sup>

The subsequent text of the constitution firmly embeds all essential characteristics of a substantive rule of law, including the separation of powers, the legal accountability of the administration, equality before the law, judicial independence, and respect for human rights, to the extent that it can be considered a fundamental state principle.<sup>5</sup> Notably, the Afghan understanding of the "rule of law" (*hakemiat-e qanun*) in the 2004 Constitution integrates not only international standards, such as the right to a fair trial, but also provides room for the application of Islamic law as a source of both legislation and jurisprudence, albeit only in a subsidiary role.<sup>6</sup> The Afghan Constitution thus served as the primary normative framework guiding the entire process of judicial reconstruction over the following decade.

All external actors were obliged to first reach agreements with Afghan state institutions. This was sometimes achieved through international agreements on common goals and measures for the justice sector, but also through bilateral arrangements on specific projects. The Afghan side did not always agree out of full conviction but sometimes did so because desired support was tied to specific interim results. Experience showed that only partners who genuinely aimed to achieve jointly defined goals could be successful. Consequently, conditionality in the promotion of the rule of law appears to be of little value.

### **3. Coordination Between Donors and the Afghan Government**

All agreements reached between the international community – i.e., the states and international organisations supporting the country's reconstruction – and the Afghan government after 2001 included provisions on judicial reconstruction.<sup>7</sup> However, the significance of this objective and the specific plans to achieve it changed over time. The relationship between both parties also evolved, with three distinct phases emerging.

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<sup>4</sup> Julia Pfeiffer, "Afghanistan – Ein langer Weg zur Rechtsstaatlichkeit," in: *Sicherheit und Frieden (S+F)* 3 (2010), pp. 175-179.

<sup>5</sup> Ramin Moshtaghi, "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts Between Them," in: Rainer Grote and Tilmann J. Röder (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, 2012), pp. 683-714.

<sup>6</sup> Tilmann J. Röder, "Complementarity and Conflict: State, Islamic, and Customary Justice in Afghanistan," in: *Majallah-ʻi muṭāliʻāt-i ḥuqūqī Afghānistān / Journal of Afghan Legal Studies (JALS)* 2 (2017), pp. 213-241.

<sup>7</sup> The texts of all agreements mentioned in this section are available at <https://reliefweb.int>.

### 3.1. Judicial Reconstruction as Intervention: The Lead Nations Approach (2002-2006)

The foundation for reconstruction was laid in January 2002 in Tokyo. At the *International Conference on Reconstruction Assistance to Afghanistan*, so-called ‘Lead Nations’ assumed responsibility for entire sectors of the state. Italy was tasked with supporting judicial reforms, which were integrated into a comprehensive programme for security and the rule of law within the *National Development Framework* of April 2002. The close interlinkage between these two fields resulted in a security-focused understanding of the *Rule of Law*, prioritising crime prevention and leaving little room for other aspects of the rule of law, such as legal accountability and judicial oversight of the administration.<sup>8</sup>

A significant issue was that the dominant role of individual Lead Nations limited the decision-making scope of their Afghan counterparts. This was evident, for example, in the enforcement of laws developed under the Italian justice project despite critical deficiencies. Meanwhile, the Italian special envoys and their small teams struggled to maintain oversight of judicial developments, let alone coordinate them effectively.<sup>9</sup> The unequal pace of progress across different sectors – with Germany-supported police reform also lagging behind – and the absence of central coordination increasingly jeopardised state-building efforts. Although the Lead Nations approach was soon deemed a failure, it was formally maintained for several years.<sup>10</sup>

### 3.2. Bilateralisation and Decentralisation (2006-2009)

By 2006, judicial reconstruction had entered its most intense phase. Numerous states, the World Bank, the EU, UNDP, and other donors contributed funds either directly or through project financing, implemented by consulting firms, international and national development agencies, and an overwhelming number of smaller NGOs, foundations, and institutes. The growing significance of the judicial sector was reflected in the *Afghanistan Compact* (London, 2006), which, unlike previous agreements, contained a dedicated chapter on *Governance, Rule of Law, and Human Rights* with concrete benchmarks and deadlines. The – overly ambitious – objective was to establish the full functionality of all constitutional institutions by the end of 2010, with a continued focus on the judiciary, particularly on law enforcement.

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<sup>8</sup> This understanding of the rule of law was reflected in common catchphrases at the time, such as "the three C's of the rule of law: cops, courts, corrections" or "the three P's: police, prosecution, prisons."

<sup>9</sup> *International Crisis Group*, "Afghanistan: The Need for International Resolve," 8 February 2008, p. 6.

<sup>10</sup> Ahmed Rashid, *Descent into Chaos: The United States and the Failure of Nation Building in Pakistan, Afghanistan, and Central Asia* (Viking, 2008), pp. 204 ff.

This marked the beginning of the most intensive phase of justice sector development. An unmanageable number of international and national development agencies, consultancy firms, small NGOs, foundations, and academic institutes not only brought aid but also introduced new problems. Many attempted to incorporate elements of their own legal systems, leading to conflicting approaches, for example, concerning the role of public prosecutors or legal aid systems. Furthermore, they sometimes competed with one another, with some even corrupting judicial officials to secure approval for lucrative projects, even if they contributed little to rebuilding the justice system.

To strengthen the leadership role of the Afghan government and better integrate the still fragmented sectors, partners established a *Joint Coordination and Monitoring Board* (JCMB), under which a highly complex structure was subordinated. Its Rule of Law Working Group at the second level comprised seven committees and numerous subcommittees. Other thematic working groups also addressed related issues, such as human rights, transitional justice, counter-narcotics efforts, and anti-corruption measures. However, the Afghan judicial institutions, lacking sufficient qualified personnel, struggled to manage the intricate coordination tasks.

At the same time, the international community increasingly financed demand-oriented reform efforts through the Justice Sector Reform Project, integrated into the Afghanistan Reconstruction Trust Fund managed by the World Bank. Budget support enabled Afghan judicial institutions to play a more active role in coordination. However, this multilateral approach was weakened by most donors continuing to provide funds mainly through bilateral channels to retain control over their use, leading to further fragmentation.<sup>11</sup>

To maintain an overview of bilateral cooperation and to coordinate efforts independently of Afghan representatives, the major donors and UNAMA established the *International Coordination Group for Justice Reform* (ICGJR). A key area of focus was the coordination of training programmes<sup>12</sup>, the rapid increase of which led to complications, including the phenomenon of ‘donor shopping’, where Afghan judicial representatives selectively engaged with donors that offered the best ‘deal’, sometimes including personal benefits such as expensive study tours abroad.<sup>13</sup> These transparency and coordination deficits contributed to rising corruption within the justice sector.

In 2007, the *Rome Conference on the Rule of Law in Afghanistan* sought to improve coordination by promoting joint planning and financing. However, despite efforts to centralise funding and coordination, most donors preferred to retain bilateral control over their contributions, undermining centralised coordination efforts. By 2008, a list recorded 221 such

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<sup>11</sup> Cf. Kai Gehring, Katharina Michaelowa, Axel Dreher & Franziska Spörri, Aid fragmentation and effectiveness: what do we really know?, *World Development* 99 (2017), p. 320 ff.

<sup>12</sup> Matteo Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan* (Routledge, 2010), pp. 66 ff.

<sup>13</sup> ‘Donor shopping’ was an informal expression used in various sectors among donor representatives.

projects, with the USA alone funding 83%, making it the largest donor in the justice sector.<sup>14</sup> These efforts were often driven by national self-interests, which massively undermined attempts at central coordination.

Another significant development during this period was the increasing expansion of judicial development from larger cities into the country's rural provinces. Two largely unconnected coordination mechanisms emerged in this context. Firstly, UNAMA established the *Provincial Justice Coordination Mechanism (PJCM)*, which was divided into eight regions.<sup>15</sup> At times, regular meetings between Afghan and international stakeholders were successfully set up in 30 of the country's 34 provinces.<sup>16</sup> The second mechanism outside Kabul was the level of civil-military cooperation (*CIMIC*).<sup>17</sup> Since 2006, the U.S. military had been carrying out support measures in the justice sector. These activities were planned by units subordinate to both the U.S. Embassy and U.S. military leadership, with the aim of ensuring a coherent approach to all U.S.-funded civilian and military activities. In order to link judicial projects across all areas controlled by foreign armed forces, the international military support mission *ISAF* established a joint coordination centre.<sup>18</sup> A key structure upon which it could rely was the *Provincial Reconstruction Teams (PRTs)* – military bases set up by individual nations to support the Afghan government in extending its territorial control and fostering reconstruction. However, the PRT approach resulted in inconsistent practices: while judicial institutions in some provinces benefited from military security, material support, training, and even salary supplements, e.g. in the UK supported Helmand province, others received no support at all. The coordination mechanisms in place were insufficient to ensure a uniform judicial development process across all provinces.

Another form of coordination during this period focused on addressing issues between state institutions. A key initiative in this regard was the *Coordination of Police and Prosecutor Project (CoPP)*, led by the European police mission *EUROPOL* alongside other international actors, which sought to improve cooperation between law enforcement agencies.<sup>19</sup>

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<sup>14</sup> Matteo Tondini, *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan* (Routledge, 2010), p. 72.

<sup>15</sup> Tilmann J. Röder, "Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan," in: *Max Planck Yearbook of United Nations Law (UNYB)* 11 (2007), pp. 307-312.

<sup>16</sup> "Enhancing Coordination," in: *Department of Peacekeeping Operations (DPKO), Justice Update* (May 2011), pp. 8-9.

<sup>17</sup> Sometimes also referred to as civil-military coordination.

<sup>18</sup> Tilmann J. Röder, "Civil-Military Cooperation in Building the Rule of Law," in: Michael Zürn et al. (eds.), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge University Press, 2012), pp. 206-232.

<sup>19</sup> European Court of Auditors, *The EU police mission in Afghanistan: mixed results*. Special Report, European Union, 2015, pp. 22-23, 41.

### 3.3. The US Diverges and the Beginning of Withdrawal (2010-2014)

All previous approaches to judicial development had focused on the state justice system. In 2009, the U.S. Special Envoy Richard Holbrooke – recognising the importance of traditional dispute resolution through elders’ councils – halted the implementation of major USAID programmes aimed at strengthening the state judiciary. However, this step was taken without prior coordination with Afghan and international partners, leading to problematic funding gaps. A year later, the U.S. introduced new programmes, including one on traditional dispute resolution, which the Afghan government accepted only reluctantly.<sup>20</sup> At an international conference in Kabul (2010), the Afghan government was also required to commit to developing an *Informal Justice Strategy*, but this effort failed later that same year due to opposition from human rights organisations and the judiciary.

In the *Kabul Conference Communiqué*, the area of *Governance, Rule of Law, and Human Rights* once again occupied a central position – partly because the objectives of the *Afghanistan Compact* had largely not been achieved. Systemic corruption, attacks on the judiciary, and a lack of political will had obstructed its implementation. At the *Kabul Conference*, new and even more ambitious benchmarks and deadlines were agreed upon, now extending far beyond the mere establishment of law and order in the country. For instance, the Afghan government committed to advancing administrative reform and strengthening the protection of women’s and children’s rights.

In an effort to improve their cooperation, Afghan and international partners agreed at the *Tokyo Conference* in 2012 on rules for mutual accountability, with compliance reviewed every two years. As part of this framework, the Afghan government undertook further commitments in the field of the rule of law. In reality, however, all of this did not change much.

Surveys conducted by the *Asia Foundation* illustrate how limited progress appeared from the population’s perspective. In 2006, 50% of respondents fully or partially agreed with the statement that state courts were fair and trustworthy; by 2014, this figure had risen to a substantial 69%. However, the percentage of those who believed that state courts dispensed justice effectively increased only marginally during the same period, from 51% to 54%. Among those who had interacted with the judiciary, 26% reported experiences of corruption in 2006; by 2014, this figure had risen to 55%. By contrast, in 2014, 85% of respondents described elders’ councils as fair and trustworthy, and 74% considered them to dispense justice effectively.<sup>21</sup>

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<sup>20</sup> USAID’s *Afghanistan Rule of Law Project* (2004-2009) was replaced with the expanded *Rule of Law Stabilization* (RLS) program, which one component (RLS-F) focusing on the formal justice sector (mainly the Supreme Court) and a new component (RLS-I) on the informal justice sector. *Congressional Research Service, Afghanistan: U.S. Rule of Law and Justice Sector Assistance* (R41484), 9 November 2010, p. 27.

<sup>21</sup> *The Asia Foundation, A Survey of the Afghan People* (2006), pp. 72, 85, 89; *The Asia Foundation, A Survey of the Afghan People* (2014), pp. 95, 200 ff.

With the withdrawal of the *PRTs* at the end of 2014, international support for judicial development in the provinces largely came to an end. The loss of protection from international forces led to an exodus of Afghan judicial personnel to the country's major cities; the resulting vacuum was filled not only by elders' councils but also by the Taliban's mobile courts, which had been gaining public trust for years due to their reputation for being just and, above all, free from corruption. At the same time, the deteriorating security situation across the country significantly restricted the operations of aid organisations, many of which withdrew from Afghanistan entirely.

#### **4. Coordination On the Implementation Level**

Coordination among international implementing agencies also occurred in two distinct forums. First, the *Rule of Law Board of Donors*, which operated at the embassy level and included major donors such as the World Bank. Thanks to the commitment of individual diplomats, this forum facilitated a constructive exchange of views on developments in the justice sector and the initiatives of various donors. The Board did not make funding decisions but sought to align so-called policy-with-means approaches among international actors and engaged in discussions with representatives of Afghan institutions and international organisations, who provided input on the key topics of the meetings.

Second, numerous attempts were made to coordinate activities at the implementation level. However, these efforts often failed due to the sheer difficulty of even cataloguing the various initiatives. After the Italian justice project proved to be largely ineffective, UNAMA's Rule of Law Unit organised regular meetings to find solutions for concrete problems, such as discrepancies in daily allowances for participants in judicial training programmes. However, when all international staff members of the Rule of Law Unit rotated at the end of 2010, UNAMA lost most of its institutional knowledge and abruptly ended its coordination efforts.

By that time, the US Embassy had already established parallel coordination structures, as the scope of activities by different US-funded actors had become unmanageable.<sup>22</sup> With the reorientation of the US Rule of Law portfolio in 2010, these structures were also expanded: a newly appointed Special Ambassador served as Coordinating Director for Rule of Law and Law Enforcement (CDROLLE), responsible for stabilisation efforts through civilian means, while a general led the Rule of Law Field Force (ROLFF) to provide military support to the justice sector as part of counterinsurgency operations. Additionally, an Interagency Planning

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<sup>22</sup> *U.S. State Department Office of Inspector General*, "Report of Inspection: Rule-of-Law Programs in Afghanistan" (Washington, D.C.: U.S. State Department, 2008), p. 23. See also Geoffrey Swenson, "Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed," in: *International Security* 42, no. 1 (2017), pp. 114-151.

and Implementation Team (IPIT) was set up to ensure overarching coordination.<sup>23</sup> These structures also invited non-US actors to engage in discussions, but they were unable to establish general coordination. This was also true for the international military mission ISAF, which became active in promoting the rule of law in Afghanistan from 2011 onwards. The NATO Rule of Law Field Support Mission (NROLFSM), created within ISAF, attempted to gain an overview of and coordinate the various activities, which may have been successful in regions where other actors could not operate for security reasons. However, on a national level, these coordination efforts remained unsuccessful.

## **5. Coordination of German Initiatives**

### **5.1. Agreements with Afghan Partners**

Various departments of the German federal government supported the development of the justice system in Afghanistan in different ways, depending on their respective objectives. While the Federal Foreign Office primarily allocated funds for rule-of-law projects to contribute to stabilisation, and the Federal Ministry of the Interior contributed to strengthening internal security through a police project, the Federal Ministry for Economic Cooperation and Development focused on the country's sustainable development. Their approaches to coordination with the Afghan government also differed. The Development Ministry, for instance, negotiated planned initiatives at the ministerial level and concluded international administrative agreements for their implementation, whereas the Foreign Office largely left coordination with Afghan government agencies to the implementing organisations.

In practice, this meant that organisations such as the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, the International Legal Foundation, or Medica Afghanistan in Kabul entered into Memoranda of Understanding with representatives of the Supreme Court, the Ministry of Justice, or other institutions regarding objectives and measures. In some cases, they even entirely dispensed with written agreements as a basis for their activities.

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<sup>23</sup> Congressional Research Service, *Afghanistan: U.S. Rule of Law and Justice Sector Assistance* (2010), available at <https://fas.org/sgp/crs/row/R41484.pdf>.

## 5.2. Coordination among German Stakeholders

Coordination among German stakeholders took place on two levels: between the involved federal ministries and among the implementing organisations. The ministries failed to develop a unified approach to promoting the rule of law. One reason for this was their focus on other issues, such as police reform and the implementation of UN Security Council Resolution 1325 on women's rights, from which individual tasks for promoting the rule of law were derived. Additionally, they largely left it to the implementing organisations to initiate projects. The result was a diverse range of projects, each appearing reasonable in itself but lacking an overarching strategy. Further complicating matters was the absence of a designated overarching coordinating body, and the Special Representatives for Afghanistan and Pakistan showed little interest in the subject.

Nevertheless, there was some success in linking rule-of-law promotion with security sector reform. The German Ministries of Development and Interior collaborated, among other things, to improve cooperation between police and public prosecutors in selected provinces. The German Agency for International Cooperation (GIZ) and the German police project implemented corresponding measures, such as jointly organising training sessions for law enforcement officers.<sup>24</sup>

The implementing organisations funded by the ministries only exchanged information sporadically. Particularly noteworthy are the GIZ, whose focus areas in rule-of-law promotion changed multiple times, the Max Planck Institute for Comparative Public Law and International Law<sup>25</sup>, which addressed topics that other actors ignored – such as constitutional and administrative law –, as well as Medica Afghanistan and the International Legal Foundation, which supported lawyers. However, systematic and continuous coordination at this level did not take place; rather, the extent of information exchange and even cooperation depended on individual initiative.

## 6. Insights on Coordination in Rule-of-Law Promotion

The case of Afghanistan clearly illustrates the critical importance of coordination in enabling sustainable, balanced development and ensuring the efficient use of financial and human resources. Five key conclusions for improved coordination can be drawn:

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<sup>24</sup> *Bundesregierung (German Federal Government), Fortschrittsbericht Afghanistan*, December 2010, p. 26.

<sup>25</sup> From 2013 onwards, these projects were continued by the Max Planck Foundation for International Peace and the Rule of Law.

1. Coordination must begin domestically, i.e., at the level of the federal government. Existing mechanisms – such as country-specific task forces and thematic working groups – do not fulfil this requirement.
2. The more actors involved in a particular context, the more important it is to establish well-resourced and, above all, authoritative units for coordination. If multiple coordination mechanisms are established, such as at national and provincial levels, they must be interconnected and hierarchically structured.
3. Bilateral cooperation is often useful, but it must not be used to advance national interests or lead to contradictory approaches.
4. Particularly with sensitive issues such as traditional dispute resolution, women's rights, and anti-corruption efforts, genuine consent from partner governments is essential. In these cases, pressure – such as through conditionalities – tends to be counterproductive.
5. Contradictions undermine the promotion of the rule of law, especially when legal principles are subordinated to security interests, as in Afghanistan.