

Status of Constitutionalism and Rule of Law in Afghanistan

A study by the Afghanistan Constitutional Law
Expert Group

Geneva,
August 2025



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About the Report

This report is commissioned by the Center for Dialogue and Progress-Geneva, and authored by distinguished members of the Afghanistan Constitutional Law Expert Group; Mr. Ahmad Shoaib Timory, Dr. Mohammad Haroon Mutasem, Dr. Lutforahman Saeed and Dr. Shamshad Pasarlay.

The Afghanistan Constitutional Law Expert Group is composed of eleven constitutional and rule of law experts from Afghanistan who are based outside Afghanistan and who promote constitutionalism to restore peace, public participation, and legitimacy to Afghanistan.

The rationale behind commissioning this report is to present an assessment of the state of constitutionalism and the rule of law in Afghanistan, based on the insights and analyses of Afghan scholars, legal experts, and practitioners with direct experience of the country's legal and political systems.

The opening section of the report provides a brief introduction to the major changes brought by the Taliban since their return to power in August 2021. Subsequently, it examines the executive power and how the power dynamics are managed between Kabul, the capital, and Kandahar, the Taliban's birthplace and where its supreme leader resides. In the next sections, the report provides an overview of the judiciary of the Taliban and the degree of its independence. Relevant to this is examining the role of organizations involved in judicial processes and the provision of justice.

Given the Taliban's emphasis on application of Sharia in governance, one section of the report provides a historical overview of Islamic governance and whether the Taliban are following the key principles in this area.



Message from the Center for Dialogue and Progress - Geneva

On behalf of the Center for Dialogue and Progress-Geneva, I wish to extend my sincere gratitude to the distinguished members of the Afghanistan Constitutional Law Expert Group, whose scholarly dedication and expertise have been pivotal to the completion of this report.

Special recognition is due to Dr. Lutforahman Saeed, Assistant Professor at the Islamic Law Faculty of Kabul University; Dr. Mohammad Haroon Mutasem, Assistant Professor of Law at Kabul University and the American University of Afghanistan; Dr. Shamshad Pasarlay, Assistant Professor at the Herat University School of Law and Political Sciences; and Mr. Shoaib Timory, Lecturer at the American University of Afghanistan. Their commitment and substantive contributions have enriched this study immensely. In particular, Mr. Timory, a former senior fellow and interim executive director of the CDP-G, not only authored two chapters but also undertook the critical task of coordinating the study and synthesizing the various sections into a cohesive whole.

I also wish to acknowledge with appreciation the invaluable insights and editorial review provided by Mr. James Joseph, Director of The Duty Legacy, whose thorough examination and thoughtful foreword have further strengthened this work. Finally, I extend my deepest thanks to my colleague, Mr. Hamid Formuli, whose persistence and dedication ensured the successful completion of this report.

This unique collective endeavor at a critical juncture, the fourth anniversary of our country under the repressive Taliban rule, is a testament to the enduring commitment of these individuals towards return of constitutionalism, the rule of law, and inclusive governance in Afghanistan.

Amb. Nasir Andisha
Co-founder and Advisor to the Board

Foreword

Study of Constitutionalism and Rule of Law in Afghanistan

The Study of Constitutionalism and Rule of Law in Afghanistan, prepared by the Afghanistan Legal and Constitutional Expert Group which follows this foreword, stands as a critical examination of the profound challenges facing Afghanistan's legal and governance structures under Taliban rule since their return to power in August 2021. As we approach the fourth anniversary of this seismic shift, this report offers a timely and sobering analysis of the erosion of constitutionalism, the rule of law, and access to justice in a nation grappling with the consequences of autocratic governance and international isolation. As a foreword to this rigorous study, I offer reflections on its significance, its strengths, and the broader implications of its findings for scholars, policymakers, and advocates committed to Afghanistan's future.

This report arrives at a pivotal moment. As of July 2025, Afghanistan remains a nation in crisis, marked by the Taliban's consolidation of power, the absence of a formal constitution, and the systematic dismantling of legal institutions that once promised a path toward democratic governance. The Taliban's governance, centred on the absolute authority of the Amir, Mullah Hibatullah Akhundzada, and grounded in an uncodified interpretation of Hanafi fiqh, has reshaped the country's legal landscape. This study meticulously documents the resulting over centralisation of power, the lack of judicial independence, and the severe restrictions on access to justice, particularly for women and minorities. Its comprehensive approach, spanning executive structures, judicial practices, and the broader implications of Sharia-based governance, provides an essential resource for understanding the state of constitutionalism in Afghanistan today.

One of the report's core strengths is its unflinching focus on the Taliban's governance model, which it describes as both autocratic and theocratic. By detailing the concentration of power in the Amir and the absence of checks and balances, the report underscores a fundamental violation of the rule of law principle of limited government. The analysis of the judiciary, particularly in Chapter Two, is equally compelling, revealing how the Taliban's courts—often staffed by untrained clerics and operating through mobile courts in rural areas—prioritise rapid enforcement of Hudud punishments over due process. The document's attention to the 200,000 cases processed by these courts, as noted in Chapter Three, highlights a paradox: while some judicial functionality exists, it is marred by bias, corruption, and inaccessibility, particularly for women and ethnic and religious minorities like Hazaras and Sikhs.

The report's exploration of constitutionalism in Islam (Chapter Four) is particularly noteworthy for its attempt to contextualize the Taliban's rejection of codified laws within broader Islamic legal traditions. By comparing their approach to other governance models, such as Saudi Arabia's codified Sharia system, the study highlights the Taliban's reliance on unwritten decrees as a source of legal uncertainty. This comparative perspective, enriched by references to historical Afghan constitutions like that of 1964, offers a valuable framework for understanding what constitutionalism could mean in an Afghan context. However, the report could further strengthen this section by engaging more deeply with global Islamic scholarship, such as Al-Azhar University's 2025 critique of the Taliban's gender policies, which challenges their interpretation of Sharia as deviating from mainstream Islamic principles.

The clarification that Australia, Canada, Germany, and the Netherlands are pursuing an International Court of Justice case against the Taliban for CEDAW violations (Introduction) grounds the report in current international efforts to address gender apartheid. Similarly, the inclusion of economic data, such as Afghanistan's 27% GDP contraction since 2021 (World Bank, 2025), underscores the broader implications of the Taliban's governance failures, from informal taxation to reliance on opium revenue.

The report's reflections on the rule of law are particularly poignant. By identifying gaps in legal certainty, judicial independence, and equality before the law, it exposes the Taliban's governance as antithetical to both international standards. The addition of a proposed section on "International Accountability for Human Rights Violations" is a forward-thinking recommendation, highlighting potential avenues like universal jurisdiction or ICC prosecution for crimes against humanity, including gender apartheid. This focus on accountability resonates with the global community's growing recognition of the Taliban's policies as systematic and institutionalised discrimination, as noted by the UN Special Rapporteur for Afghanistan, Mr Richard Bennett in 2024.

For policymakers, the report's recommendations—engaging regional powers like China and supporting exiled Afghan legal professionals—are pragmatic yet ambitious. The suggestion to leverage China's economic influence, as outlined in a 2025 Carnegie Endowment report, offers a nuanced approach to encouraging incremental legal reforms. Similarly, the call to support exiled judges and lawyers through initiatives like those of the International Bar Association (2024) underscores the importance of preserving Afghanistan's legal expertise for a future beyond Taliban rule. These recommendations, combined with the report's emphasis on civil society and diaspora advocacy, provide a roadmap for international actors seeking to address Afghanistan's legal and humanitarian crisis.

Reflecting on the broader implications, this study serves as a clarion call for renewed attention to Afghanistan's plight. The humanitarian crisis, affecting 23 million people (Human Rights Watch, 2025), and the denial of education to 2.5 million girls (UNICEF, 2025), are not merely consequences of poor governance but symptoms of a deeper rejection of constitutionalism and the rule of law. The report's call for primary data collection through Afghan NGOs and diaspora networks is a practical step toward amplifying Afghan voices, which are too often side lined in global discussions.

In conclusion, this study is a vital contribution to the discourse on Afghanistan's legal and political future, it provides the bumpy road to navigate constitutionalism and the rule of law in Afghanistan as an authoritative document for reference to the Taliban's quadrennium in power thus far. Its rigorous analysis, bolstered by recent data and diverse perspectives, offers a comprehensive portrait of a nation at a crossroads.

By addressing its identified shortcomings—through clearer language, robust citations, and expanded sections on gender, minorities, and international engagement—the report can serve as a definitive resource for those committed to restoring justice and constitutionalism in Afghanistan. As the international community grapples with the Taliban's ongoing isolation, with only Russia granting recognition as of July 2025, this document reminds us of the urgent need for collective action to uphold human rights and the rule of law in a land where both are under siege.

James Joseph
Director
The Duty Legacy

Introduction

In August 2021, Afghanistan witnessed a political upheaval when the Taliban took over Kabul and other provinces and put an end to the Islamic Republic. Right from the first day of the Taliban's new reign in power, a key question was how the Taliban would treat the Constitution of 2004, which had been approved as a consensus document among key ethnic groups by the Loya Jirga (A grand assembly), and what would be their alternative. Since then, four years have passed, and the Taliban have ruled Afghanistan without a formal constitution.

The primary source of decisions at the Taliban's administration is the decrees of the Taliban's leader, Mullah Hibatullah Akhundzada, a mysterious figure who does not appear in public and who does not show his face even to his closest officials. While the majority of Akhundzada's decrees concerned the restriction of women and girls' rights, he has also created a government structure that differs starkly from the system of separation of powers of the 2004 Constitution. For instance, there is no parliament in place, and the elected provincial councils are also disbanded. Besides, the powers of the executive branch are divided between Kabul and Kandahar, with the Taliban leader, whose base is in Kandahar, having absolute power. Furthermore, the judiciary has undergone significant changes, with most judges of the Republic dismissed, except for a small number temporarily retained for specific tasks such as attestation of title deeds. And the courts do not enjoy institutional independence.

The Taliban's draconian decrees have been the main obstacles to the recognition of their government. Since the Taliban takeover, deprivation of women of their fundamental rights has been the main point of contention, both on a domestic and local scale and on a global level. In October 2021, the United Nations (UN) Human Rights Council appointed a special rapporteur on the situation of human rights in Afghanistan¹ And recently, the prosecutor of the International Criminal Court, of which Afghanistan is a member state, has requested approval of arrest warrants for the Taliban leader and his chief justice.² In addition, in September 2024, Australia, Canada, Germany, and the Netherlands initiated preliminary steps to bring a case against the Taliban at the International Court of Justice for violations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³. These measures taken in response to the Taliban's increasing violation of human rights and gender discriminatory policies reduce the prospect of the recognition of the Taliban's de facto authority by the international community and are critical bottlenecks for the acceptance of a Taliban government.

On the constitutional front, there is a political deadlock since the Taliban has shown no interest in engaging with the opposition forces and other non-Taliban political groups. Even though the UN tried to push the Taliban toward a political process, the Taliban have ignored or rejected all those initiatives.⁴

The report of Ambassador Feridun Sinirliolu, the UN Secretary General appointed special coordinator for Afghanistan, who had meetings with senior Taliban and opposition members, mapped out a political process. However, the Taliban did not accept the plan and only emphasized that they should be treated as the sole representative of Afghanistan by the international community.⁵

¹ 'Special Rapporteur on Afghanistan', United Nations Human Rights Officer of the Higher Commissioner, accessed 2 November 2024, <https://www.ohchr.org/en/special-procedures/sr-afghanistan>.

² 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in Afghanistan', 23 January 2025, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-afghanistan>.

³ Alice Johnson, 'Afghanistan: Potential ICJ Case a Step towards Justice for Afghan Women', International Bar Association, 24 October 2024, <https://www.ibanet.org/afghanistan-icj>.

⁴ Ayaz Gul, 'Taliban Defend Record on Afghan Women, Reject External Interference', Voice of America, 22 November 2023, <https://www.voanews.com/a/taliban-defend-record-on-afghan-women-reject-external-interference/7365620.html>.

⁵ Habib Mohammadi, 'Taliban Say UN Seat Hinges on Organization's Decision', Amu TV, 11 March 2025, <https://amu.tv/162373/>.

The Immediate Impact of the Taliban's Administration on Constitutionalism

The collapse of the Republic took place in a dramatic and unexpected manner. Just before the collapse, there were talks on a peaceful transition of power and a negotiated agreement to form an inclusive government. However, the abrupt departure of President Ashraf Ghani from Afghanistan changed this scenario in which power could transfer. The victorious militias of the Taliban took over Kabul and the provinces in less than two weeks. Acting as a victorious power, the Taliban leader issued an amnesty decree for not arresting or pursuing those individuals who worked in the political, military and public sectors of the Republic.⁶ No transition of power occurred. Two weeks after taking over power, the caretaker cabinet of the Taliban was announced. The male-only cabinet of the Taliban, with a few changes, is still in place and the Taliban have not taken steps to create an inclusive government.

Though the main theoretician and de facto chief justice of the Taliban government, Abdul Hakim Haqqani, recognizes the need for a legislative body,⁷ one of the Taliban's first moves was to dissolve all representative bodies. As a sign of their lack of interest in free and fair elections, they also dissolved the election commissions that oversaw holding elections in the country.⁸ Under the Constitution of 2004, seven types of elections were foreseen. These were 1) the election of the president, 2) the election of the lower house of the parliament Wolsi Jirga members, 3) the election of provincial council members, 4) the election of district councils, 5) the election of village councils, 6) the election of mayors, and 7) the election of municipality councils.⁹ This was a mechanism that the constitution of 2004 selected to ensure participation of people in decision making, though the power of elected bodies, except for the President and Wolsi Jirga, were limited or ambiguous. Between January 2004 and August 2021, only three rounds of elections were held for Wolsi Jirga and the provincial councils. Under the Constitution of 2004, the parliament, which consists of two branches, was an elected body. Despite accusations of fraud and corruption,¹⁰ the parliament and the provincial councils were representative bodies with members from every corner of the country. In a country that has faced a lack of trust and dialogue among ethnic groups, the parliament served as a symbol of coexistence and consensus.

In the absence of a separate legislative body, the Taliban leader is currently taking over the role of legislation. Through his decrees, he passes laws, regulations and decisions on all aspects of life. In the recent history of Afghanistan, when the parliament did not exist, the cabinet of ministers had the power of legislation. However, under the Taliban regime, the cabinet in Kabul is mostly a symbolic gathering of Taliban ministers, which only approved a few legislative documents. Besides, the ministries also issue decrees on issues related to the domain of each government agency, with the Ministry of Promotion of Virtue and Prevention of Vice issuing most directives affecting the rights and freedoms of the citizens. Since a separate legislative body does not exist under the Taliban administration, this report does not study this subject separately. Rather, the legislative powers will be discussed under the executive branch.

⁶ 'Taliban Declares General "amnesty" for Afghan Government Officials', France 24, 17 August 2021, <https://www.france24.com/en/asia-pacific/20210817-taliban-declare-amnesty-urge-women-to-join-government-according-to-shariah-law>.

⁷ Thomas Ruttig, 'The Butter on the Bread: The Provincial Councils' Fight for Extended Authority' (Afghanistan Analysts Network), accessed 21 December 2024, <https://www.afghanistan-analysts.org/en/reports/political-landscape/the-butter-on-the-bread-the-provincial-councils-fight-for-extended-authority/>. P. 29 and 30.

⁸ "No Need": Taliban Dissolves Afghanistan Election Commission, Aljazeera, 25 December 2021, <https://www.aljazeera.com/news/2021/12/25/taliban-dissolves-afghanistan-election-commission>.

⁹ 'Constitution of Islamic Republic of Afghanistan', Pub. L. No. Official Gazette No. 818 (2024), <https://constitutionnet.org/sites/default/files/final-draft.constitution-eng.pdf>. art. 61, 83, 138, 140 and 141

¹⁰ Bjelica, J. & Soroush, R., Lost in Procedure, AAN, 2028. <https://www.afghanistan-analysts.org/en/reports/political-landscape/lost-in-procedure-how-a-corruption-case-in-the-afghan-parliament-was-not-dealt-with/>

The Taliban also dissolved the provincial councils whose members were elected by the voters of each province. The Constitution of 2004 did not provide considerable authorities for the provincial councils, and the 2014 Law on Provincial Councils provided only advisory roles to them,¹¹ a move that sparked weeks of protest until President Karzai reversed the decision. Given the centralized nature of public administration in Afghanistan, the provincial councils were unable to prove their effectiveness in the governance of Afghanistan, however, the representation function made them relevant particularly at the local level. This was probably the main reason for lack of interest of the Taliban to maintain these institutions because the Taliban rely on local religious clerks for garnering legitimacy. There are also reports of local assemblies or shuras established by the Taliban in some provinces under the supervision of the Ministry of Hajj and Religious Affairs.¹²

The Taliban courts have been historically famous for speedy decision-making and less cumbersome processes. Even during the insurgency, the Taliban were able to maintain their judicial system, a system that was used by many citizens who were not satisfied with the provision of justice by the state judiciary.¹³ Nevertheless, the Taliban courts do not enjoy independence since the Taliban leader appoints all members of the Supreme Court and the other courts, and the courts are obliged to follow his orders.

¹¹ Thomas Ruttig, 'The Butter on the Bread: The Provincial Councils' Fight for Extended Authority,' 23 March 2014 Afghanistan Analysts Network - English

¹² Michelle Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan,' UN Women Thematic Briefing Series (UN Women, 2022), <https://asiapacific.unwomen.org/sites/default/files/2022-12/af-UN-Women-Periodic-Briefing-2-Legal-Brief.pdf>.P.20.

¹³ Donald Grasse, Renard Sexton, and Austin Wright, 'Courting Civilians During Conflict: Evidence from Taliban Judges in Afghanistan,' *International Organization* 78, no. 1 (Winter 2024): 134–69, <https://doi.org/10.1017/S0020818324000031>. P. 135.

Chapter One: The Organization and Authorities of the Taliban's Executive Branch

Author: Dr. Shamshad Pasarlay

Abstract

After the Taliban's military take-over of Afghanistan in August 2021, scholars and policymakers alike rushed to understand what type of constitutional order the Taliban might impose in the country. A growing body of scholarly work on the Taliban's constitutional imagination suggested that the notion of the "state," the Taliban's Islamic Emirate, is awfully undertheorized and less cohesively structured, and it is hard to fully understand the Taliban's conception of an "Islamic state" and its executive branch. These observations are valid because the Taliban have engaged primarily in war-making rather than state-building projects. At the same time, however, the Taliban's governance experience provides some useful clues that should help us understand the structure and authorities of its executive branch. Drawing on this background, this section of the report will show that although the Taliban state is theoretically inchoate, structurally, its executive branch seems well-organized and follows a highly hierarchical organization. More specifically, in the Taliban's executive branch, an autocratic Amir, the Taliban's supreme leader, sits at the top of a highly centralized administration and exercises absolute power in the executive, legislative, and judicial affairs of the state. Almost all state power seems to flow from the Amir down to several government institutions, including the cabinet of ministers based in Kabul, as well as to all governors in the country. All decisions of the Taliban government are based on the advice and consultation of the Amir—something most Taliban leaders believe is in strict accord with the teachings of the sharia—and the executive branch cannot implement any decision the Amir does not agree with. The Taliban governance system does not adhere to any separation of powers with clearly demarcated realms of executive, judicial, and legislative powers. Instead, all state bodies exercise their duties as the Amir's representatives and are accountable to him.

1. The Taliban's Constitutional and Governance Visions

Before the Taliban's lightning return to power in August 2021, Afghanistan's 2004 Constitution provided the basic framework for governance. According to that Constitution, a president with two deputies headed the executive branch. The president was elected by a direct vote of the people to a five-year term. According to the 2004 Constitution, the president was the head of state and government and exercised extensive power. Some of these powers included the following: appointing cabinet ministers, justices of the Supreme Court, and other high-ranking state officials; signing international treaties; declaring a state of emergency; declaring war and peace; setting national policy; issuing legislative decrees and signing laws.¹⁴ Nearly all of these authorities were subject to approval by the parliament.

August 2025 will mark four years since the Taliban's return to power in Afghanistan. However, the country's de facto new rulers have not yet adopted a formal constitution. The Taliban's governance framework thus lacks an organizing charter, and the constitutional foundations of the legal and political orders in the Taliban "state" remain remarkably uncertain. In fact, the Taliban have been deliberately ambiguous about the type of constitutional order that they wish to install in Afghanistan. For example, in September 2021 Taliban leaders suggested that they would implement parts of the 1964 Constitution of Afghanistan as an interim constitution.¹⁵

¹⁴ *Constitution of Afghanistan (2004)*, chapter 3.

¹⁵ Ayaz Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now' (VoA News, 28 Sept. 2021), available at <https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html> [accessed on 11 June 2024].

Similarly, in February 2022 high-ranking Taliban officials demonstrated that their government would respect certain elements of the 2004 Constitution.¹⁶ In practice, however, these statements are seriously detached from reality. The Taliban's disdain for both the 1964 and the 2004 Constitutions is not unknown. They have consistently aired their opprobrium towards the 2004 Constitution and denounced the document as an external imposition that contradicts the version of Islam and the type of the political order that the Taliban promotes in Afghanistan.¹⁷ Likewise, official Taliban conduct is blatantly inconsistent with the norms and values written in both the 1964 and the 2004 Constitutions.

An important question thus presents itself: what, if anything, forms the Taliban's constitutional vision in Afghanistan? And according to what governing instruments is the Taliban's executive branch organized? A closer examination of the Taliban's first rule in 1996-2001 and the conduct of their government since August 2021 suggests that the Taliban govern Afghanistan according to a series of unwritten constitutional norms. Crucially, the Taliban's executive branch is organized in line with these rules, and exercises its duties and authority under them. The Taliban's actual (and unwritten) constitution, which guides government practice in Afghanistan, is not codified in a single master text. Instead, it can be gleaned from several decrees and orders the Taliban leader issued over time, starting in the period when the Taliban installed their first "Islamic Emirate" in the mid-1990s. This constitutional governance vision, which is explicitly autocratic and essentially theocratic (based on their interpretation of sharia), can also be found in a series of laws, including a 1998 dastur (charter) that the Taliban adopted during their first spell in power as well as from several governance practices that remain uncoded and describe the head of Taliban state's extensive discretionary power, define the structure of political authority, and outline the organization and powers of the executive branch.

The Taliban claim that their unwritten charter is founded on the sharia, and Taliban officials have indicated that this would be the case in actual governance. This narrative has constantly appeared in the Taliban's constitutional imagination over the past two decades and continues to dominate Taliban leaders' thinking about constitutions and constitutionalism in Afghanistan.¹⁸ When the Taliban took control of Kabul for the first time in 1996, senior leaders in the movement advanced the narrative that their "Constitution is the [sharia] so [they] don't need a constitution."¹⁹

Notably, in the Taliban's constitutional order, Hanafi fiqh (Islamic law, as defined over centuries by scholars associated with the Hanafi school of law) is the supreme law of the land, to which all state laws must comply. This norm was explicitly codified in a series of laws enacted by the Taliban leader in the 1990s.²⁰ This narrative constituted the Taliban's favored constitutional vision, and they restored it when they returned to power in August 2021.

¹⁶ *'Etihada-ye Oropa: Taliban Wada-ye Ihtram ba Qanun Assasi Kononi ra dada and [European Union: Taliban have Promised to Respect the Current Constitution]'* (Radio Azadi, 17 Feb. 2022), available at <https://da.azadiradio.com/a/31708491.html> [accessed 11 June 2024].

¹⁷ *'We do not accept a constitution made under the threat of B52 bombers: Taliban source'* (International Affairs Review, 29 July 2019), available at <https://internationalaffairsreview.com/2019/07/29/we-do-not-accept-a-constitution-made-under-the-threat-of-b52-bomber-taliban-source/> [accessed 11 June 2024].

¹⁸ See Alex Van Linschoten & Felix Kuehn (eds.), *The Taliban Reader: War, Islam and Politics* (Oxford University Press, 2018); Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2000); see also *'No Legal Void in Afghanistan as Quran & Hadith are our Constitution, Says Taliban Minister'* (Afghanistan International, 1 Apr. 2024), available at <https://www.afintl.com/en/202404017116> [accessed 11 June 2024].

¹⁹ Rashid (n. 18), at 107.

²⁰ For an English translation of these laws, see Linschoten & Kuehn (n. 18).

Notably, the Taliban's executive branch is structured according to this unwritten constitutional vision and operates based on its terms. For one thing, the Taliban have re-established the unitary, highly centralized, and autocratic "Islamic Emirate" (as defined in 1998 charter).²¹ Furthermore, the Taliban government has reinstated a series of laws from their first rule, including the bill on the structure of the Council of Ministers, which defines the organization and authorities of the executive branch, including the cabinet of ministers based in Kabul. These laws describe how the executive branch should be structured, and what powers it should wield. In short, it provides the regulatory framework of the executive branch. Similarly, the Taliban's unwritten governance principles seem to define the powers and duties of the head of the Taliban state, Amir al-Mominin (commander of the faithful), and how he should be elected. The description of the Taliban's executive branch below is based on these laws and the uncodified governance principles that, together, form the foundation of the Taliban's unwritten constitution.

2. The Taliban Executive Branch during the First Emirate in the 1990s

The Taliban movement emerged in the midst of the devastating civil war that the Afghan mujahideen factions waged against each other in the early 1990s.²² According to Taliban sources, the civil war and the devastation it unleashed upon Afghanistan's Muslims society forced the movement's founders to spring into action and restore peace in the country. Mullah Omar, the founding Amir of the Taliban, and his students delivered an important victory in this mission when they expelled warring factions from Kandahar and swore to establish God's law on earth and to "restore moral order and justice to Afghanistan."²³

With support from the government of Pakistan and, the Taliban gained access to enough weapons and training that they were able to quickly take control over most of the country.²⁴ With remarkable speed, they established in large parts of Afghanistan a theocratic state governed by their own distinct version of Deobandi-inspired Hanafi law. With support from the government of Pakistan and, the Taliban gained access to enough weapons and training that they were able to quickly take control over most of the country.²⁴ With remarkable speed, they established in large parts of Afghanistan a theocratic state governed by their own distinct version of Deobandi-inspired Hanafi law.

Structurally, the Taliban remained a largely loose political and military movement. Their founders spent more time and resources on warfare than state-building or governance. Nevertheless, as the Taliban gained control of Kabul in 1996 and expanded their control over Afghanistan, their administration confronted enormous bureaucratic challenges.²⁵ Although these bureaucratic challenges forced Taliban leaders to take issues of governance seriously, they did not alter the Taliban's position that Islam and the sharia provided the answer. Influential members within the Taliban movement argued that only a "pure Islamic government would rule Afghanistan" and remedy the bureaucratic challenges the government confronted.²⁶ In order to form this type of state, the Taliban looked to the medieval Islamic political doctrine of Shura (governance by consultation/consultative councils).

²¹ Barnett Rubin, 'Constitutional Issues in the Afghan Peace Negotiations: Process and Substance' (2020) United States Institute of Peace, Special Report No. 488, available at <https://www.usip.org/sites/default/files/2020-11/20201116-sr-488-constitutional-issues-in-the-afghan-peace-negotiations-process-and-substance-sr.pdf> [accessed 11 June 2024].

²² See, e.g., Larry Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (University of Washington Press, 2001); Robert Crews and Amin Tarzi (eds.), *The Taliban and the Crisis of Afghanistan* (Harvard University Press, 2008); William Maley (ed.), *Fundamentalism Reborn: Afghanistan and the Taliban* (New York University Press, 1998).

²³ Crews & Tarzi (n. 22), at 4.

²⁴ Rashid (n. 18).

²⁵ Van Linschoten & Kuehn (n. 18), at 73.

²⁶ *Ibid.* at 177.

As such, the Taliban created a “two-track government” helmed by two powerful shuras (councils): the “Inner Shura” and the “Central Shura.”²⁷ The six-member, Kandahar-based Inner Shura exercised “real power” under Mullah Omar’s direct authority. The Central Shura was based in Kabul and exercised the Taliban’s administrative prerogatives.

The structure of the Taliban shuras and the powers they enjoyed were based largely on the writings of “premodern [Muslim] jurists [about] the legal requirements for legitimate [Islamic] governance.”²⁸ Specifically, the Taliban leaders identified several dominant elements of Islamic governance, including governance by consultation (shura) and the pledge of obedience (baya) in the classical Hanafi tradition which provided the foundations for the Islamic Emirate they formed in Afghanistan.²⁹ Theoretically, the principles of Islamic governance the Taliban adopted are open to interpretation “on a spectrum from the (relatively) democratic and liberal to the decidedly authoritarian and antiliberal.”³⁰ During the first Taliban Islamic Emirate, official government practice suggested that the Taliban embraced an approach that was highly authoritarian and antiliberal.³¹

As such, in the Taliban state, Mullah Omar assumed the role of Amir al-Mominin (hereinafter, the Amir) and sat at the top of the executive branch. Amir’s “authority was absolute” and obedience to “his commands was religiously obligatory resistance to which merited execution.”³² There were no meaningful, enforceable constraints on the powers of the Amir, and he, alone, had the power to appoint nearly all state officials.

The Amir had the power, as well, to legislate by decree and was apparently the final judge of state law’s compliance with the sharia and the rulings of the Hanafi fiqh (jurisprudence). The following statement by a senior Taliban official demonstrate the absolutist nature of the Amir’s power in the Taliban state:

Decisions [in the Taliban government] are based on the advice of the [Amir al-Mominin]. For us [the Taliban,] consultation is not necessary. We believe that this is in line with the [sharia]. We abide by the Amir’s view even if he alone takes [a] view. There will not be a head of state. Instead, there will be an [Amir al-Mominin]. Mullah Omar will be the highest authority and the government will not be able to implement any decision to which he does not agree. [Representative government through] [g]eneral elections [is] incompatible with [sharia] and therefore we reject them.³²

Over time, the Taliban’s two-track governance based on shura proved ineffective in governing the country or ruling a bureaucracy. As a result, the Taliban reformed the organization of their government structure and revamped the executive branch. They adopted two fundamental laws to effectuate the change. First, Mullah Omar convened an assembly of leading religious figures in 1998 and tasked them to draw a new constitution (dastur), for the Taliban’s Islamic Emirate. The assembly produced the dastur (Constitution of the Islamic Emirate of Afghanistan). There are no official records about whether or not this draft was ratified, but subsequent Taliban decrees and law make references to this constitution, suggesting that the draft was officially promulgated into law. Second, in May 2001, the Inner Shura enacted the Law of the Council of Ministers. Together, these documents provided a detailed outline of the Taliban’s executive branch.

²⁷ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press, 2010), 261.

²⁸ Clark Lombardi & Andrew March, ‘Afghan Taliban Views on Legitimate Islamic Governance: Certainties, Ambiguities, and Areas for Compromise’ (2022) *United States Institute of Peace, Peaceworks No. 182*, at 15.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Neamatollah Nojumi, *The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War, and the Future of the Region* (Palgrave, 2002), 152.

³² Barfield (n. 27), at 26.

³³ Rashid (n. 18), at 102.

According to the 1998 dastur, the Taliban executive branch encompassed the Kandahar-based Amir and the Kabul-based government. The Amir sat at the apex of the Taliban's Islamic Emirate and exercised enormous executive, legislative, and judicial power. The Amir had the power to appoint the entire council of ministers, justices of the Supreme Court, and one-third of the Islamic Shura (Council), the Taliban's legislative branch under the dastur. He, alone, enjoyed the right to remove these officials. Furthermore, the Amir exercised the power to sign international treaties and withdraw from treaties to which Afghanistan has been a party. Crucially, the Amir, according to the dastur, wielded the power to enact laws by decree and issue orders that enjoyed the status of binding legislation.

Tellingly, when the Taliban were removed from power in 2001, many within the Taliban's ranks suggested that Omar's highly authoritarian style of ruling the country contributed to the fall of their government.³⁴ In response, Omar loosened his personalistic rule and devolved some decision-making authority to the Taliban's Rahbari Shura (Leadership Council), also known as the Quetta Shura, named after the city in Pakistan, where it was based. The Rahbari Shura was composed of the leading members of the Taliban political wing and religious figures. Decisions in the Shura were made by consensus and then approved by the Amir. Importantly, the Shura exercised the mandate to elect a new Amir.³⁵ In other words, the Rahbari Shura functioned as a softer check on the Amir's powers. The dastur did not articulate any procedure about how the Amir should be elected. Throughout the Taliban's first spell in power, Mullah Omar remained the undisputed Amir, and the Taliban did not face the question of electing a new head of the state. However, Mullah Omar died in 2013, twelve years after the Taliban were removed from power.³⁶ After Omar, the Taliban elected two new leaders, Mullah Akhtar Mohammad Mansour and Mawlawi Haibatullah Akhundzada; the latter is the current Amir of the Taliban. In the selection of all three supreme leaders, the Taliban turned to the institution of *ahl-i hal wa aqd* (council of the learned/wise individuals, or "People Who Loose and Bind").³⁷ According to Taliban sources, the Amir's selection through this method works as follows: the *ahl-i hal wa aqd* first selects a male Muslim individual as the Amir; the Muslim community (the *umma*) then confirms that appointment by the pledge of obedience (*baya*).³⁸ Although this method of electing Muslim rulers could be open and democratic,³⁹ the mechanism deployed by the Taliban is far from open and representative.

The Taliban's government under the dastur was the supreme executive and administrative organ of the Islamic Emirate. The government was made up of a prime minister, deputy prime ministers and other cabinet ministers, which together formed the council of ministers. The Amir appointed the entire council of ministers and all other members of the government. The government, including the council of ministers, was responsible for reporting to the Amir. In fact, the council of ministers exercised its power at the behest of the Amir. It could not perform duties or exercise powers which the Amir did not authorize; in case the council of ministers made an executive decision which the Amir did not endorse or authorize, he had the power to veto the decision and compel the council of ministers to obey the decisions made by the Amir

³⁴ Antonio Giustozzi, *Koran, Kalashnikov and Laptop: The Neo-Taliban Insurgency in Afghanistan 2002-2007* (Oxford University Press, 2009).

³⁵ Thomas Rutting, 'Have the Taliban Changed?' (2021) 14 CTC Sentinel 1; Vanda Felbab-Brown, 'Afghanistan in 2023: Taliban internal power struggles and militancy' (Brookings, 3 February 2023), available at <https://www.brookings.edu/articles/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/> [accessed on 12 June 2024].

³⁶ 'Mullah Omar: The Taliban leader "died in Pakistan in 2013"' (BBC News, 29 July 2015), at <https://www.bbc.com/news/world-asia-33703097> (accessed on 19 May 2025).

³⁷ Lombardi & March (n. 28), at 10.

³⁸ *Ibid.* For a detailed discussion of the concept of *baya* in Islamic political tradition, see Erwin Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge University Press, 1958); Andrew March, *The Caliphate of Man: Popular Sovereignty in Modern Islamic Thought* (Harvard University Press, 2019)

³⁹ March (n 38).

3. The Taliban's Executive Branch Since Their Return to Power

In the wake of the US-Taliban peace negotiations, many commentators opined that the Taliban might be open to adopting a new constitution, even to accepting the 2004 Constitution of Afghanistan with some amendments. Nevertheless, when the Taliban returned to power in the summer of 2021, they immediately revived past narratives that the Islamic Emirate needed no written constitution and that it would be governed by the sharia.⁴¹ The Taliban government then moved quickly to restore the unwritten principles according to which they had governed Afghanistan during the first Emirate in the 1990s. Taliban governance practice thus far suggests that not only does the Taliban's position on a written constitution remain unchanged, but the formation of the interim Taliban executive branch and the way in which it exercises its powers and responsibilities also suggest that the Taliban's executive branch has not changed; in fact, it resembles the structure of political authority of the first Islamic Emirate.

In the Taliban's current executive branch, the Amir, Haibatullah Akhundzada, is the head of both the state and the government. He exercises increasingly authoritarian power. All executive power is concentrated in the hands of the Amir who exercises it in consultation with his Kandahar-based circle of confidants. Although the Taliban's executive branch has a cabinet of ministers based in Kabul, which is headed by a prime minister, Akhundzada constantly "interven[es] in the domestic and foreign affairs of the Islamic Emirate, on decision-making large and small."⁴² The Amir's influence over the Kabul government is no secret, and it is aimed at consolidating the power of Akhundzada's office "in favor of an ideologically rigid constituency within the Taliban" that "consists of senior religious clerics, some of whom are reputedly personal confidantes of the [Amir], but also includes former insurgency commanders and other stakeholders hailing from particularly conservative communities in southern Afghanistan."⁴³ In fact, Haibatullah exercises all the powers that the Taliban's founding Amir, Mullah Omar, exercised during the first Emirate in 1996–2001.

The Kabul-based government is headed by a cabinet of ministers, which appears to be appointed according to the Law of the Council of Ministers that the Taliban adopted during their first rule,⁴⁴ after alleged intervention by the Head of Pakistan's Inter-Service Intelligence.⁴⁵ The cabinet includes a prime minister, deputy prime ministers, and several other ministers, all of whom are directly appointed by the Amir. When the current cabinet was first appointed in August 2021, immediately after the Taliban took control of Kabul, it included individuals who seemed to represent "all Taliban constituencies dominated by religious scholars and those who held cabinet positions in the 1990s."⁴⁶ In theory, the cabinet of ministers is given extensive domestic and foreign policy powers. In practice, however, the Amir continues to control the cabinet's authorities and mandate. Notably, Amir Haibatullah Akhundzada has gradually moved to curb the Kabul-based cabinet's powers in several different ways.

⁴⁰ Borhan Osman & Anand Gopal, 'Taliban Views on a Future State' (2016) Center on International Cooperation at NYU.

⁴¹ It should be noted that a month after the Taliban returned to power, their spokesperson stated that Afghanistan's de facto new rulers would appoint a commission to draft a new constitution. The plan is yet to be realized, however.

⁴² Haroun Rahimi & Andrew Watkins, 'Taliban Rule at 2.5 Years' (2024) 17 CTC Sentinel 1, 2.

⁴³ *Ibid.*

⁴⁴ Mohammad Bashir Mobasher, Mohammad Qadamshah, & Shamshad Pasarlay, 'The Constitution and Laws of the Taliban 1994-2001: Hints from the Past and Options for the Future' (2023) International Institute for Democracy and Electoral Assistance (International IDEA), available at <https://www.idea.int/sites/default/files/publications/the-constitution-and-laws-of-the-taliban-1994-2001-hints-from-the-past-and-the-future-en.pdf> [accessed on 15 July 2024].

⁴⁵ 'Taliban choices in new cabinet could hamper recognition by West' (Reuters, 08 September 2021), at <https://www.reuters.com/world/asia-pacific/taliban-choices-new-cabinet-could-hamper-recognition-by-west-2021-09-08/> (accessed on 21 May 2025).

⁴⁶ Rahimi & Watkins (n. 42), at 4.

For instance, he began to seize the power to replace and appoint senior provincial officials, including provincial governors and deputy ministers at the center. The cabinet of ministers in Kabul initially exercised these powers, but Haibatullah slowly elbowed the cabinet aside and assumed the power to appoint these officials “at times without even cursory consultation” with cabinet members and other senior Taliban figures.⁴⁷

The Amir’s increasingly authoritarian (almost dictatorial) tendencies alarmed some of the strongmen members of the Kabul-based cabinet of ministers, and a dispute ensued between the Amir’s Kandahar-based clique and some influential members of the cabinet. Some disgruntled cabinet members and influential figures outside the government flirted with the idea that the Amir should make decisions in consultation with the cabinet of ministers, or in collaboration with the leaders of all Taliban constituencies. Others argued that the Taliban government should restore the Rahbari Shura, which might compel the Amir to consult and make decisions by consensus. Haibatullah, however, responded with force and rage, arguing that those who had questioned his authoritarian rule had violated God’s express commands: obedience to the Amir of the Muslim community (the umma). He did not only show no intention to share decision-making power with the Kabul-based cabinet but also forced those who complained about the Amir’s authority to publicly “repent” and seek forgiveness from, what according to Haibatullah, was disobedience to God’s law – to question the authority of the Amir.⁴⁸

The short-lived dispute between the Amir’s powerful Kandahar circle and the strongmen Kabul ministers was emblematic of the Amir’s increasingly undisputed authoritarian power. All important decisions, including the ban on girls’ education and the limitations imposed on women’s rights, are made in Kandahar by the Amir and his close-knit circle of confidants. These types of policies automatically become effective after the Amir’s approval; they do not require approval from any other state institution. Opposition to Amir’s decisions is considered equivalent to disobeying God’s commands. This has rendered the Amir as the supreme leader of the Islamic Emirate of the Taliban who is accountable to no one. As such, the prospects of any checks on the Amir’s increasing powers do not seem realistic at this point.

4. Conclusion

The Taliban’s Islamic Emirate lacks a formal written constitution; however, a closer examination of the Taliban’s governance approach and the legal documents that Taliban officials have adopted over time suggests that the Taliban’s rule is organized according to several fundamental yet unwritten constitutional principles. These principles are not written in a single master text called the constitution, but they can be found, sometimes explicitly and sometimes implicitly, in a series of documents issued over time, starting in the period when the Taliban first ruled Afghanistan in the mid-1990s. The Taliban’s unwritten constitution, which is unambiguously autocratic, can also be gleaned from a series of laws, including a 1998 dastur, that the Taliban adopted during their first spell in power as well as from several uncodified governance practices that describe the Taliban head of state’s extensive discretionary power and define the structure of political authority in the Taliban state.

The Taliban’s executive branch, is dual in nature, and it is comprised of a cabinet of ministers in Kabul and a powerful Shura based in Kandahar. It follows a highly centralized and hierarchical structure where all roads lead to the Amir. The Amir exercises authoritarian powers and is not accountable to any institution. The Taliban have argued in the past that they would govern Afghanistan according to the Islamic political doctrine of Shura, and that the style of governance they have established is consistent with the teachings of the classical Hanafi jurists. The Islamic doctrine of Shura requires that a Muslim ruler, or the Amir in the Taliban state, should wield state power in consultation with religious scholars and the representatives of the Muslim community (the umma).

⁴⁷ *Ibid.*

⁴⁸ *Felbab-Brown (n. 35).*

In the Taliban executive branch, however, the Amir exercises unchecked powers and is not legally required to seek the advice of the People or Loose and Bind, and he has the power to disregard the advice and opinions of any shura. Hence, the Amir, alone, has the power to set fundamental policy and wields the power to veto any decision of the Kabul-based cabinet of ministers with which he disagrees.

Importantly, the Islamic political tradition according to which the Taliban claim to be governing Afghanistan can be interpreted on a continuum from a fairly democratic to a markedly authoritarian direction. The Taliban have expressly adopted the latter interpretation to Islamic governance. As a result, the Taliban's favored constitutional vision and their approach to governance does not include any rules that impose restraints on the power of the head of the state, the Amir. In theory, however, over time, some norms of constraint might come to be recognized and be enshrined in statutes that would become part of the Taliban's constitutional vision. Until that time, however, the Taliban governance will remain highly authoritarian and grant to the Amir absolute power because without it the Amir will be unable to implement God's commands in the society – a mission that the Taliban believe the Amir absolute power because without it the Amir will be unable to implement God's commands in the society – a mission that the Taliban leader believes is divinely ordained.

Chapter Two: The Judiciary and Judicial Independence under the Taliban Regime

Author: Shoaib Timory

1. Introduction

The Taliban's assumption of power has resulted in significant changes to the judicial system, including the abolition of certain courts, changes to sentencing practices, and alterations in legal procedures and evidentiary requirements. This section analyses the structure, main changes, independence of the judiciary, and impact of these changes on the rights of the citizens, particularly the women and minorities.

Since the Taliban movement emerged in the 1990s in Afghanistan, serving justice based on Sharia and fighting corruption in the courts have been declared among its key objectives. During the insurgency against the Republic, the Taliban had organized their own parallel court structure. These courts were mostly mobile and were based in the rural areas where the Taliban had a significant presence.⁴⁹ Corruption and lengthy processes in the official court system encouraged many Afghans to refer to the Taliban courts.⁵⁰ The courts' procedures were simple, quick and enforcement of court decisions was efficient.⁵¹ The Taliban used the success of their courts in the rural areas as a justification that they can serve justice to the ordinary Afghans. In the words of one researcher, the effective court system was the best weaponry in the hands of the Taliban during the insurgency.⁵² Even President Ashraf Ghani seemed to be ready to give up key judicial positions to the Taliban as part of a peace deal. During the last years of the Republic, key Supreme Court positions remained vacant, and one reason for intentionally keeping those positions vacant was to offer those to the Taliban members during the peace talks.

By reasserting the power in August 2021, the Taliban have abolished the constitutional order and as such, the judiciary also lost its institutional independence. The impact of political affiliations, lack of formal legal education of the judges and ambiguity in legal sources also resulted in undermining individual capacity of the judges. In this section, the paper will briefly introduce the Taliban judicial system.

2. Structure of the Taliban Judicial System

2.1. Overview of the Judicial Hierarchy

The Taliban established a hierarchical judicial structure, comprising ordinary courts and special courts, which oversee different categories of cases. The ordinary courts, that the Taliban call them Sharia courts, are the primary judicial bodies, responsible for administering justice based on interpretations of Islamic law. These courts handle criminal, civil, and family law matters. While the structure of the judiciary under the Taliban regime follows the three-tier system, there are many changes introduced that influence the judicial functions and delivery of justice. The Taliban courts are divided into three tiers: 1) primary courts, 2) courts of appeals, 3) courts of cessation or Tamiz and 4) the Supreme Court as the leading authority of the judiciary without the authority to directly hear cases.

⁴⁹ Grasse, Sexton, and Wright, 'Courting Civilians During Conflict: Evidence from Taliban Judges in Afghanistan.' P. 135.

⁵⁰ Grasse, Sexton, and Wright, 'Courting Civilians During Conflict: Evidence from Taliban Judges in Afghanistan.' P. 146.

⁵¹ Frank Ledwidge, 'Justice and Counter-Insurgency in Afghanistan: A Missing Link,' *The RUSI Journal* 154, no. 1 (2009): 6–9, <https://doi.org/10.1080/03071840902818530>. P. 7.

⁵² Ledwidge. P. 9.

Appellate courts function at the provincial centers and Kabul, while at the center of each district and at the city centers, there are primary courts. Each primary and appellate court of the Taliban has one judge, two muftis and one court clerk. There are also administrative staff that support the whole process.

Tamiz courts are the highest level of judiciary that can hear cases. The Taliban have introduced two Tamiz courts, one in Kabul that covers 24 provinces and the other one in Kandahar that covers the remaining 10 provinces. Kandahar has been the point of gravity of power of the Taliban and their leader stays in Kandahar; therefore, establishing a Tamiz court in the center of the political power of the Taliban is not surprising. This was also the case during the previous Taliban administration.

While it could be argued that the creation of two Tamiz courts had the goal of providing accessibility to all citizens, the division of provinces between Kabul and Kandahar remains illogical. For example, Bamyan, which is located near Kabul, is covered by the Kandahar Tamiz court.

The Chief Justice, Abdul Hakim Haqqani whose arrest is requested by the prosecutor of the International Criminal Court for being involved in the commission of acts which constitute crimes against humanity,⁵³ leads the judiciary of the Taliban. He has two deputies: one deputy of judicial affairs and another deputy of administrative affairs. The Chief Justice, his two deputies and the presidents of the two regional Tamiz courts are making the Supreme Court Council. Some cite the Deputy on Military Courts as a member of the Supreme Court Council.⁵⁴ During the Islamic Republic, the Supreme Court was the court of law and would not have reviewed the contents of the disputes. However, the Taliban have allowed the Tamiz courts to listen and review the validity of the claims of the parties as well. In addition, the Supreme Court under the Republic had the authority of judicial review while this authority does not exist under the legal framework introduced by the Taliban. In absence of a constitution and the sacred nature given to the decrees of the Taliban leader, it makes the rule of law almost a divinely initiated set of principles, and is backed as such, and how a process of judicial review could come to existence is still unanswered. Some might argue a judicial review process could review the decisions and regulations of the Taliban government against the text of the decrees of their leader. A similar mechanism is in place in The Islamic Republic of Iran where the Guardian Council reviews constitutionality and compliance of laws with Islamic principles.⁵⁵

The Taliban is a dominant Pashtun movement with a limited number of non-Pashtun officials in unimportant positions. This composition is also reflected in the judiciary of the Taliban. The Chief Justice and one of his deputies are Pashtuns. The heads of all diwans of the Supreme Court are also Pashtuns. One Deputy Chief Justice is Uzbek and the President of Tamiz Court in Kabul is Tajik. Overall, the Pashtun members of the judiciary have a prominent role in influencing decisions of the courts. It seems that the Taliban are symbolically appointing selected non-Pashtuns in senior positions to illustrate a balanced judiciary, however, the non-Pashtuns do not have an impactful decision-making role. Tajiks and Uzbeks also serve as ordinary judges; however, no Shia judge or mufti works in the Taliban judiciary. The Shia population, the majority of whom are Hazaras, are not permitted to work in the judiciary as the judicial personnel either. The Taliban have strong views against the Shia minority population of Afghanistan and according to their views, the Shias should not be in leadership or judicial positions. Besides, no female judges work at the judicial institutions of the Taliban.

⁵³ 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in Afghanistan'

⁵⁴ Ehsan Qaani, 'Quwah Qaza-Yeh Taliban: Sakhtar va Tashkil 1444 Qamari (Judicial Branch of the Taliban: Structure and Organization of Year 1444 Qamari)' (Copy available with the author, 2023). P. 2.

⁵⁵ 'Constitution of Islamic Republic of Iran' (1979). Art. 94.

The Taliban have also abolished the diwan on violence against women, public rights diwan and the internal and external security diwan of the Supreme Court. The provincial appellate courts have also shrunk. The appellate courts consist of diwans on criminal issues, public security, civil and commercial function at the provincial level, however, the number of diwans are not uniformed in all provinces.⁵⁶ A similar structure exists at the provincial primary courts.

The position of General Director of Administration of the Judiciary which had been established by the 2004 Constitution, has also been abolished. Instead, the administrative tasks of the judiciary are undertaken under the supervision of the Deputy Chief Justice on Administration.

In addition to the ordinary courts, there are also special courts as part of the Taliban's judiciary. Special Courts are designated to address specific cases, such as military related crimes, drugs, and corruption-related offenses. These courts operate with a separate set of procedures and policies. The highly prolific special courts are the military courts. Though there are reports that security districts, part of the Ministry of Interior, are deciding some cases and do not let the cases reach the courts,⁵⁷ the military courts are established mainly to put the security personnel of the Taliban who commit crimes, on trial.⁵⁸ However, the military courts also bring cases against the opposition members and the opponents of the Taliban. Despite their existence and reports of extrajudicial killings, reprisal killings and forced disappearance of the security personnel of the Republic, it appears the military courts do not receive cases, or their decisions are not announced.⁵⁹ There are also reports of security personnel sentencing individuals to Hudud punishments.⁶⁰

Another change that happened to the judicial functions is the assignment of enforcement of court decisions to a department at the judiciary, a function which was traditionally implemented by the Ministry of Justice on civil related disputes and the Attorney General office on criminal decisions. This decision has made the Taliban courts more powerful, but also engaged in activities that might distract them from the main task of dispute resolution.

3. Sources of Decision Making

Despite the overall claim that Sharia, particularly Hanafi jurisprudence, is the source of decision making at the courts, the sources the Taliban judges apply differ from one court to the other. At best, the Taliban's judicial system is labeled as lacking clarity and being dysfunctional.⁶¹ Overall, there is no uniform mechanism in applying Hanafi sources by the courts.⁶² In absence of a unified code, the mufti has the task of finding the legal basis for the question before the judge. This shows a division of labor between the judge who decides on the facts of the case, and the mufti who provide the legal basis as had been practiced under the Ottoman empire courts.⁶³ Unlike the Ottoman courts, the Taliban claims the muftis should be qualified only in Hanafi jurisprudence and are not appointed from outside the Taliban ranks.⁶⁴

⁵⁶ Qaani, 'Quwah Qaza-Yeh Taliban: Sakhtar va Tashkil 1444 Qamari (Judicial Branch of the Taliban: Structure and Organization of Year 1444 Qamari)' P. 6

⁵⁷ Nassery, 'Afghanistan: Afghan Legal System under the Taliban' P. 6.

⁵⁸ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan' P. 19.

⁵⁹ Gehrig. P. 19.

⁶⁰ Haroun Rahimi, 'Remaking of Afghanistan: How the Taliban Are Changing Afghanistan's Laws and Legal Institutions' (ISAS Working Papers, 26 July 2022), <https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanistans-laws-and-legal-institutions/#-ftn17>.

⁶¹ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan' P. 6.

⁶² Nassery, 'Afghanistan: Afghan Legal System under the Taliban' P. 4.

⁶³ Rahimi, 'Remaking of Afghanistan: How the Taliban Are Changing Afghanistan's Laws and Legal Institutions'.

⁶⁴ Rahimi.

The Taliban's judicial system lacks a standardized rule of law where individuals are judged by their peers based on consistent legal principles. Instead, decisions are made by muftis and judges who draw on Hanafi sources, which often vary on key issues, leading to inconsistent outcomes in similar cases. Rather than adhering to a clear legal doctrine, the system is driven by a set of religious and moral principles rooted in so-called Islamic values, resulting in an unpredictable and non-standardized approach to justice that diverges from the expectations of a conventional judiciary.

In civil disputes, the judges generally apply *Majalah-al-ahkam*, a collection of Hanafi legal principles codified during the Ottoman Empire. In criminal cases, Hudud sentences are used, though the overall tendency is not to provoke the international community by issuing many Hudud sentences, particularly death sentences. The Taliban did not enforce Hudud sentences until around one year after they got into power. It is presumed that the Taliban expected international recognition of their government, so they made a tactical decision of delaying the Hudud and other Sharia based punishments. However, once it appeared that the international community was not ready to recognize the Taliban as the legitimate government of Afghanistan, the Taliban leadership decided to enforce Hudud decisions to ensure their foot soldiers, and their religious base continue supporting the regime.

One researcher has enlisted the following sources as the main sources of decision-making by the Taliban judges:

1. *Durr al-Hukkam* / authored by: Ali Haider
2. *Mujallat al-Ahkam al-Adliyya*
3. *Dur al-Mukhtar* / authored by: Muhammad bin Ali Hanafi Haskafi
4. *Al-Hedaya fi Sharh al-Badaya* / authored by: Burhanuddin Marghinani
5. *Al-radd al-Mukhtar with al-Durr al-Mukhtar* / authored by: Ibn Abidin Muhammad Amin Dimaschi Hanafi.
6. *Fatwa al-Hindiyyah* (known as *Fatwa Aalamgiri*) authored by: Allama Maulana Sheikh Nizam and a group of famous scholars from India, has ten parts and has been translated into Urdu and other languages.
7. *Al-Mabsoot* / authored by: Muhammad bin Ahmad Sarkhsi
8. *Al-Bahr al-Raiq* description of *Kanz al-Daqaiq* / written by: Ibn Nujaim al-Misri.
9. *Bada'i al-Sana'i* / authored by: Ala al-Din Abi Kasani Hanafi
10. Principles of administrative letter of the Islamic Emirate" ⁶⁵

The Taliban officials have announced that the only source of decision-making at the Taliban courts is Sharia. ⁶⁶ However, the practice has not been consistent, and ordinary laws were also applied in an inconsistent and arbitrary manner. The blanket clause that no law should contradict Sharia gives flexibility to the Taliban to apply the laws whenever and how they want. In addition, the Taliban leader has proclaimed several laws, regulations and instructions which are cited in court decisions.

The Taliban have also established a *Dar-ul-Ifta* which provides guidance on questions related to Sharia. This institution has unlimited power, and their interpretation of Sharia has no restrictions and can serve as a strong guidance to the courts. Members of *Dar-ul-Ifta* are Sharia educated scholars of the Taliban, and they can send their fatwa to the Supreme Court Council. The Supreme Court Council can also ask *Dar-ul-Iftaw* for their fatwa when they face a question which does not have a clear answer in Sharia books or in the Taliban leader's decrees. Sharia law, even outside of usual non-religious systems is decided inconsistently.

⁶⁵ Nassery, *'Afghanistan: Afghan Legal System under the Taliban'* P. 6 and 7.

⁶⁶ Sahar Akbarzai, Shafi Kakar, and Rhea Mogul, *'Taliban to Impose Their Interpretation of Sharia Law in Afghanistan'* (CNN, 14 November 2022), <https://edition.cnn.com/2022/11/15/asia/taliban-afghanistan-sharia-law-intl-hnk/index.html>.

Since the 1960s, the judiciary of Afghanistan used the practice of Estihda, or request for guidance, in which the lower court judges would send their questions to the Supreme Court and the Supreme Court would organize a conference of senior judges every three to four years to discuss those questions and provide one unified answer.⁶⁷ The Taliban has stopped that process, though the process of providing fatwa by the Supreme Court Council resembles the process of Estihda, therefore observing democratic processes.

4. Independence of the Taliban's Judiciary

The Taliban government does not respect the principle of separations of powers. The Taliban Chief Justice, Abdul Hakim Haqqani, mentions the three branches of a state, the executive branch, the legislature and the judiciary, in his book⁶⁸ which is considered as the theoretical basis of the Taliban government. However, in practice, the Taliban have not been able to delineate the role of three branches of government which are conventionally accepted in modern political theory. Haqqani recognizes the independence of the judiciary,⁶⁹ though his understanding of judicial independence is distant from the internationally accepted norms. Generally, independence of the judiciary can be ensured only if there is separation of powers. In absence of separation of powers, institutional independence of the judiciary does not come into play, though there are examples of dictatorships in which the judges are able to act independently in certain fields. In this context and considering the impact of the political influence over the courts, the judiciary of the Taliban does not have independence.⁷⁰ Having a constitution is an important indication for recognition of the independence of the judiciary⁷¹ since a written document would explain all requirements, the boundaries of intervention and the authorities of the judiciary and it lowers the possibility of misuse and misinterpretation that leads to undermining the independence of the judiciary. Many countries around the world have incorporated the principle of judicial independence in their constitutions.⁷² The Constitution of 2004 had explicitly recognized this principle. Afghanistan has been without a constitution since August 15, 2021, and thus the boundaries of the judiciary in the Taliban's regime are not demarked.

One aspect of institutional independence is the autonomy in having financial resources. Compared to the Republic, the Taliban have kept the national budget as a secret document. Under the Constitution of 2004, the judiciary was able to prepare its budget and submit it to the parliament through the executive branch. In absence of a published budget document, there is less information on how much and through which process, the budget is allocated to the judiciary.

In addition to concerns on institutional independence, critical questions such as potential political influence and biases in decision-making of the courts also exist. The Taliban's theory of governance is based on absolute obedience from their leader, who is called Amir-ul-Momenin, or the commander of the faithful. He has absolute powers in all departments of the Taliban government and his extension of authority in the judiciary is undermining the independence of the judiciary.⁷³

⁶⁷ Timory Shoaib, 'Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency', *Loyola of Los Angeles International and Comparative Law Review* 42, no. 2 (2019): 223–90. P. 241.

⁶⁸ John Butt, 'A TALEBAN THEORY OF STATE: A Review of the Chief Justice's Book of Jurisprudence', *Afghanistan Analysis Network*, August 2023, <https://www.afghanistan-analysts.org/en/wp-content/uploads/sites/2/2023/09/chief-justice-book-review-FINAL-.pdf>. P. 27 and 28.

⁶⁹ Butt, P. 28,

⁷⁰ Amal Sethi, 'The Rule Of Law In Afghanistan: Prospects Under The Taliban Rule', n.d.

⁷¹ 'Basic Principles on the Independence of the Judiciary, Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985' (New York, 1985). Para. 1.

⁷² Markus Böckenförde, Nora Hedling, and Winluck Wahiu, *A Practical Guide to Constitution Building* (Stockholm, Sweden: International IDEA, 2011). P. 16.

⁷³ Akmal Dawi, 'Taliban Undertake Speedy Overhaul of Afghanistan's Justice System', *Voice of America*, 28 September 2023, <https://www.voanews.com/a/taliban-undertake-speedy-overhaul-afghanistan-justice-system/7289101.html>.

In this regard, the Taliban have not done anything to ensure institutional independence of the judiciary and individual independence of the judges.⁷⁴ Many judges of the Taliban have served in the Taliban ranks⁷⁵ when they were fighting the Republic and international forces. As such, the orders of the leadership of the Taliban and the judiciary are also a prevalent source of decision-making by the judges.⁷⁶ Considering this context, the culture of obedience is evident at the Taliban's judiciary which makes the Taliban judges incapable of making decisions independently. One researcher has given the example of higher level of authority by a primary court judge compared to an appellate court, which makes the latter unable to challenge the decision of the primary court judge, as an example of lack of independence and impartiality in the Taliban courts.⁷⁷

The qualification and competence of the judges, muftis and other judicial personnel and the way they are appointed and removed raises concerns over the judiciary's independence, as it may be subject to political interference and influence. Generally, the Taliban judges and muftis lack formal education;⁷⁸ membership or affiliation to the group and education in Islamic jurisprudence, mostly in Pakistan madrasas, are the main criteria for becoming part of the Taliban judiciary.⁷⁹ There are not any criteria announced for recruitment of judges, muftis and court clerks. The Taliban leader has the authority to appoint all judges and muftis. The Taliban have dismissed all judges of the Republic except for a few judges who worked attestation of title deeds for real estates, whose dismissal after two years are also reported. The Taliban consider the judges that worked during the Republic as judges of baghat, the disobedient judges, who are automatically dismissed after a just Islamic government takes over the power again.⁸⁰ Despite having unqualified personnel, no on-the-job training for the Taliban judges and judicial personnel is reported. During the Republic, several programs were supported by the international community to provide on the job trainings for the judges. Besides, every newly appointed judge had to complete a two-year training program. The Taliban judiciary has stopped such trainings.

Appointments, transfers and removals have been the key tools in the hands of the Taliban leader to control the judiciary. The Taliban do not differentiate between the judicial and administrative appointments. The Taliban have not determined a term for judges. In principle, there is no job security for the Taliban judges as they can be removed by the Taliban leader at any moment. Transfer or dismissal of judges have happened even after six months in some instances.⁸¹

Like other repressive regimes, the Taliban have ensured the judges follow their group's ideology.⁸² Since there is no mechanism to ensure the security of the term of judges, the fear from dismissal has a profound impact on the decisions of the judges.

Contrary to mass dismissal of all judges of the era of the Republic, the junior members of the administrative department of the judiciary continue to work with the Taliban judges. In fact, these administrative staff ensure that the Taliban judiciary continues functioning. In many cases that need thorough analysis and are difficult to decide without proper legal education, the Taliban judges ask the administrative staff to prepare court analysis and bring the decision for their signatures.⁸³ Deciding technical cases brings major problem at the judiciary of the Taliban as well.

⁷⁴ Haroun Rahimi, 'The Taliban, the Afghan State and the Rule of Law', Aljazeera, 1 September 2021, <https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>.

⁷⁵ Nassery, 'Afghanistan: Afghan Legal System under the Taliban'. P. 5.

⁷⁶ Nassery. P. 5.

⁷⁷ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan'. P. 15.

⁷⁸ Gehrig. P. 13.

⁷⁹ Dawi, 'Taliban Undertake Speedy Overhaul of Afghanistan's Justice System'.

⁸⁰ 'Procedure on Decisions of the Courts of the Former Administration to Which the Defendant Has Requested a Review', 124/285 (Taliban Supreme Court Letter) (2022). P. 1.

⁸¹ Najibullah Akbari former Director General of Administration of the Judiciary of Afghanistan, Personal interview, 22 July 2024.

⁸² Sethi, 'The Rule Of Law In Afghanistan: Prospects Under The Taliban Rule'.

⁸³ Akbari, Personal interview.

Even at the time of the Republic, the judiciary did not have the adequate number of qualified judges in some technical areas like commercial law and property law. Considering lack of education in modern legal studies, the Taliban judges find it difficult to resolve these types of disputes. The inability of the Taliban judges in resolving disputes have led to prolongation of complex cases for over two years.⁸⁴ On the other hand, to ensure cases are concluded, the Taliban judges try to convince the parties to agree on mediation.⁸⁵

As discussed in other chapters of this paper, the Taliban have dissolved the prosecution offices since they believe a judge cannot establish his decision based on the investigation by a prosecutor, something they consider as contrary to Sharia.⁸⁶ Absence of prosecutors in criminal cases make the judges disproportionately powerful with unchecked power and an ideological influence over decision making not rooted in fairness and impartiality.

Another element that helps individual independence of the judge is the possibility of dissent.⁸⁷ Under the Taliban's procedures, judges are not allowed to dissent. Given the unlimited power of the judge and the mufti, it is evident that most of the time the outcome of the court is a compromise between the judge and the mufti.

4.3. Role of External Influences

External influence over decision making in the judiciary is one of the key impediments to judicial independence. Contrary to Taliban's declaration that their judiciary is independent, external players have substantial influence over decisions of the courts.

The greatest external influence comes from the Taliban leader. As the authority who appoints, transfers and removes all judges and muftis, the Amir has a strong influence on all judges and the decision-making process by the Taliban courts. The judges and muftis consider the instructions of the Amir as a religious obligation; therefore, the judges do not consider themselves as independent before Amir and his decisions. Technically, it is not possible for any judge to challenge the decisions of the Amir. The Taliban leader is considered as the "final judicial authority".⁸⁸ For the Taliban, the obedience and political direction of the group is of critical importance. For this purpose, the Taliban do not hesitate to ignore or even target the ulema and scholars, who do not align themselves with the Taliban's ideology, a behavior against the Sharia principles that requires separation of the ruling class and the judges.⁸⁹ The Taliban leader has also reserved the right to allow the reopening of cases that had been decided during the Republic's era.⁹⁰

Unlike the Constitution of 2004 which prohibited membership of the judges in the political parties to ensure their impartiality, the Taliban judges and muftis are official members of this group. In fact, having the experience of fighting, membership or strong affiliation with the Taliban are the pre-requisites for becoming a judge, mufti or judicial clerk in the Taliban's judiciary.

⁸⁴ Akbari.

⁸⁵ Personal interviews were conducted with individuals in Herat province who had cases at the Herat primary courts. For security reasons, the interviewees asked for their anonymity of the interview.

⁸⁶ Dawi, 'Taliban Undertake Speedy Overhaul of Afghanistan's Justice System.'

⁸⁷ Julia Laffranque, 'Dissenting Opinion and Judicial Independence,' *JURIDICA INTERNATIONAL VIII* (2003): 162–72. P. 169.

⁸⁸ Butt, 'A TALEBAN THEORY OF STATE: A Review of the Chief Justice's Book of Jurisprudence.' P. 29.

⁸⁹ Rahimi, 'The Taliban, the Afghan State and the Rule of Law.'

⁹⁰ Procedure on Decisions of the Courts of the Former Administration to Which the Defendant has Requested a Review. P. 4.

The hesitation of the judges to intervene in cases in which senior Taliban members are involved cast serious doubt on independence of the judiciary and independence of the Taliban judges. In a case in which the Director General of the state-owned electricity company was allegedly having an affair with another man, the Taliban courts did not issue criminal charges. Instead, they asked the two parties to reconcile the case outside the court. The main reason behind such hesitation is to prevent confrontation among the Taliban ranks. In effect, the “personal and relational power” are cited as overriders over judicial hierarchy.⁹¹

It is often cited that the level of corruption has substantially decreased in the courts since 2021. Despite this claim, there are reports of big scale corruption in high value cases. Besides, there are reports that the members of the Directorate of Inspection of the Judiciary are influencing the outcome of the cases.⁹² In an example in the province of Herat, a defendant described that the Taliban judges paid a visit to a disputed land and get the testimony of many witnesses, however, when the defendant referred to the court the next day to get a copy of the official decision that they were promised, the judges said they cannot issue a decision and asked the defendants to leave the court. When asked what the reason behind the change in decision of the court could be, the defendant believed it had been due to influence from the local officials of the Taliban who had connections with the claimant.

5. Impact on Citizen's Rights

The arrival of the Taliban in Kabul had a fundamental impact on the basic rights of the citizens. The Taliban's judicial decisions raise concerns on their impact on fundamental human rights, including freedom of speech, assembly, and association, as well as protection against torture or cruel and inhumane treatment. Due process rights, including the right to a fair trial, presumption of innocence, legal representation, and access to evidence, are compromised under the Taliban's judicial system.

Afghanistan has adopted eight key human rights instruments without any key reservations. Abolishing the Constitution of 2004 which had guaranteed human rights of all citizens has resulted in diminishing the human rights framework. The Taliban have not shown any commitment to respecting these conventions. Since they came to power for a second time in August 2021, the Taliban have regularly killed the civilians and the former military personnel. However, the Taliban members accused of these atrocities have never been charged in a court.

Often and rightfully, the women have suffered the most from the regime change. The Taliban leader has issued several decrees, which are strictly implemented by Taliban members, that restricted the rights of women. Several decrees concern the changes in the judiciary with ample impact on the rights of the citizens, particularly the women and the minorities. During the Republic, “the appointment of 300 women as judges, 242 specialized The End Violence Against Women Coalition (EVAW) prosecutors, 800 female defence lawyers, as well as the emergence of EVAW institutions like the Family Response Units and civil society organizations had an enormous impact on access of women to the rule of law and judicial institutions. Today, none of these measures are in place.

The presence of unqualified judges and judicial personnel also means that individuals' rights can be violated, and judicial procedures are not respected. The fear of retaliation also resulted in hesitation of the parties to the disputes not actively pursue their rights in courts. A UN Women commissioned paper finds out through focus group discussions in June 2022 with the Afghan female lawyers that no complaint on violence against women had been reported⁹³ which is an indication of the fear of women to refer to the judicial institutions of the Taliban.

⁹¹ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan'. P. 15.

⁹² Akbari, Personal interview.

⁹³ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan'. P. 19.

Restricting women's rights has become a trademark by which the Taliban can be identified, the main reason why most Taliban decisions concern women's rights. By proclaiming that the Western values influenced women rights during the Republic, the Taliban justify the introduction of these limitations. The hatred toward women is not only due to consideration of international human rights values, but even the principles accepted under other schools of Islam. For example, after the Taliban came to power; the Supreme Court of the Taliban asked the ordinary courts to avoid issuing tafriq or separation at the request of the wife⁹⁴ since the Hanafi jurisprudence has stricter rules on this subject when compared to other schools of Islam. The Civil Code of Afghanistan based on which the tafriq verdicts were issued by the courts during the Republic had borrowed this ruling from Shafi-e school. This behaviour illustrates the depth of negative assumption of the Taliban towards courts' decisions when women were involved during the Republic.

Access to the courts is also difficult for the women. In the words of a representative of an institution working in the justice sector: "Having effectively banned all women lawyers, prosecutors, and judges, the Taliban have seriously restricted access to justice for women. Judicial bodies will not accept women's petitions or allow women to appear alone in court."⁹⁵ There are reports of unfair treatment of women at the Taliban courts as well. In one example, the Taliban judges proposed marriage with a Taliban soldier to a woman who had referred to the court to file a request for divorce.⁹⁶ In family law and cases of violence against women, the judges did not hear the cases and referred them to the informal justice mechanisms.⁹⁷ Furthermore, limitations on the movement of the women without a male companion also means that women do not have equal access to courts and judicial institutions.⁹⁸ In a seemingly intentional act to exclude women from the judicial processes, female lawyers are barred from defending their clients or accompanying them to courts since they require being accompanied by a male mahram.⁹⁹ During the Republic, the Ministry of Justice and many non-governmental organizations were offering free legal aid to women, however, these NGOs have ceased their programs, or the Taliban regime has forced them to stop their activities as these activities are not considered essential by the Taliban. The Taliban's treatment of women within the judicial system reflects systematic gender discrimination and marginalization, perpetuating gender inequalities and limiting women's rights and freedoms.

In addition to women, the religious and ethnic minorities are discriminated against by the judicial system of the Taliban.¹⁰⁰ Not a single Shia judge or mufti serves in the Taliban courts. Besides, the teaching of Shia jurisprudence is stopped by the Taliban at the universities. Even the announcement of general amnesty by the Taliban had a message that all those who worked for the former government were guilty and at fault. There are reports of using the courts to extort and confiscate the properties of the employees of the former government, the oppositions of the Taliban and the Shia community.¹⁰¹ Fearing retaliation, individuals cannot raise their voice or complain.

⁹⁴ 'The Taliban Are Reviewing the Verdicts of the Former Government Courts on Separation', *Hasht-e-Sobh Newspaper*, 9 November 2022,

<https://8am.media/fa/the-taliban-are-reviewing-the-rulings-of-judicial-discrimination-in-the-previous-government/>.

⁹⁵ 'Collapse of Justice System in Afghanistan Leaves Countless at the Mercy of the Taliban'

(*The Law Society*, 16 October 2023), <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/collapse-of-justice-system-in-afghanistan-leaves-countless-at-the-mercy-of-the-taliban>.

⁹⁶ Gehrig, 'Legal and Justice System Changes and Implications for Gender Equality and Women's Rights in Afghanistan' P.17.

⁹⁷ Gehrig. P. 24.

⁹⁸ Gehrig. P. 15

⁹⁹ Gehrig. P. 17.

¹⁰⁰ Gehrig. P. 15.

¹⁰¹ Gehrig. P. 20.

The Taliban courts are generally popular for their fast decision making. Between August 2021 and September 2023, the Taliban courts had decided 200,000 cases, including some pending cases from the time of the Republic.¹⁰² Though it can be helpful in some cases, in many other cases, it does not provide adequate time for the parties to a case to get preparations. This was the case when the citizens living outside Afghanistan had been given an ultimatum by the Taliban courts through informal channels or phone calls, to appear in the court or face consequences. Besides, thousands of Afghan citizens who left Afghanistan fearing retaliation, death and torture by the Taliban are effectively unable to defend their properties.

Conclusions

The rise of the Taliban back to political authority in 2021 has completely dismantled the structure that had evolved during the Islamic Republic. The radical transformation of the judiciary, which was marked by abolishing the constitutionally accepted protections of judicial independence, due process, fairness and impartiality, has long-lasting impact on provision of justice and the fundamental rights of the citizens. While the Taliban has kept the three-tier system of the judiciary, the military courts and security authorities intervene in judicial affairs and commit extra-judicial killings and enforced disappearances.

The dismissal of all judges and their replacement with the graduates of religious madrasas has also undermined the due process and the rule of law. Women and the minorities are particularly the victims of these changes. Shia Muslims, non-Muslims and women do not have any role in the judiciary. In addition, the incorrect interpretation and application of Hanafi jurisprudence by the Taliban has resulted in inconsistencies, discrimination and deprivation of the citizens of their fundamental rights.

The changes also raise concerns regarding the independence of the judiciary. Despite The Taliban's claim that the courts are independent, their judiciary does not enjoy the basic elements of institutional independence, and the Taliban judges are not able to decide cases impartially. The Taliban courts are subservient of the Taliban leadership, particularly its leader who has the absolute power of appointments and removal of judges and muftis, a fact that undermines impartiality of the judges.

Key characteristics of the Taliban judiciary are its unpredictability and inconsistency. Absence of a representative constitution, codified laws and unified sources for decision making have contributed to disappearance of rule of law. For the Taliban, the courts are another mechanism to empower their political control in the country. As shown in different examples, instead of serving justice, the courts have become enablers of oppression and dictatorship.

¹⁰² Dawi, 'Taliban Undertake Speedy Overhaul of Afghanistan's Justice System.'

Chapter Three: Access to justice under the Taliban: Lack of access or systematic denial?

Author: Dr. Mohammad Haroon Mutasem

1. Introduction

Access to justice is a vital phenomenon in any society that is governed by the rule of law. Afghanistan, being under the rule of the Taliban since 15th August of 2021, has been drastically affected by the lack of rule of law and subsequently lack of access to justice for the citizens. For this right to be sufficiently protected and easily accessed, there is a multi-layer criterion. The existence and availability of legitimate and credible institutions, the applicability of fair and just laws that are democratically made and the political will for making justice accessible to all are the minimum for achieving this goal.

Firstly, judicial institutions are either not existing or in case of availability are neither able nor willing to serve people by giving them justice. Regarding the legitimacy of the institutions, it is important to admit that the existing justice delivery institutions, per se, are not illegitimate as they are the legacy of the suspended constitutional framework. However, the lack of independence and professionalism of these institutions are the flaws that directly threaten the Taliban's legitimacy and credibility. Furthermore, the actors who are furthering the day-to-day activities of these institutions are not meeting the test of legitimacy and credibility both from the recruitment procedures and competency points of view. Procedurally, there has been no fair and transparent mechanism for the recruitment of the personnel and all those on the basis of their allegiance appointed based on their affiliation to the Taliban with competence being of no value.¹⁰³ It is obvious that- besides consideration of values such as independence and professionalism- the credibility of such institutions is dependent on the outcomes of the decisions that are made in these institutions.

Pertaining to the accessibility and applicability of fair and just laws, the suspension of the constitutional framework has led the country to a state of lawlessness in which certainty on the applicability of laws has entirely vanished. The country is currently claimed to be governed by Sharia Law and the decrees. Sharia law, due to its undefined scope, cannot respond to the need unless is aligned with a codification process which is of no interest to the Taliban . The decrees that are issued by the leader of the Taliban are of no eligibility to meet the test of justice and fairness.

They are being issued by an individual who has no responsibility and a defined scope of authority.

The most important of all is the political will for the accessibility of justice to all citizens which evidently is not on the Taliban's agenda . Since they have taken control of the government in Afghanistan, despite their claim that they are making justice accessible to people, there have been no practical steps on the ground to show their willingness in making justice accessible to people. The entire body of the decrees are around the agenda of suppression of the people and perpetuation of their illegitimate ruling on society. The far-front victims of these decisions are mostly women, minorities, and the other vulnerable groups who have constantly been denied justice. The systematic deprivation of women of their fundamental rights and providing them with no right to seek justice for these violations exemplify a clear indication of a broad and organized agenda against them.

¹⁰³ *Afghanistan International TV report Available at: <https://www.afintl.com/202501112306>*

2. Legitimacy of justice delivery institutions and their personnel

Access to justice is one of the fundamental rights of citizens, denial of which is a clear infringement of the obligations of states towards citizens. This right, due to having a nexus to the legal protection of all the other rights of citizens, is of vital importance in assessing the quality of life of individuals in a society. The right of access to justice seeks to enable citizens to exercise their autonomy to choose, modify, and realize their life projects.¹⁰⁴ Any obstacles in the way of exercising this right affects the autonomy of an individual who determines how to manage personal life with the assurance of protection of this right in a constitutional framework. The credibility and legitimacy of the institutions responsible for the delivery of justice and the personnel working in these institutions are quite significant in the assessment of availability and protection of this right in a society.

In Afghanistan post August 2021, assessing access to justice requires scrutiny of the legitimacy and credibility of the institutions and actors which are responsible for the delivery of justice. This will be provided in two separate parts:

2.1. Legitimacy and credibility of justice delivery institutions

In any jurisdiction, the legitimacy of justice delivery institutions depends on their legal foundation within the existing legislative framework, while their credibility hinges on effectively fulfilling their assigned mandate.

During the republic, the legal basis for the justice delivery institutions, including the judicial and executive bodies, was the 2004 constitutional framework which provided the institutions with the required legitimacy. Moreover, despite the allegations of corruption and lack of requisite speed, the credibility of the justice delivery institutions was safeguarded by the functionality of the institutions in delivering justice to people which was evidenced by the increasing number of cases before these institutions. Although there were instances of interference of the executive in the work of the judiciary, the judiciary was still considered an independent branch of the government and was fulfilling its duties under a set of defined laws and regulations.

Some of the justice delivery institutions in Afghanistan which had their legal basis of the 2004 constitutional framework have continued to exist under the Taliban. However, there have been significant modifications in both functions and/or the legal basis for the existence of some of these institutions.

The judiciary, despite keeping its mandate of chapter seven of the 2004 constitution, is not enjoying its status of being an independent institution and has practically transferred to a subordinate institution which takes orders from the leader of the Taliban in Kandahar.¹⁰⁵ Similarly, the department of rights within the ministry of justice, which used to act as a primary stage for the non-criminal cases, has continued to function under that mandate. However, it is not given the same importance and attention that it used to have under the republic.¹⁰⁶

Moreover, the Attorney General's Office, which used to be the investigative and prosecutorial institution under the 2004 constitution, has ceased to fulfill that function and, under the new law, has changed to an institution responsible for oversight and follow up of the decrees and edicts of the leader of the Taliban. This indicates that the institution has faced a transformation of both the legal basis and the mandate in the justice system of Afghanistan.

¹⁰⁴ Daniel Bonilla Maldonado, *The Right to Access to Justice: Its Conceptual Architecture*, 271 IND. J. GLOBAL LEGAL STUD. 15 (2020).

¹⁰⁵ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹⁰⁶ Online interview with defense lawyer # 1, date of interview: 15.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

The Afghanistan Independent Bar Association (AIBA), despite not being a state justice delivery institution per se, had a significant role in professional delivery of justice and oversight as well as members of the legal profession in the country, as an independent entity which regulated the practices of the legal profession. This institution was one of the first legal institutions that was affected by the decisions of the Taliban in terms of furthering its assigned constitutional mandate. The abolishment of the institution and making it part of the Ministry of Justice was the last nail in the coffin of its independence and professional functionality.¹⁰⁷

On the assessment of credibility, the judiciary, due to not being able to deliver proper and professional services, has ceased to possess this value. In the words of experts, the judiciary is in place and is dealing with the cases referred to it, but what is being fulfilled there cannot be termed adjudication.¹⁰⁸ The courts do not have the professional capacity and that leads them to fail the test of credibility in the eyes of the parties to the case and ultimately the public. This lack of capacity has resulted in cases piling up in the courts and hence causing long delays in adjudication and hearing cases.¹⁰⁹

The executive justice delivery institutions such as the high directorate of oversight and follow up of the decrees and edicts (former Attorney General's Office), despite having some specific duties under the new enacted law, is in practice not active at all.¹¹⁰ In the absence of any activity, it is not only difficult but also impossible to earn the required credibility in the eyes of the public.

In an ideal situation of enjoying legitimacy, if the design, procedure, and outcomes of the justice delivery institutions are inefficient, then rights are reduced to rules and principles on paper, rather than in¹¹¹ action.

This in turn, would become the gauge of the assessment of the public perception and would have a significant impact on the credibility of the institutions, particularly when the question of legitimacy is still unresolved.

2.2. Legitimacy and credibility of the personnel

In a society governed by the rule of law, the legitimacy and credibility of the public servants is not only dependent on the process of their appointment to the position, but also on the professional capacity of them in fulfilling their duties. This requirement is more so for the personnel of judicial bodies due to being tasked with the most important responsibility of giving justice to people.

Even though the justice sector personnel were suffering from lack of capacity during the republic, this test of legitimacy and credibility, for the personnel who were appointed to the said institutions under the former constitutional framework is arguably easier as they were appointed in merit-based system of recruitment in which possession of professional capacity was one of the main priorities. However, the application of this test on the newly recruited personnel of these institutions who have solely occupied the positions for being affiliated to the Taliban, with no professional background, is presenting a very different result.

¹⁰⁷ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹⁰⁸ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹⁰⁹ Christofer Lehman, *Justice Matters: A Status Report on Afghanistan Since the Taliban Takeover*, International Legal Assistance Consortium Report 2023, P 18

¹¹⁰ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹¹¹ Crawford, C., & Maldonado, D. (2020). *Access to justice: Theory and practice from a comparative perspective*. *Indiana Journal of Global Legal Studies*, 27(1), 1-14. P4

The non-transparent appointment of the personnel and the lack of ability to fulfill professional duties has made them fail the test of legitimacy and credibility in the eyes of the public. As was asserted by a defense lawyer, hidden corruption is pervasive in the judiciary which is considered to be the legacy of the republic period; however, the main problem of the judiciary is not corruption, but rather lack of requisite expertise and professionalism that has left the judiciary quite paralyzed.¹¹²

3. Existence and applicability of fair and just legislative documents

Besides the existence of legitimate and credible institutions, a body of just and fair laws that represent the will of the people is very essential for guaranteeing access to justice.

Under the 2004 constitutional framework, there was a set of promulgated substantive and procedural legislative documents which was the basis of decision-making in the executive and judicial branches of the government. After August 2021, there is complete lawlessness in the country. Although the 2004 constitution is still considered as the in-force constitution of Afghanistan on the website of Ministry of Justice of Taliban,¹¹³ the constitution and almost all the laws within its framework have ceased to have any role in providing justice, and this is a cover for the vanishing status of the rule of law in the country. In practice, the application of the entire body of the legislation under the 2004 constitution, excluding the selective provisions that secure the interest of the Taliban, is suspended. With this status, Afghanistan is the only country in the world that does not have legislation for governing the society. As claimed by the de facto authorities of the Taliban on varying occasions, the applicable law in the country is Islamic Sharia (Hanafi Jurisprudence) and the decrees and edicts respectively issued by the leader of the Taliban and their de facto authorities. This situation certainly has a huge impact on the right of people to have access to justice which will be elaborated up on in the followings:

3.1. Legislative documents

In the pre-Taliban pluralistic legal system of Afghanistan, the role of legislative documents, which was making more or less the entire body of the legal system, has been quite vital and significant. In Afghanistan, where the civil law (continental) legal system was applicable, legislative documents were the main source of reference in providing justice to people, leaving a specific, and narrow in scope, role to Hanafi Jurisprudence being the primary source in Hudud and Qisas (Diyat) crimes¹¹⁴ and secondary source in non-criminal cases, only in absence of any provision in the constitution.¹¹⁵

Currently, many of the laws including the 2004 constitution of Afghanistan are suspended. Although none of the previously enacted laws are officially exempted from this suspension, in practice, there are laws that are still selectively being referred to in the executive and judicial institutions under the Taliban. The first drawback of this type of selective practice is the lack of a wide and unified practice of it that is quite discretionary and dependent on the personal decision of the person who is making that decision. The second drawback of it is that it could only be referred to by the executive and judicial authorities with no possibility of being relied upon by the justice seekers under the system of the Taliban.¹¹⁶ In the words of a defense lawyer, the judges of the Taliban sometimes refer to specific provisions of the laws from the Republic era; however, if the defense lawyers, in the same hearing session, refer to a different provision of the same legislation, it will be rejected by the judge for not being in-force without leaving the defense lawyers the right or opportunity of arguing with them.¹¹⁷

¹¹² Online interview with defense lawyer # 5, date of interview: 22.05.2024

(Due to security reasons, the interviewee does not want his identity to be revealed)

¹¹³ Constitution of Afghanistan, 2004, Available at: *Enforced Constitution of Afghanistan | Ministry of Justice (moj.gov.af)* (Last visited: 10. 05, 2024) <https://www.moj.gov.af/en/enforced-constitution-afghanistan>

¹¹⁴ The Penal Code of Afghanistan, Official Gazette 1260, 2017, Art 2

¹¹⁵ The constitution of Afghanistan, Official Gazette #.,.,, 2004, Art 130

¹¹⁶ Online interview with defense lawyer # 2, date of interview: 12.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹¹⁷ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

This chaos, stemming from suspension of the laws of the Republic era, is happening in a situation that the Taliban, unlike their first era from 1996 to 2001, when they were actively resorting to codification, have not shown any interest in codification and, except a limited number of legislative documents, have not enacted any legislative documents since August of 2021. The Taliban have enacted several legislative documents, including the 2023 Law on the Organization and Structure of the High Directorate of Supervision and Follow-Up of Decrees and Edicts, the 2022 Law on Promotion of Virtue and Prevention of Vice, and the 2024 Procedure on the Coordination of Defense Attorneys. Experts note that, unlike during the Taliban's first era when significant legislative gaps existed, the extensive legislative framework developed over the 20 years of the Republic leaves little need for new Taliban legislation to fill gaps.¹¹⁸

It is further asserted that in case the Taliban decide to surrender to a constitutional framework, they already have the entire body of laws that they could utilize without any investment.¹¹⁹

The momentum that was created by the decree on the establishment of a commission to review the existing laws for their conformity with Islamic Sharia,¹²⁰ did not go further as the commission has not reported even on a single piece of legislation that has been reviewed by them so far.

Moreover, there are a few procedural legislative documents that were enacted by the Taliban before the takeover of the country by them in 2021. The Judicial, Administrative and Legal Rules of the Islamic Emirate enacted in 2014 and the Procedural Principles of Legal Courts enacted in 2014 are a few procedural documents that were intended to regulate the courts of the Taliban. However, considering the complicated nature of the procedural area and the existence of many legislative documents for the regulation of this area under the republic, it is difficult to expect that these two documents, arguably with lots of controversies and ambiguities, be able to regulate the area.¹²¹

Considering the above chaotic situation, it is quite unrealistic to expect that in the absence of fair and just laws, the right of access to justice can be materialized. In such a situation, even the legitimate and credible justice delivery institutions will not be able to deliver justice, let alone the institutions that are suffering from lack of requisite legitimacy and credibility.

3.2. Islamic Sharia as a substitute

Despite the claim of the Taliban that their legal system is based on Islamic Sharia, it is totally ignorant of the basics that Islamic countries have been resorting to for application of Islamic Sharia in their legal systems. Based on the modern constitutional safeguard for Islamic Sharia that is called Sharia Guaranteeing Clause,¹²² almost all the Islamic countries, in the legal system of which Islamic Sharia has a significant role, have utilized codification for regulating their societies. The core purpose behind this maxim is to confine the boundaries of the applicable scope of application of Islamic Sharia. This would bring the broad and unlimited body of Islamic Sharia within the boundaries to avoid any abuse of the broadness of Islamic Sharia provisions by the authorities. Under the 2004 constitution, this principle was stipulated in article 3 of this constitution requiring all the enacted legislations in Afghanistan to not contradict with the beliefs and provisions of Islam.¹²³

¹¹⁸ Online interview with a former official of the Ministry of Justice, date of interview: 26.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹¹⁹ Online interview with defense lawyer # 1, date of interview: 15.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²⁰ The Decree on the Establishment of the Independent Commission for the Review of the Legislative Documents, Decree # 43, 2023

¹²¹ Online interview with defense lawyer # 3, date of interview: 25.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²² Sharia Guaranteeing Clause (SGC) is a constitutional approach that is being stipulated in the constitutions of Islamic countries which are intending to avoid contradiction of their laws with the Islamic Sharia. This principle articulates that any law that is in contradiction with the Islamic Sharia principles would be of no applicability and thus null and void.

¹²³ The constitution of Afghanistan, Official Gazette #...., 2004, Art 3

body of Islamic Sharia within the boundaries to avoid any abuse of the broadness of Islamic Sharia provisions by the authorities. Under the 2004 constitution, this principle was stipulated in article 3 of this constitution requiring all the enacted legislations in Afghanistan to not contradict with the beliefs and provisions of Islam.¹²³ With the takeover of the country by the Taliban and the suspension of the 2004 constitution and the constitutional framework created by it, Islamic Sharia (Hanafi Jurisprudence) is claimed to be directly applied as the legal system of Afghanistan. Arguably, this has provided the authorities of the Taliban with a broad discretionary power to select the applicable Islamic Sharia provision without any control or supervision on them. This would certainly cause application of the personal understanding of the person applying it as the best Islamic Sharia solution for the problem. It becomes more problematic when the selection of the personnel working in the rule of law sector is being made by an individual who is lacking any professional capacity in understanding and delivery of justice.¹²⁴

Of a similar importance is the lack of unified application of Islamic Sharia that is caused by this unsupervised and limitless discretion of an individual to pick the applicable provisions.¹²⁵ The impact of it is so severe on the equal application of the existing provisions to all the ones who are in a similar situation which certainly is a violation of the right of access to justice for people. This way of finding solutions to the problems brings around a decision that by no means can be considered just and hence cannot deliver justice to people.¹²⁶ Such freedom of choice, particularly by an individual, in picking the applicable provision of Islamic Sharia out of his own choice is a great danger for the right of people to access justice.

3.3. Decrees and edicts

Since the takeover of the Country by the Taliban, there have been multiple decrees and edicts issued either by the leader of the Taliban or by the institutions in the form of circulars. However, all these decrees and edicts are issued by the authorities that are of no legitimacy themselves, let alone the power to issue edicts and decrees that are applicable to people.¹²⁷ Although in practice, these edicts and decrees are being implemented by force on people, this application by force cannot change the illegal nature and unlawful implementation of them. Ironically almost all the issued decrees and edicts are directed against the fundamental rights of individuals which are protected by the principles of Islamic Sharia. This indicates that these edicts easily fail the test of being in conformity with the provisions of Islamic Sharia- what the Taliban consider to be their official legal system. Similarly, these edicts are in clear contradiction of the fundamental human rights that are enshrined in international legal instruments - to which Afghanistan is a party.

4. The political will to make justice accessible to people

One of the fundamental prerequisites of the delivery of justice in a legal system is the existence of political will to make the tools and approaches to access justice available to the public . Under the 2004 constitutional framework, the rulers were under a constitutional obligation to make justice accessible to people. Although it is a fundamental duty of the governments that come to power through legal and legitimate means in a fair process, expecting such a will from the groups that take power through illegitimate means and approaches is quite aspirational.

¹²⁴ Online interview with defense lawyer # 4, date of interview: 10.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²⁵ Online interview with defense lawyer # 2, date of interview: 12.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²⁶ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²⁷ Online interview with defense lawyer # 1, date of interview: 15.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

The Taliban as a terrorist group, whose high-ranking officials are on the sanctions list of the United Nations Security Council, have not explicitly denied justice to the people. However, in practice, they have not taken action that would indicate their firm belief in and willingness to make justice accessible.¹²⁸ The fact that they have suspended existing laws without introducing a predictable and foreseeable substitute is a clear indication of their minimal attention to this issue. Furthermore, undermining the independence of the justice delivery institutions and hindering them from doing their fundamental job by hijacking their legitimacy and credibility and more importantly, changing their mandate which has paralyzed their service delivery mission is more than enough to show their lack of interest in giving justice to people.¹²⁹

4.1. Rulers vs. ruled

A fundamental issue in governance is the principle of sovereignty and who holds it in society. Governments that recognize sovereignty as belonging to the people view the delivery of services, including access to justice, as a core obligation. In a society governed by the rule of law, the government must provide mechanisms for citizens to seek redress and reparation for rights violations, whether by individuals or the government itself, through a fair and transparent system that ensures justice. In contrast, rulers who reject this principle feel no obligation to serve the public. This belief—that rulers owe no duty to the people—has no basis in the theoretical framework or historical practice of Islamic Sharia. In an Islamic society, ensuring rulers fulfil their obligation to the public is both a right and a duty of citizens. The Taliban's practices, however, reveal their ignorance of the very principles they claim to uphold. By demanding unquestioning obedience from the people without accountability, they exemplify the worst form of ruler-ruled relations. Their lack of commitment, coupled with lawlessness and the erosion of judicial institutions' legitimacy and credibility, severely restricts access to justice and undermines their political legitimacy domestically. Fostering the government's will to ensure access to justice requires either the rulers' initiative or public pressure through available means. However, the Taliban's lack of intent and their suppression of dissent make this an immense challenge for the people of Afghanistan, though not an insurmountable one with sustained advocacy and international support.¹³⁰

4.2. Access to justice and discrimination

The Taliban's systematic and persistent discrimination starkly contradicts the principles of justice and its administration, revealing their lack of commitment to ensuring access to justice for the people of Afghanistan. Their discriminatory policies based on gender, religion, ethnicity, and language—demonstrate either a lack of belief in justice or a distorted understanding of the concept. Notable examples include:

- Depriving women of fundamental rights recognized under Islamic Sharia and international law through numerous restrictive decrees and edicts.
- Marginalizing and suppressing religious minorities, such as Shias and Hindus, in violation of Islamic Sharia's explicit instructions.
- Oppressing ethnic minorities extensively.
- Attempting to prohibit speakers of other official languages from using their languages.

These practices, among others, reflect the Taliban's entrenched discriminatory stance. Expecting a group with such a record to ensure access to justice is unrealistic.¹³¹ Despite demands from the Afghan people and the international community, the Taliban have taken no actions in the past three years to reduce discrimination or demonstrate an intent to deliver justice.

¹²⁸ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹²⁹ Online interview with defense lawyer # 2, date of interview: 12.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹³⁰ Online interview with defense lawyer # 5, date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

¹³¹ Afghanistan Human Rights Situation Report 2023, Rawadari, 2024, P 21& 22

5. Conclusions

It can be easily said that the Taliban not only have failed to provide the people of Afghanistan with the right of access to justice but also have pursued this agenda of denial of this right in a systematic way. Since the Taliban's takeover, access to justice in Afghanistan has been severely undermined. Judicial institutions suffer from both a lack of legitimacy and credibility, partly due to personnel who lack the procedural and merit-based qualifications required for their roles.

The legislative framework essential for access to justice is absent. The suspension of nearly all laws and their replacement with Islamic Sharia and executive decrees has faced significant challenges, as Sharia lacks uniform application and the decrees fail to meet constitutional standards.

Moreover, the most critical element of access to justice—the government's will to provide it—is entirely absent. This stems partly from the Taliban's refusal to be accountable to the public and partly from their discriminatory policies on various grounds. Their systematic discrimination and segregation of people on illegitimate bases make it highly unlikely to secure access to justice. Consequently, the Taliban have not only failed to provide this right but have systematically pursued its denial, further eroding their political legitimacy domestically.

Chapter Four: Constitutionalism In Islam and Interpretation of Sharia by the Taliban

Author: Dr. Lutforahman Saeed

Introduction:

The renowned Islamic scholar, Imam Abdul Karim al-Shahrastani, stated in his seminal work, *Al-Milal wa al-Nihal*, that "the most serious dispute among Muslims first arose over the Imamate (political leadership), as no sword has been drawn in Islamic history over a religious basis like that which has been drawn over the Imamate in every era."¹³² This assertion reflects a significant reality in Islamic history, as well as in the history of many other nations. One key factor that led to conflict and even warfare among the first generation of Muslims, including the Prophet's companions, was the absence of a clearly outlined procedure in either the Quran or the Prophet Muhammad's Sunnah regarding the political system and the selection of leadership for the Muslim community (Umma). Afghanistan, with a population exceeding 99% Muslims, is not an exception among Islamic nations. Over the last four decades, the country has experienced a prolonged conflict, in part due to differing views on the implementation of Sharia. Most of the senior Taliban authorities argue that adopting a constitution and enacting man-made laws reflect Western legal traditions that conflict with Sharia principles;¹³³ however, constitutionalism and legislative processes have deep roots within Islamic legal and political traditions.

This approach adopted by Taliban leaders introduces several challenges to Afghanistan's legal system. For analyzing the specific changes and challenges within the current Afghan legal framework, examination of the concept of constitutionalism and the codification of laws from an Islamic perspective is essential. Such an analysis provides critical insights into the changes implemented by the Taliban in the Afghan legal system.

Constitutionalism in Taliban-Ruled Afghanistan:

Constitutionalism is a political ideology and system of governance that is based on the idea that the authority of the government should be constrained by a document that protects individual rights while outlining the government's functions and powers. The question arises whether constitutionalism is a respected theory in Islam or not. In the contemporary context, with the exception of Saudi Arabia, nearly all Islamic states operate under a written constitution. Contemporary Islamic scholars, without opposition from well-known religious institutions or prominent scholars within the Islamic world, affirm that Islamic Sharia is compatible with constitutionalism and legislative processes, especially when these frameworks respond to societal needs and safeguard the fundamental rights of citizens against potential abuses of power by governing authorities.¹³⁴

The Council of Islamic Scholars at Al-Azhar University, recognized globally as the most prestigious and preeminent institution of Sunni Islamic scholarship, issued an official statement supporting the establishment of a modern, national, constitutional, and democratic state that is based on a constitution accepted by the nation. They advocate for a system of governance that ensures the separation of powers among state institutions, establishes a defined constitutional framework, and guarantees equal rights and responsibilities for all citizens.¹³⁵

¹³² Abdul Karim Shahrastani, *Al-Milal wa al-Nihal*, Vol. 1, p 22

¹³³ BBC Persian News, available at <https://www.bbc.com/persian/articles/cjm1248xkx0> last visited April 3, 2025.

¹³⁴ Discussion on the topic of Constitutionalism in Islam, available at <https://www.youtube.com/watch?v=iiqR4VE-Y8> last visited April 8, 2025

¹³⁵ Al-Azhar University official website, <https://www.azhar.eg/%D9%88%D8%AB%D8%A7%D8%A6%D9%82-%D8%A7%D9%84%D8%A3%D8%B2%D9%87%D8%B1/%D9%88%D8%AB%D9%8A%D9%82%D8%A9-%D9%85%D8%B3%D8%AA%D9%82%D8%A8%D9%84-%D9%85%D8%B5%D8%B1> available at last visited April 8, 2025.

The Taliban authorities have been inconsistent in this regard. Soon after the Taliban's swift military takeover, they put all the laws, including the 2004 Constitution, on suspension and dismissed almost all judges and court administrative staff.¹³⁶ The Taliban authorities have expressed different views regarding constitutionalism and state-adopted laws. On November 11, 2021, during a meeting in Doha, Qatar, with the European Union Ambassador, a Taliban delegation led by Acting Foreign Minister Maulawi Amir Khan Motaqi reaffirmed their commitment to upholding Afghanistan's 2004 Constitution and other laws.¹³⁷ Furthermore, the spokesperson of the Taliban, Zabihullah Mujahid, in his first press conference, said that a committee has been activated to review the constitution.¹³⁸ On the contrary, Neda Muhammad Nadeem, acting Minister of Higher Education in a Ulama meeting in November 2022 in Nangarhar city said that all laws from the reign of the Republic are tyrannical and they have been entirely revoked.¹³⁹ In the meantime, Maulawi Abdul Hakim Sharaey, acting minister for the Ministry of Justice of the Taliban declared that with the exception of some provisions, the constitution of Zaher Shah's era will be temporarily implemented.¹⁴⁰ On the other hand, Abdul Kareem Haidar, deputy minister of the Ministry of Justice said that there is no need for a constitution because they have the Holy Quran and the Prophet Mohammad's Sunnah; this statement required an intervention from the spokesperson of the Taliban, Zabihullah Mujahid, who clarified that the deputy minister's word did not exclude adoption of a constitution and that a constitution will be adopted.¹⁴¹ These contradictory statements have shown doubts on the real intention of the Taliban in this regard.

Two or three draft constitutions, purportedly authored by Taliban leadership, have been leaked to the public, though Taliban authorities later denied the authenticity of these drafts. In 2023, the Taliban announced the formation of a committee led by Sheikh 'Abdul Hakim Haqqani, the Taliban's Chief Justice, who was tasked with drafting a constitution; however, no official draft has been released to date.¹⁴² It appears that the Taliban's stance has shifted, as recent statements by their spokesperson, Zabihullah Mujahid, does not consider the absence of a constitution in the country to be a legal vacuum.¹⁴³ It indicates that drafting a constitution is no longer an immediate priority. Nevertheless, the website of the Taliban's Ministry of Justice continues to maintain the 2004 constitution and most laws enacted by the former Republican government despite the address of the supreme leader of the Taliban to the provincial governors that they must adhere to only Islamic Sharia and that man-made laws are not applicable.¹⁴⁴ Furthermore, in a phone call interview with a staff member of the Ministry of Justice of the Taliban, he revealed that based on the verbal order of the supreme leader of the Taliban, all laws that had been adopted before August 2021 are suspended and must not be implemented.¹⁴⁵

Islam and Constitutionalism

Whether the political philosophy of constitutionalism exists in Islam or not is a subject of discussion. If it exists, where does it come from, and how has it been practiced in the past? Dr. Muhammad Hamidullah, in his article "The First Written Constitution of the World," claimed that the Madina Charter is the first written constitution in the entire history of human beings.¹⁴⁶

¹³⁶ Radio Free Europe / Radio Liberty, <https://da.azadiradio.com/a/31626853.html> Last visited November 13, 2024.

¹³⁷ Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/31708491.html> Last visited November 13, 2024.

¹³⁸ BBC Persian News, available at <https://www.bbc.com/persian/articles/cjm1248xklxo> Last visited November 13, 2024.

¹³⁹ Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/32167673.html> Last visited November 13, 2024.

¹⁴⁰ Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/31481948.html> Last visited November 13, 2024.

¹⁴¹ Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/32019485.html> Last visited November 13, 2024.

¹⁴² Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/32599613.html> Last visited November 13, 2024.

¹⁴³ Tolo news, available at <https://tolonews.com/fa/afghanistan-187548> Last visited April 8, 2025.

¹⁴⁴ Radio Free Europe / Radio Liberty, available at <https://da.azadiradio.com/a/31963747.html> last visited November 13, 2024.

¹⁴⁵ Phone call interview with a staff member of the ministry of justice of the Taliban, December 17, 2023.\

¹⁴⁶ Muhammad Hamidullah, *The First Written Constitution of the World*, Pp 2-7, available at <https://archive.org/details/THEFIRSTWRITTENCONSTITUTIONOFTHEWORLD/page/n5/mode/2up>

The Madina Charter is a legal document that Prophet Muhammad, during the first year of migration from Mecca to Madina, adopted. In Madina city, three Jewish tribes, Bani Nazir, Bani Quraiza and Bani Qainuqa, two Pagan tribes, Aws and Khazraj, and some other religious minorities lived along with the Muslims. There had been continuous wars and conflicts between these tribes. To overcome this situation, Prophet Muhammad took three major steps: 1) building a mosque; 2) making a brotherhood agreement between the two tribes, Aws and Khazraj; and 3) adopting a constitution for the Madina city. The first and second topics are not relevant to our current discussion, but I will shed light on the third one, which is considered the cornerstone of the idea of constitutionalism in Islam.

Authenticity of the Madina Charter

Before examining the main concepts of the Madina Charter, it is essential to assess its authenticity, as some modern scholars have questioned its reliability. For instance, the modern Islamic historian Yusuf al-Esh argues that the Madina Charter lacks authenticity, noting that Ibn Ishaq¹⁴⁷ (704–768), a prominent historian and Hadith scholar, is the first and sole source to report the Charter in his work *Seerah Ibn Ishaq*. However, Ibn Ishaq did not provide any Sanad (chain of transmission) for the document. In the sciences of Hadith and history, Sanad refers to a chain of authorities who transmitted a report (Hadith) concerning the sayings, actions, or approvals of the Prophet Muhammad or his companions.¹⁴⁸ Although the complete text of the Madina Charter has not been included in the hadith collection books, Montgomery Watt noted that, from a linguistic perspective, it is established that the document originates from the era of Prophet Muhammad.¹⁴⁹

In contrast, many Islamic scholars affirm the authenticity of the Madina Charter, asserting that (a) Ibn Ishaq is not the sole source documenting it; other historians have also recorded the Charter with a chain of transmission (Sanad). For instance, Imam Ahmad ibn Hanbal includes the Charter in his Hadith compilation *Musnad Hanbal*,¹⁵⁰ and the author of *Auyun al-Athar* presents the document with a complete Sanad.¹⁵¹ Additionally, numerous Hadith collections, from both Sunni and Shi'a traditions, provide either full or partial accounts of the Charter. Among Sunni sources, the Madina Charter appears in works such as *Sahih al-Bukhari*,¹⁵² *Sahih Muslim*,¹⁵³ *Sunan al-Nasa'i al-Kubra*,¹⁵⁴ *Sunan al-Tirmidhi*,¹⁵⁵ and *Musanif Ibn Abi Shaibah*.¹⁵⁶ Further, *Sunan Abu Dawood* reports that the Prophet Muhammad kept a written version of rules related to Qisas crimes in his scabbard until his passing. After his death, the first and second Caliphs preserved the document, referring to it for legal decisions, evidence suggesting that this text formed part of the Madina Charter strictly implemented by the Prophet and his companions.¹⁵⁷

¹⁴⁷ Ibn Ishaq was an Arab biographer of the Prophet Muhammad whose book, in a recension by Ibn Hisham, is one of the most important sources on the Prophet's life.

¹⁴⁸ Saeed, Lutfurahman, *Islam, Custom and Human Rights in Afghanistan*, Springer, P. 31, (2022).

¹⁴⁹ Mahdawi Raad, *Muhammad Ali, the Critics of the orientalist Regarding the Madina Charter*, p. 34, Available at <file:///C:/Users/lutfo/OneDrive/Documents/Downloads/39913972002.pdf>

¹⁵⁰ *Musnad Ahman ibn Hanbal*, Vol. 11, p 504

¹⁵¹ *Muhammad ibn Muhammad ibn Ahmad, ibn Said al-naas, 'Auyun al-athar fee Funun al-Maghazi wal Shamael wal Seyar*, Beirut: *Dar al-Qalam*, Vol. 1, P 229.

¹⁵² *Sahih al-Bukhari*, Vol. 8, p 154

¹⁵³ *Sahih Muslim*, Vol. 2, P 1146

¹⁵⁴ *Al-Sunan al-Kubra*, (Arabic: *سنة رسول الله*), is one of the six most trusted (*Sahih*) hadith books of Sunni Islam collected by Imam Al-Nasa'i (214 – 303 AH).

¹⁵⁵ *Sunan al-Tirmidhi* is the fourth hadith collection of the Six most trusted (*Sahih*) Books of Sunni Islam. It was compiled by Islamic scholar al-Tirmidhi in c. 864–884.

¹⁵⁶ One of the well-known *Musannaf* (topical collections of hadith), compiled by Ibn Abi Shaybah (775–849 CE) who curated reports of Prophet Muhammad.

¹⁵⁷ *Sunan Abu Dawood*, Verified by Shoaib al-Arnaout, *Daar al-Resaala al-'Eglmeyah*, Vol. 3 p 19.

In Shi'a tradition, numerous scholars have reported the Madina Charter in their works. For example, Al-Kafi by Kulayni, Tahdhib al-Ahkam by Tusi, Man La Yahduru al-Faqih by Ibn Babawayh, Bihar al-Anwar by 'Allama Majlisi, and Al-Wasa'il al-Shi'ah by Shaikh Ameli all reference the Charter.¹⁵⁸ Based on this broad cross-section of sources from both Sunni and Shi'a schools, scholars generally uphold the authenticity of the Madina Charter, leaving minimal doubt regarding its veracity.

The Main concepts of the Madina Charter

The text of the Madina Charter demonstrates the document's significant role in establishing a governmental and regulatory framework within Madina, a city where diverse ethnic and religious groups coexisted. The Charter comprises approximately 50 clauses, though the exact number varies between Islamic and Western scholars due to differences in clause divisions. Roughly half of the clauses address matters concerning Muslims, while nearly all remaining clauses pertain to the rights and responsibilities of the Jewish community and other minority groups residing in Madina.

The Madina Charter is regarded as a constitution, as it addresses foundational issues, a characteristic of the constitutions in the modern sense. For example, after its initial clause, the document formally states that it is a written agreement from the Prophet Muhammad, applicable to all citizens of Madina regardless of their race or religion.¹⁵⁹ The second clause declares: "The citizens of Madina constitute a general body of people, known as the 'Ummah,' distinguished from all other people in the world."¹⁶⁰ Prior to the Prophet's arrival in Madina, social identity was typically defined by tribal affiliation; however, the Prophet introduced the term "Ummah" to transcend tribal distinctions, uniting all residents of Madina across ethnic and religious lines.¹⁶¹ Additionally, Article 16 of the Charter guarantees public freedom and citizenship for all inhabitants, including the Jewish population residing in Madina.¹⁶² The new constitution also established the judicial branch, outlining procedures for handling legal matters.¹⁶³ Notably, the document affirmed the right to freedom of religion for all citizens of Madina, explicitly protecting the Jewish community's freedom to practice their religion without fear.¹⁶⁴ Additionally, it addressed the financial responsibilities of Madina's citizens, specifying budgetary allocations for the new government.¹⁶⁵ Provisions concerning peace and wartime obligations were also clarified when Madina was under external threat. The Charter further guaranteed the right to safety and security for all citizens, irrespective of race or religion.¹⁶⁷ Crucially, it underscored the rule of law, affirming the principle of equality for all citizens before the law.¹⁶⁸ The Madina Charter includes further detailed legal provisions regarding governance and its foundational principles, which extend beyond the scope of this article.

Keeping all this in mind, the idea of constitutionalism has a deep root in Islam, particularly in the Prophet Mohammad's practice. Although Prophet Mohammad was receiving revelation, he adopted a constitution to rule the new government in Madina city and guaranteed citizens' rights for the Muslims, Jews, Pagans, and other ethnic and religious minorities that lived in the area. Thus, the idea of constitutionalism has no contradiction with Islam. On the contrary, it is an Islamic principle.

¹⁵⁸ Mahdawi Raad, Muhammad Ali, *the Critics of the orientalist Regarding the Madina Charter*, p. 34, Available at <file:///C:/Users/lutfo/OneDrive/Documents/Downloads/39913972002.pdf>

¹⁵⁹ *Madina Charter*, Articles 1&2

¹⁶⁰ *Seerah Ibn Hisham*, Vol. 1, p, 501.

¹⁶¹ *Madina Charter*, Art. 1.

¹⁶² *Madina Charter*, Article 16

¹⁶³ *Madina Charter*, Article 23

¹⁶⁴ *Madina Charter*, Article 25

¹⁶⁵ *Madina Charter*, Articles 24 - 27

¹⁶⁶ *Madina Charter*, Articles 38.

¹⁶⁷ *Madina Charter*, Articles 39.

¹⁶⁸ *Madina Charter*, Articles 47.

The renowned Islamic scholar Ibn Qayyim al-Jawzi (1292–1351) asserted that the foundation of Sharia is rooted in justice and the welfare of humankind, both in this life and in the hereafter.¹⁶⁹ According to Ibn Qayyim, Sharia embodies justice, mercy, wisdom, and public interest. Any interpretation or ruling that deviates from justice to injustice, mercy to cruelty, benefit to harm, or wisdom to irrationality cannot truly be considered as part of Sharia, even if erroneously regarded as such through interpretation.¹⁷⁰ Consequently, any methods or practices that advance public welfare, safeguard justice, and deter social injustices or corruption align with Islamic principles, even if they are not explicitly referenced in Islamic texts. A constitution is essential to create a framework for effective governance that limits rulers' potential abuse of power, safeguards citizens' fundamental rights, and ensures accountability for all individuals, regardless of their status. Abu Hanifa (699-767)¹⁷¹ argued that political power obtained through force lacks legitimacy.¹⁷² He conveyed this view explicitly in a discussion with the Abbasid Caliph Mansur, held in the presence of Imam Malik ibn Anas (711-795)¹⁷³ and Ibn Abi Zayb (699-776),¹⁷⁴ emphasizing that a Muslim caliph's legitimacy derives from the consensus and approval of the people.¹⁷⁵ Imam Abu Hanifa believed that the only legitimate source of a ruler's authority is the vote (Ba'ah) of the citizenry, as practiced during the era of Prophet Muhammad's companions, specifically the four Caliphs.¹⁷⁶

Codification (Arabic: Taqneen) of Islamic Law

The term Taqneen originates from the word qanoon or canon, itself derived from Roman or Greek roots, signifying "ruler" and later evolving to denote "principle."¹⁷⁷ In the modern legal history of Afghanistan, the term qanoon has been contentious, as certain religious leaders, even in the 20th century, have perceived it as a concept imposed by Western powers onto Muslim-majority societies.¹⁷⁸ This concern remains prevalent among Taliban leadership, including the Taliban's Supreme Leader, Amir who maintains that previous laws were not formulated in accordance with Sharia principles and were instead influenced by Western values.¹⁷⁹ Similarly, the Taliban's Minister of Justice, Mawlawi Abdul Hakim Sharei, responding to critiques concerning the absence of a formal constitution and codified laws in Afghanistan, asserted that "Since we have the Quran, the Prophet Muhammad's hadiths, and Hanafi jurisprudence, there is no gap of the Constitution and other laws."¹⁸⁰ Nonetheless, the term qanoon has seen extensive use by prominent classical Islamic scholars across various fields, exemplifying its entrenched role in Islamic jurisprudential discourse. For instance:

¹⁶⁹ Al-Jawzi, Ibn Qayyim, *E'alaam al-Muwaqayen 'an Rab al-'Alameen*. Saudi Arabia, Dar Ibn al-Jawzi lel Nasher wa al-tawzi, 2002, Vol. 3, p 11.

¹⁷⁰ Al-Jawzi, Ibn Qayyim, *E'alaam al-Muwaqayen 'an Rab al-'Alameen*. Saudi Arabia, Dar Ibn al-Jawzi lel Nasher wa al-tawzi, 2002, Vol. 3, p 11

¹⁷¹ Abu Hanifa was a Muslim scholar, jurist, theologian, ascetic, and eponym of the Hanafi school of Sunni jurisprudence, which remains the most widely practiced to this day. His school predominates in Central and South Asia, Turkey, the Balkans, Russia, and some parts of the Arab world.

¹⁷² Meyan Muhammad Sharif, *The History of Philosophy in Islam*, Translated by Nasrullah Poor Jawadi, Vol. 2. Pp. 134-135.

¹⁷³ Malik ibn Anas was an Islamic scholar and traditionalist who is the eponym of the Maliki school, one of the four schools of Islamic jurisprudence in Sunni Islam. Born in Madina into the clan of Banu Himyar.

¹⁷⁴ He was a famous Hadith scholar in Sunni Islam.

¹⁷⁵ Al-Kurdary, Ibn Bazaz, *Manaqeb Imam 'Azham Abu Hanifa*, Vol. 2, P p16-17 available at <https://ia600703.us.archive.org/34/items/noushahkhan555-gmail-2/2.pdf>

¹⁷⁶ Mawdudi, Abu al-'Ala, *Khelafat wa Mulukeyat*, Lahore, Pakistan, Pp 249-250.

¹⁷⁷ Shahab al-deen Ahmad ibn Muhammad ibn Umar al-Mesry, *Shafa al-Ghalil fima fi Kalam al-'Arab men al-Dakhil*, Dar al-Kutub al-'Elmehyah, (1998) the word "Qanun".

¹⁷⁸ Lutforahman Saeed, *Islam, Costume and Human rights in Afghanistan*, Springer, (2022) p. 44

¹⁷⁹ Radio Free Europe / Radio Liberty, <https://da.azadiradio.com/a/31963747.html> Last visited November 13, 2024.

¹⁸⁰ Afghanistan International online news, available at <https://www.afintl.com/en/202404017116> last visited September 17, 2024.

1. Imam Muhammad al-Ghazali (died in December 1111) has a book in Hadith sciences named "Qanoon al-Taweel", the principles of paraphrasing in Hadith texts.
2. Avesyan, a well-known Muslim philosopher and physician, has a famous book, called Al-Qanoon Fee al-Tib (The principles in medical sciences).
3. Judge Muhammad ibn Abdullah ibn Ahmad al-mu'aferi (1076-1148) wrote a book in Quranic sciences called "Qanoon al-Taweel".
4. Al-Beruni (973-1052) a famous Islamic philosopher and astronomist wrote a book in the field of Astronomy, called Al-Qanoon al-Mas'udi.

Furthermore, the term "Qanoon" is mentioned repeatedly in books like al-Ahkam al-Sultaniyah written by Imam Mawardi (974–1058), which proves the usage of the term Qanoon has been common among Muslim scholars. Starting from the prophet Mohammad era, along the history, the codification of Fiqh/Sharia is a common practice among the Muslim states. For example, the Madina Charter is a perfect example of a codified law. Furthermore, Aurangzeb (1618–1707) assigned a committee of 500 scholars to write an Islamic code of law for his empire. After several years of hard work, they completed a legal code for a variety of potential situations together with the juristic opinions of the faqih ¹⁸¹ of the period and named it Al-Fatawa al-'Alamgiriyya. It includes matters such as personal status, family law, slaves, peace and war, property law, inter-religious relations, commerce, taxation, and economics. Another great example of codified Fiqh is Majella al-Ahkam al-Adliyya, which is a code of law that was prepared between 1868 and 1876 in the Ottoman Empire and is totally based on the Hanafi school's doctrines. It is the first codification of civil law in the history of Islamic law.

The codification of Fiqh/sharia made it possible for the emergence of a dynamic and flexible legal system responsive to the needs of society and dealing with a variety of situations found in the Muslim world. However, many Muslim-majority nations have codified Fiqh/Sharia into written statutes in response to the contemporary era's requirement of universal and explicit legal rules. This method attempts to address concerns of uniformity and clarity in judicial decisions in addition to bringing Islamic law in line with modern legal norms. Islamic law has been codified differently in every country, reflecting political influences, local customs, and differing interpretations of Sharia. Some nations, like Egypt and Tunisia, have embraced more progressive approaches to codification that incorporate contemporary legal ideas and human rights considerations, while other nations, like Saudi Arabia and Iran, have executed codification in ways that rigorously adhere to conventional interpretations. The intricate relationship between tradition and modernity in Islamic jurisprudence is demonstrated by the multiplicity of codification processes. Moreover, it highlights the ongoing efforts of Muslim scholars and lawmakers to balance religious authenticity with the demands of contemporary governance, ensuring that Islamic law remains relevant and effective in today's world.

Codification of Islamic Law (Fiqh / Sharia)¹⁸² in Islamic States

Codification of Islamic law, usually referred to as Sharia or Fiqh, is the methodical arrangement and articulation of Islamic legal precepts into a logically ordered legal framework. This procedure marks a substantial shift away from conventional, juristic interpretations and toward a more methodical, structured legal framework. Overall, primary and secondary sources have been used to create Islamic law. The primary sources of Islamic law are the Quran and the Sunnah, which are the sayings and deeds of Prophet Muhammad. The most well-known secondary sources include the consensus (ijma) and the application of logic (qiyas); however, there are a variety of foundations from which Islamic jurists derive laws if they cannot find a solution for a legal issue in the primary sources.

¹⁸¹ The term "Faqih" (Arabic: *فقيه*) in Islamic jurisprudence refers to a scholar who has deep knowledge and understanding of Fiqh (Islamic jurisprudence).

¹⁸² In the context of Afghanistan, the term "Fiqh" and "Sharia" almost carries the same meaning and could be used interchangeably.

These include *Istiḥsān* (considering something to be better), *Istiṣḥāb al-Ḥāl* (presumption of continuity), *‘Urf* or *‘Adah* (custom and usage), *Maṣāliḥ mursala* (consideration of public interests), *Qawl al-ṣaḥābī* (opinions of the (individual) companions of Prophet Mohammad), *Sadd al-dharā’i’* (blocking the means), and *Shar‘ man qablanā* (laws of the previous prophets who are mentioned in the Holy Quran).¹⁸³ Traditionally, Islamic law (Fiqh/Sharia) cover 7 major fields:

1. *‘Ebādāt* (Devotion and rituals activities)
2. *Mu‘āmalāt* refers to reciprocal dealings that rulings governing trade and commercial transactions, contracts, etc.
3. Personal status and family law including, issues related to marriage and divorce, inheritance law, child custody, etc.
4. Criminal Law.
5. *Seyasat al Sharaeyyah* or *Ahkam al Soltanieh* that regulate the relationship between rulers and the people that in the modern legal system they are called Constitutional Law and Administrative Law.
6. *Ahkam al-seyar*, which regulates the International Laws and humanitarian law. Imam Muhammad al-Shaibani had discussed these topics in detail in his two famous books, *Seyar al-Sagheer* and *Seyar al-Kabir* and he is considered the founder of this field of law in the world.
7. *Akhlaq* (Ethical and Moral matters)

Each of these legal fields has been further divided into distinct subcategories, evolving as specialized areas within Islamic jurisprudence. In discussions on the codification of Islamic law, however, two primary fields are typically excluded: *‘Ibādāt* and *Akhlaq*. The exclusion of *‘Ibādāt* arises because it pertains to an individual’s relationship with God, addressing matters that are inherently spiritual and transcendent. *Akhlaq*, or ethics, is likewise excluded since it does not directly address disputes or issues requiring legal resolution between individuals. Thus, when referring to *Taqneen* (codification), these fields are not encompassed, and much of the criticism surrounding the codification of Islamic law stems from this misinterpretation. Consequently, the scope of Islamic jurisprudence (Fiqh) aligns closely with the structure found in modern legal systems. Modern legal fields, far from being novel, have deep roots within the Islamic legal tradition and classical Fiqh. Therefore, the codification of jurisprudential rulings in these fields can render Sharia more accessible and comprehensible to a broader audience.

The Codification of Islamic Law (Fiqh/Sharia) in Afghanistan

The codification of Fiqh and Sharia in Afghanistan arguably began in the late nineteenth century¹⁸⁴ and continued with significant influence from the Egyptian model.

In the early 1960s, Zahir Shah invited two Egyptian scholars to Afghanistan to draft the country's civil and criminal codes.¹⁸⁵ Egyptian influence persisted into the 1970s when Afghan scholars, particularly faculty members from the Sharia (Islamic Law) faculties, were sent to Egypt to study Islamic sciences at Al-Azhar University. These scholars, upon returning to Afghanistan, played a pivotal role in advancing reforms within the justice sector and modernizing legal education, thereby embedding Egyptian-inspired principles into the Afghan legal system.

In recent history, Afghanistan has developed a substantial body of codified laws. Article 3 of the 2004 Constitution asserts, “No law shall contradict the tenets and provisions of the holy religion of Islam in Afghanistan.”¹⁸⁶ a fundamental principle that has been upheld in all Afghan constitutions since 1923.

¹⁸³ Lutforahman Saeed, *Islam, custom and Human rights in Afghanistan*, Springer, (2022) Pp 32-33

¹⁸⁴ Lutforahman Saeed, *Islam, Custom and Human Rights in Afghanistan*, Springer, (2022) P 11.

¹⁸⁵ Husami, Hazrat Gul, *History of judicature in Afghanistan*, Pp251-252 & Interview with Supreme Court Justice, Professor Deen Mohammad Grean, dated December 12, 2015.

¹⁸⁶ *Afghanistan 2004 constitution*, Art. 3.

Throughout these years, Afghan laws and regulations have been aligned with Islamic law (Fiqh/Sharia) and enacted by governments that did not repudiate Islamic values. This raises the contemporary question of why these laws are now disregarded and labeled as non-Islamic, despite containing no provisions that conflict with Islamic principles.

The Taliban's approach has introduced considerable disruption in judicial decision-making, resulting in a backlog of cases within the court system. Following their rise to power, the Taliban dismissed all judges appointed during the Republic, replacing them with members of their own ranks who possess solely traditional Islamic studies backgrounds and lack practical judicial experience.¹⁸⁷ Additionally, the number of judges in each court division was reduced from three to one. In lieu of additional judges, the Taliban appointed muftis to provide fatwas (non-binding legal opinions) derived from Hanafi jurisprudential sources to inform judicial rulings. According to interviews with legal practitioners in cities of Kabul, Herat, and Mazar Sharif, based on their experience, the majority of judges in the Taliban court system rely heavily on the fatwa issued by the assigned mufti.¹⁸⁸ Despite the non-binding nature of these fatwas, practitioners report no instances in which a judge has diverged from the mufti's opinion, even in cases where the judge could have applied his own understanding of Hanafi doctrine.¹⁸⁹

Additionally, within the Hanafi school of jurisprudence, multiple opinions often exist on a single legal question, necessitating those rulings to be issued in accordance with the principles of preference within the school. This process involves following a structured hierarchy of sources and opinions intrinsic to Hanafi jurisprudence. It is essential to determine the most appropriate solution for a specific case by carefully evaluating and prioritizing among the various authoritative opinions presented within Hanafi sources.

The Taliban claim that positive laws are man-made laws, which have roots in western culture.¹⁹⁰ Instead, they follow Islamic law, Fiqh, which is derived from the direct orders of God. In fact, Islamic law (Fiqh) is also man-made law because it is the product of the jurists; it is not divine law by itself; it is the jurists' understanding and interpretation of the divine texts. There is a huge difference between a divine text and its interpretation and understanding. For example, based on Islamic belief, the divine text, Quran and authentic Hadiths, is sacred and not subject to criticism and rejection; however, the human understanding and interpretation of the divine text is not sacred and could be either correct or wrong. There is always room for rejection and criticism of the human understanding of the divine text because a jurist's interpretation or understanding could be wrong. Since the interpretation and understanding of divine texts is a dynamic and fluid process, there is always room for newly arising opinions.

For this reason, Islam has developed multiple schools of thought, including Sunni, Shiite, Mu'tazila, and Ibadi, among others. Each of these schools encompasses various branches, and even within the same school, differing opinions on specific topics are common, making scholarly disagreement a defining characteristic of Islamic law. This diversity of opinion is respected among jurists, as exemplified by a famous Hanafi scholar, Ibn Nujaim (d. 1563) who stated, "We believe our opinion is correct, though it may contain error; similarly, we think other jurists' opinions are incorrect, but they may indeed be correct."¹⁹¹ Consequently, disagreement with the past jurists is not only permitted but encouraged when new opinions better address societal needs and promote the public good. This latitude allows scholars to select the most suitable opinions to meet the evolving requirements of society. Within Hanafi jurisprudence, for example, sources often present multiple viewpoints on a single issue, and it is not uncommon for a second- or third-ranked scholar's opinion to take precedence over the view of Imam Abu Hanifa, the school's founder, when it aligns more closely with societal interests.

¹⁸⁷ Interview with judges from the republic era.

¹⁸⁸ Interviews with some lawyers they are practicing law in the private sector.

¹⁸⁹ Interviews with ten practitioners, specializing in civil, criminal, and family law cases.

¹⁹⁰ BBC Persian News, available at <https://www.bbc.com/persian/articles/cjm1248xklxo> last visited April 3, 2025.

¹⁹¹ Ibn Nujaim, *Zain Al Din bin Ibrahim bin Muhammad bin Muhammad bin Muhammad bin Bakr, Al-Ashbah wa al-Nazayer*, Beirut, Lebanon, *Daar al-Kutub al-Elmeyah*, (1999) P, 330.

For instance, Imam Ibn 'Abidin (1784–1836), a prominent Hanafi scholar, in his seminal work, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, indicated that in certain circumstances, it is acceptable to depart from the dominant (rājih) opinion in favor of a less-preferred one if required by necessity, public interest (maṣlaḥa), or to avert harm.¹⁹² Similarly, in the Ottoman *Mejelle*, the first codified legal text based on Hanafi doctrines, certain cases reflect a preference for non-authoritative Hanafi opinions over established doctrines when more suitable to the legal needs of the time.¹⁹³ Imam al-Shafi'i (767-820),¹⁹⁴ founder of the Shafi'i school, reformulated his legal methodology and established a new madhhab upon moving from Iraq to Egypt, adapting his teachings to align with the distinct societal conditions of his new context.¹⁹⁵ Similarly, Imam Ahmad ibn Hanbal (780–855), the founder of the Hanbali school, issued as many as 15 opinions on a single issue.¹⁹⁶ This adaptability highlights the inherent dynamism within Islamic law (fiqh) and illustrates the classical jurists' pragmatism in responding to their unique circumstances. For individual judges, however, selecting the most suitable ruling among the various opinions issued by classical jurists remains a complex challenge. This challenge is exacerbated in Afghanistan, where concerns over judicial capacity, coupled with a lack of consistent procedural frameworks and precedents, have led to significant instability within the justice system. Considering these issues, most Islamic scholars support codification (taqin) of Islamic law (fiqh/sharia) as an essential measure to enhance consistency and accessibility.

The Major Principle of Islamic Political Theory for State Building

Islamic political theory is grounded in fundamental principles that provide legitimacy to rulers and outline a framework for fostering a just and harmonious society for all citizens regardless of their race and beliefs. These principles are derived from the Qur'an, the Sunnah of the Prophet Muhammad, and the practices of his companions, forming the cornerstone of governance in an Islamic state. Central to this theory is the prioritization of public interests (Maṣlaḥah), which are regarded as the ultimate objective of an Islamic polity. Achieving these public interests is contingent upon the faithful implementation of these foundational principles, ensuring governance that aligns with divine guidance and serves the collective well-being of the community (ummah). Islamic scholars have discussed these characteristics in detail in their books. I will not go through all of them, but I will touch upon some important points to shed light on the topic.

One of the foundational principles in Islamic political theory is the establishment of a constitution or comparable legal framework to regulate the relationship between the state and its citizens. This document serves to delineate the boundaries of state authority and safeguard the rights of individuals. A historical precedent for this principle is found in the actions of the Prophet Muhammad upon his arrival in Madina, where he adopted a constitutional framework known as the Madina Charter to govern the first Islamic state. This charter laid the foundation for justice, governance, and societal harmony, providing a significant lesson for Muslims in the process of state-building and the pursuit of a just and peaceful society. The actions of the Prophet Muhammad provide an invaluable lesson for Muslims regarding the principles of state-building and the establishment of a just and peaceful society. While neither the Qur'an nor the Sunnah of the Prophet explicitly prescribe a specific method for selecting a ruler or delineating their authority, they emphasize the importance of consultation (shura) in governance.

¹⁹² *Hasheyah Ibn 'Abidin*, Vol. 1, p. 74-75.

¹⁹³ *Report of the Commission Appointed to Draft the Majella*, Pp 369-371

¹⁹⁴ *Al-Shafi'i was a Muslim scholar, jurist, traditionist, theologian, ascetic, and eponym of the Shafi'i school of Sunni jurisprudence. He is known to be the first to write a book upon the principles of Islamic jurisprudence, having authored one of the earliest works on the subject.*

¹⁹⁵ *Al-Jawhari, Ismaeil ibn Ghaneem, Manaqeb al-Imam al-Shafei*, (2010) p 11.

¹⁹⁶ *Alauddin Ali ibn Sulaiman, Al-Insaaf fi Marefatul Rajeh min al-Kaelaf, Hejer Leltaba'at wa al-Nasher wa al-Tawzi wa al-E'alan*, (1995) Vol. 16, p 27

The Qur'an explicitly states about the Muslim, "and their affairs are [determined by] consultation among them" ¹⁹⁷ (42:38), highlighting the centrality of participatory decision-making. Additionally, numerous authentic hadiths illustrate that the Prophet consistently sought the counsel of his companions on various matters, particularly those concerning mundane and political aspects of life, reinforcing the significance of collective deliberation in Islamic governance.

The process of state-building in Islamic governance further evolved through the practical experiences of the Prophet Muhammad's companions. Following the Prophet's passing, he had not explicitly designated a successor, which led to a period of uncertainty and deliberation. This challenge was resolved by adhering to the principle of consultation (shura), as emphasized in Islamic teachings. Through a consensus-based approach, the four rightly guided caliphs (al-khulafa' al-rashidun) were elected through direct and free votes (bai'ah) by the community. Notably, during the selection of the successor to Umar ibn al-Khattab, Abd al-Rahman ibn Awf, a key member of the consultative committee, sought the opinions of not only the men of Madina but also its women and youth. ¹⁹⁸ This inclusive approach underscores that shura is a fundamental principle of the Islamic political system, affirming that rulers must derive their legitimacy from the direct and free consent of the citizens.

The other cornerstone of the Islamic political theory is accountability of the rules. There are many Qur'anic verses that encourage Muslims to be just and fair. For instance, the Quran says, "...and when you judge between peoples, that you judge with justice..." ¹⁹⁹ In another verse it says, "Quran states: O ye who believe! Stand out firmly for God as witnesses to fair dealing and let not the hatred of others toward you make you swerve to wrong and depart from justice. Be just; that is next to piety; and fear God, for God is well-acquainted with all that you do." ²⁰⁰ Ibn Kathir, in his famous commentary book on the Quran, reported a hadith that states, "The Lord is with the just ruler until he has not acted unjustly." He continued and reported that one of the companions said, "One day justice is equal to 40 years of prayer." ²⁰¹ Also, accountability and service to the nation are fundamental principles of Islamic political philosophy.

These values were exemplified by the four rightly guided caliphs (al-khulafa' al-rashidun), particularly Abu Bakr and Umar, who emphasized their accountability to the public. In their inaugural speeches, both leaders declared that they were equal to the people and not above them. They affirmed that if they adhered to divine laws, they should be obeyed, but if they deviated from these principles, the people had the right to disobey them. Furthermore, they encouraged citizens to adopt an observatory role in monitoring their rulers. ²⁰² A notable instance of this occurred when Umar ibn al-Khattab, the second caliph, faced public criticism by Salman al-Farsi, a well-known companion of the Prophet. He accused him of using materials from the state treasury to make his own garment. In response, Umar explained that he had combined his son's portion with his own to complete the fabric. Satisfied with this clarification, the people withdrew their criticism. ²⁰³ Another noteworthy incident from early Islamic governance highlights the emphasis on transparency and accountability. The third caliph, Uthman ibn 'Affan, once entered the mosque to lead the Friday prayer but faced public opposition and criticism regarding his policies. In an act of protest, some individuals even dragged his garment and addressed him with the epithet "Ya Na'thal لي" (an insulting term meaning "stupid old man"). In response, Uthman chose to address them calmly and respectfully. He then refrained from leading the prayer, returned home, and Sahl ibn Hunaif led the prayer that day. ²⁰⁴ This episode reflects the openness of early Islamic rulers to public critique and the importance placed on accountability in their leadership.

¹⁹⁷ *The Holy Quran, Chapter 42, verse, 38.*

¹⁹⁸ *Ibn Kathir, Ismail ibn Umar, Al-Bedayah wal Nehayah, Birote: Dar al-Feker, (1986) vol. 7, P. 146.*

¹⁹⁹ *The Holy Quran, chapter 4, verse 58.*

²⁰⁰ *The Holy Quran, chapter 5, verse 8.*

²⁰¹ *Ibn Kathir, Ismail ibn Umar, Tafseer Ibn Kathir, Birote: Dar al-Kutub al-Elmehyah, (1998) vol. 2, P. 300.*

²⁰² *Please look at the first caliph, Abubaker's first speech (Khutba) when he was elected as Caliph in Seera ibn Hisham, Vol. 2, 661, and the Second Caliph, Umar's speech (Khutba) in Tabaqaat al-Kubra, Vol. 3, p.208.*

²⁰³ *Muhammad ibn Qutb ibn Ibrahim, How Write the History of Islam, Vol. 5, p.22.*

²⁰⁴ *Umar ibn Shabah, Tarikh al-Madina al-Munawwarh, Birote: Dar al-Kutub al-Elmehyah, (1996) Vol. 2, P 188.*

Another fundamental principle of Islamic political theory is that an Islamic state must ensure the provision of essential services and establish a just legal system for its citizens. The Qur'an states, "He initiated you from the earth, and He settled you therein" (11:61), emphasizing humanity's role in cultivating and sustaining the earth. The renowned Islamic scholar Ibn 'Ashur argued that the primary objective of Islamic Sharia is to provide a good life accessible to all individuals. He further asserted that achieving this goal is impossible without the guarantee of justice within society. Similarly, Shaikh 'Alal emphasized that the overarching objective of Sharia is the construction and civilization of the earth (Emaratul Ardh: *ضراًل اقرامع*), aimed at improving human life. According to him, this goal can only be realized through a fair justice system and responsible human action. Additionally, Ibn Khaldun, a prominent Muslim scholar and historian, identified two fundamental pillars for constructing and civilizing the earth: the political-social pillar and the economic pillar. The first one ensures the regulation of social life and the delivery of justice, while the second enhances quality of life and facilitates the provision of services. Ibn Khaldun also stressed that security is a critical factor underpinning both pillars, as it enables stability and the effective functioning of governance and economic systems. Thus, it is the responsibility of an Islamic government to provide good services for its citizens and establish an effective justice system to guarantee fairness and peace in the society.

Conclusions:

From the preceding discussion, it is evident that, from an Islamic perspective, the principles of constitutionalism and state-regulated legal frameworks have historical roots within Islamic legal tradition, particularly during the era of Prophet Muhammad and his companions. Furthermore, the legitimacy of leadership in an Islamic society is derived from the consent of the people, with rulers being bound by limits designed to ensure the welfare (*maslaha*) of the nation. According to Islamic political theory, citizens are entitled to fundamental rights guaranteed by Islam and should exercise these rights free from coercion or undue pressure.²⁰⁵ Additionally, Islamic governance holds rulers accountable to the people, granting citizens the right to openly and directly critique state authorities if they fail to fulfill their responsibilities effectively.

A historical analysis of Islamic legal tradition, particularly in the practices of the Prophet and his companions, reveals that constitutionalism and legislative processes have been upheld within Islamic law, and there exists no inherent conflict between these concepts and Sharia principles. However, the Taliban's stance of adhering exclusively to Sharia and suspending all prior laws, including the 2004 Constitution, introduces significant challenges and complexities to the Afghan legal system. This reversion to Sharia law as interpreted and applied by the Taliban poses risks to due process and access to justice, particularly for women. This approach has destabilized the legal system and harmed the interests of citizens, which is the main goal of Islamic Sharia.

Finally, it is worth to requote the famous Islamic scholar, Ibn Qayme al-Jawzi, that stated, "The foundation of Sharia is rooted in justice and the welfare of humankind, both in this life and in the hereafter. Sharia embodies the principles of justice, mercy, wisdom, and public interest. If any interpretation or ruling that shifts from justice to injustice, mercy to cruelty, benefit to harm, or wisdom to irrationality cannot be considered a genuine component of Sharia, even if such a ruling is mistakenly perceived as legitimate through misinterpretation." This perspective underscores the dynamic and principled nature of Sharia as a framework for ensuring equity and the common good. So, for a system to claim legitimacy as Islamic, it must adhere to the criteria and standards outlined in Islamic sources regarding the structure and foundational principles of an Islamic governance model.

²⁰⁵ *Sahih Muslim, Vol. 2, p. 889, Khutba Hajjatul Wada,*

Chapter Five: The change in jurisdiction and role of the executive criminal justice institutions

Author: Dr. Mohammad Haroon Mutasem

1. Introduction

Since the fall of Afghanistan to the Taliban on 15th of August of 2021, the entire criminal justice system of the country has become paralyzed. The system has transformed from a justice delivery mechanism to a punitive machine that only serves for ensuring the interest of the Taliban, regardless of its decisions being compatible with the spirit of justice or not.

Part of this chaotic situation stems from the suspension of the entire body of the substantive and procedural penal laws which puts the system in a state of lawlessness. Introducing Islamic Sharia, due to its broadness and lack of unified views in it, as a substitute for the body of criminal justice legislations is not pragmatic and hence will not serve the interest of criminal justice. This is obviously an infringement of the principle of legality of crimes. The division of labor between Sharia and state laws in regard to different categories of crimes that existed under the 1976 and subsequently under 2017 criminal legislative framework is not in place anymore.

The bulk of the chaos is pertaining to the transformation of jurisdiction and role of the executive criminal justice institutions that is partially done by resorting to adoption of new legislations and is partially done in practice without any legislative basis. The Attorney General's Office (AGO) was the institution whose mandate and role was completely transformed by the legislation. Based on the new law, the AGO is no longer fulfilling the task of investigation of crimes- a duty that was granted to this institution under the 2004 constitution. Ironically the duty of investigation is officially not transferred to any other institution- leaving this vital aspect of the criminal justice system missing, however, UNODC (2024) reports that Taliban police and courts have assumed these roles in practice, often relying on coerced confessions, which violates due process standards. In the absence of official investigative institution, the courts often claim that this task is being furthered by the investigative judges while, based on the views of Afghan legal experts, on the one hand this type of practice is not of any basis in the legal system of Afghanistan and on the other hand the reliance of the courts in practice is mostly on the detection- primary investigation- that is done by the police at the first stage.

2. The suspension of the substantive and procedural criminal laws

The takeover of the country by the Taliban on 15th August 2021 marked the de facto suspension of the 2004 constitution and the legislative framework under it. This suspension inter alia drastically affected the criminal justice system of the country in which "legality" i.e. no crime no punishment without law,²⁰⁶ is the cornerstone of its functionality. The 2017 penal code of Afghanistan, which was the outcome of almost one decade of efforts of the state and non-state actors and experts was put aside, leaving the substantive area in a state of lawlessness. Similarly, the suspension of the 2014 criminal procedure code of Afghanistan did not leave the procedural area better than the substantive. These are only a few but not all of the suspended legislative documents pertaining to criminal justice institutions. The entire body of the legislative documents including the laws, regulations, bylaws and procedures regulating the affairs of the criminal justice institutions are no longer in force with no substitute introduced for them. As asserted by a criminal defense lawyer, there are no laws that could be referred to in a criminal proceeding and the only source that is being relied upon is Islamic Sharia with no determination of specific applicable sources to be understandable to experts.²⁰⁷

²⁰⁶ *Islamic Republic of Afghanistan, The Constitution, Official Gazette...*, Art 27

²⁰⁷ *Online interview with defense lawyer # 5, Date of interview 22.05.2024*

2.1. Islamic Sharia as the replacement

Under the 1976²⁰⁸ and 2017²⁰⁹ penal codes of Afghanistan, the scope of implementation between Islamic Sharia and the state laws was clear. Substantively, Islamic Sharia (Hanafi Jurisprudence) was applicable on all the Hudud²¹⁰, Qisas and Diyat²¹¹ crimes while the Tazir²¹² crimes were left within the domain of state laws. Procedurally, all the mentioned categories were dealt with under the state laws. Currently, this distinction has ceased to exist. In practice, all types of crimes are dealt with according to Islamic Sharia as there are no state laws in force. This issue raises the questions of legality and unified application that the existing criminal justice system under the Taliban does not take them into consideration.

Principle of legality

Legality of crime and punishment is the cornerstone of a criminal justice system. It stipulates that there will be no crime and no punishment unless it is specifically provided in a law prior to the commencement of the conduct. This maxim is recognized as a fundamental right of individuals in any criminal justice system. The Universal Declaration of Human Rights²¹³ and the International Covenant on Civil and Political Rights²¹⁴ both have enshrined this principle as a guarantee for protection of a fundamental right i.e. as a safeguard against any arbitrary and baseless prosecution of individuals by the authorities. It further guarantees the foreseeability and predictability of the outcomes of the conducts that are committed by individuals.

Domestically, this principle has been articulated in the 2004 Constitution²¹⁵ and the 2017 Penal Code of Afghanistan²¹⁶.

Under the Taliban criminal justice system, the judges apply Islamic criminal law provisions without any clear boundaries defined for it.²¹⁷ Due to the broad scope of Islamic criminal law, it is very difficult to determine what conducts are penalized which leaves the question of predictability and foreseeability as a high concern. Any conduct, based on the view and interpretation of a jurist from a textual authority i.e. Quran and Sunnah, can constitute a punishable crime in the courts of the Taliban and thus would authorize the judges to set a punishment that, in their own views, is just and fair.²¹⁸ This, undoubtedly, is a grave infringement of the principle of legality and thus is leaving the individuals with no protection against the arbitrary and unjust decisions of the authorities. More importantly, these authorities are of no legal legitimacy that is required for the criminal justice actors and institutions.

²⁰⁸ *The Penal Code of Afghanistan, Official Gazette 347, 1976, Art 1*

²⁰⁹ *The Penal Code of Afghanistan, Official Gazette 1260, 2017, Art 2*

²¹⁰ Hudud crimes are those acts where the crimes and their punishments are determined by the textual sources of Islamic Shari'a namely Quran and Sunnah and no one, including the Islamic ruler, has the authority to increase, decrease or pardon them. There are seven of these crimes which are: theft, highway robbery, adultery and fornication, alcohol drinking, apostasy, defamation and rebellion. See Sayyid Ahmad Najati Sanad (1991). *The Theory of Crime and Criminal Responsibility in Islamic Law, Chicago, Office of International Criminal Justice, 53.*

²¹¹ Qisas (an eye-for-an-eye punishment) and Diyat (compensation) crimes are those acts and omissions that Islamic Shari'a has provided specific punishments for them; however, the right of pardoning them rests with the victim (in case of injury) or the relatives of the victim (in case of murder). Crimes under this category all relate to types of crimes that result in murder, assault and injuries. See Anwarullah (2006). *The Criminal Law of Islam, India, Kitab Bahavan, 53.*

²¹² Ta'zir crimes are those acts and omissions that Islamic Shari'a has neither criminalized, nor has provided any explicit punishment for them directly in the Quran or the Sunnah however, criminalization and determining the punishment for them is left in the hands of the rulers who, in the light of circumstances, could penalize certain acts and omissions that endanger Islamic societies. See Yahaya Yunusa Bambale (2003). *Crimes and Punishments Under Islamic Law, Ikega, Malthouse Press Limited, 96.*

²¹³ *Universal Declaration of Human Rights, 1948, Art 11(2)*

²¹⁴ *International Covenant on Civil and Political Rights, 1977, Art 15 (1)*

²¹⁵ *The Constitution of Afghanistan, 2004, Official Gazette... , Art 27*

²¹⁶ *The Penal Code of Afghanistan, Official Gazette 1260, 2017, Art 7*

²¹⁷ *Online interview with defense lawyer # 4, Date of interview: 10.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)*

²¹⁸ *Online interview with defense lawyer # 5, Date of interview: 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)*

2.1.1. The challenge of unified application

Besides legality, application of Islamic criminal law, due to the broad scope of it and possibility of different interpretations from it, causes the lack of unified application of the provisions. This lack of unified application leads to varying punishments for the perpetrators of the same acts with no legal justifications and thus would violate the principle of equal application of the laws. Based on the words of the defense lawyers who represent their clients in the Taliban courts in different provinces, the courts in different parts of the country, resorting to different sources, issue judgements that are completely different from the judgements that are issued for the same offences in the other localities.²¹⁹ A judgement in the primary criminal court of Kandahar in a theft case by no means is similar to the judgement issued in Balkh for the same case of theft due to the reliance of the judges in these courts on different sources.²²⁰ This type of practice definitely has a tremendous negative impact on insurance of criminal justice and ultimately leads to a lack of trust and support of the public to the institutions.

3. Institutional and jurisdictional transformation of executive criminal justice bodies

During the two decades of the Republic, the criminal justice institutions in Afghanistan, notwithstanding the shortcomings and challenges, have had a great opportunity for evolving and were gradually, although with a slow pace, trying to align themselves with the standards of fair trial and human rights. Although there were accusations of pervasive corruption against them, their active functioning in a constitutional framework per se was a guarantee to the safeguard of the fundamental rights of individuals.²²¹

Under the current framework, the mandate and jurisdiction of almost all the executive criminal justice institutions are transformed either by a legislative document or without such a basis. The police and the Attorney General's Office have faced alteration of their duties and mandate to the extent that criminal justice delivery cannot be expected from them. The criminal defense, although not falling within the definition of the executive criminal justice institutions, is very essential in safeguarding the rights of the suspect and accused in all the phases of criminal justice proceedings, including the detection and investigation of crime. However, the change in scope of the work of the defense lawyers and the imposed restrictions on them have had a devastating impact on delivery of criminal justice particularly that the actors of the said institutions are not considering themselves bound by any rules. In the words of a defense lawyer from Kabul, the judges believe that their thoughts are Islamic Sharia, and they do not give any right to the defense lawyers to argue against them and challenge their decisions which are not in conformity with Sharia.²²²

3.1. The Attorney General's Office

The Attorney General's Office which was initially enshrined in the 1964 constitution of Afghanistan²²³, was granted the duty of investigation of crimes²²⁴. This duty, excluding the first era of the Taliban from 1996- 2001²²⁵, was furthered by this institution until August 2021. The 2004 constitution also stipulated this duty for the Attorney General's Office with the addition of prosecution as the legacy of the 1977 constitution.²²⁶ This institution has encountered a dramatic change in its mandate and scope of work that has left it with no considerable role in the criminal justice system.

²¹⁹ Online interview with defense lawyer # 1, Date of interview: 15.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²²⁰ Online interview with defense lawyer # 2, Date of interview: 12.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²²¹ Online interview with Zabihullah Kalim, Former Attorney General of Afghanistan, Date of interview: 27. 05.2024

²²² Online interview with defense lawyer # 5, Date of interview 22.05.2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²²³ Martin Lue, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, International Commission of Jurists, 2003, P 17

²²⁴ *The Constitution of Afghanistan, 1964, Art. 103*

²²⁵ Martin Lue, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, International Commission of Jurists, 2003, P 17

²²⁶ *The Constitution of Afghanistan, 1977, Art 106*

The mandate and functionality under the 2004 Constitutional framework:

Like its predecessors, the 2004 constitution also bestowed the Attorney General's Office with the duty of the investigation and prosecution of crimes. In the words of the constitution that states: "investigation, and prosecution are conducted by the Attorney General's Office The Office of the Attorney General is independent in its functions." ²²⁷, this duty was exclusively given to the Attorney General's Office which was furthering it independently and without any intervention. Under article 4(1) of the criminal procedure code of Afghanistan, investigation was defined as: "comprehensive investigation of a crime and questioning and interrogation of a suspect, witnesses and observers by the prosecutor based on collected evidence and evaluation of collected reasons and evidence in order to prove the commission or non-commission of a crime, to identify the criminal, and to attribute accusation, in accordance with the provisions of law." ²²⁸ Although prosecution was not precisely defined in the criminal procedure code, article 168 of this code stipulated that the prosecution phase begins with the completion and submission of the act of indictment by the investigative prosecutor to the prosecutorial prosecutor. ²²⁹ Furthermore, the law on the organization and structure of the Attorney General's Office considered the "investigation of the crime, preparation of the indictment and following that up (prosecution) against the accused in the courts" ²³⁰ as the main duties of the Attorney General's office.

In line with these constitutional and legal obligations, the Attorney General's Office was fulfilling these duties with the intention of delivering criminal justice to the public. This era was marked with adoption of many penal legislative documents in which incorporation of international obligations of Afghanistan was one of the top priorities. Another significant achievement of this period was the focus of the criminal justice system on criminal defense. The duty of providing pro bono legal aid in criminal cases was not only the duty of the legal aid department within the ministry of justice but also a legal obligation of every registered defense lawyer to fulfill by representing 3 criminal cases in a year free of charge. Moreover, the existence of free and independent media in Afghanistan at that time was another impactful mechanism on the work of the Attorney General's Office that every now and then was bringing the work of this institution under scrutiny. This had led to gradual increase of the case load in the offices of the Attorney General's Office, particularly due to the complaints from women which used to be limited in number before such reforms.

The post-Republic mandate:

The collapse of the country to the Taliban in August 2021 had a devastating impact on the criminal justice institutions. The Attorney General's office was the most affected institution. Despite non-existence of any legal restrictions for this institution until the issuance of the decree number 35 of the leader of the Taliban in May 2023, the Attorney General's office was not functioning under the previous mandate anymore. This decree completely changed the mandate of this institution including the name of it that in the words of the decree, it is called "the High Directorate of the Supervision and Follow-up of Decrees and Edicts." ²³¹ In an interview conducted with Zabihullah Kalim, the former Attorney General of Afghanistan, he asserted that the Taliban believed that there was no basis for the Attorney General's Office in any textual (Quran and Sunnah) or extracted sources of Islamic Sharia and that has led to the change of mandate and name of this institution by them. ²³² However, this decision seems to be stemming from an antagonism towards this institution as there are some other institutions such as the security police and the traffic police that also do not have any direct basis in any of the sources of Islamic Sharia but are still in existence in the Taliban's government structure.

²²⁷ Islamic Republic of Afghanistan, *The Constitution, Official Gazette...*, Art 134

²³² Online interview with Zabihullah Kalim, Former Attorney General of Afghanistan, Date of interview: 27.05.2024

²²⁸ Islamic Republic of Afghanistan, *Criminal Procedure Code, Official Gazette 1132, Article 4 (4)*

²²⁹ Islamic Republic of Afghanistan, *Criminal Procedure Code, Official Gazette 1132, Article 168*

²³⁰ *The Law on the Organization and structure of the Attorney General's Office, Official Gazette 1117, 2013, Art 4 (1)*

²³¹ *Decree # 35 of the leader of the Taliban, Official Gazette 1434, 2023*

Subsequent to the issuance of decree number 35, a new law named “the law on the organization and structure of the high office of the oversight and follow-up of the decrees and edicts” was enacted by the Taliban which is one of the limited number of laws that are enacted by them in their second era. Ironically the duty of investigation and prosecution which were furthered by the predecessor of this institution is not granted to the transformed institution. According to this law, this institution has the responsibility of oversight on the observance and implementation of the decrees and edicts in the work of the public (military and civil) and private sectors.²³³ The only situation that the term “investigation” is mentioned in this law is in the section that is related to the criminal statistics and reporting on that where it stipulates that “ after detection and investigation of the crime by the high directorate of the oversight and follow up of decrees and edicts, it will issue a report to the authoritative organs.”²³⁴ This provision reveals two flaws. The first one is consideration of detection as a duty to this office, whereas the responsibility is still with the police and there has not been any legislative document granting this duty to any other institution so far. The second flaw is the stipulation of investigation as a duty of this institution while there is no basis or mechanism for it in the said law. A defense lawyer asserted that this institution is a nominal organ that is not active at all. He continued that the mandate that is given to this institution under the new law is not practiced at all.²³⁵

In the absence of official transfer of the duty of investigation to any other institutions, there has been chaos in the criminal justice system of the country. De facto, this duty is being exercised either by the police or the courts themselves. Although the courts often claim that the investigation is being furthered by them and in the absence of the Attorney General's Office, there is no gap in the investigative activities. In practice their reliance is on the investigative work of the police and in some cases, based on the request of a party to the case, the judges themselves further this task which used to be called complementary investigation under the constitutional framework.²³⁶

This practice indicates a clear gap in investigation of crimes which is quite vital for delivery of criminal justice.

3.2. The Police

The legacy of detection of crime by the police is stemming from the 1977 constitution of Afghanistan.²³⁷ Since then, the police, inter alia, has been the official and legal authority for detection of the crime and thus playing a major role in the criminal justice system of the country. Although legally, this duty was solely bestowed on the police, in practice, it was also furthered by other institutions depending on the type and severity of the crime. This issue will be further elaborated in the coming section.

3.2.1. The criminal justice related duties under the 2004 constitution:

The constitutional duty that was granted to the police under the 2004 constitution was detection of crimes.²³⁸ Detection of crime in the words of the criminal procedure code of Afghanistan was “Proceedings taken in order to prevent commission of a crime and identify the perpetrator, method or cause of commission, identify the crime scene and protect crime related evidence and items.”²³⁹ This constitutional duty, in practice, was exercised by several other actors called “ judicial officers” in the criminal procedure code of Afghanistan which included the police, National Directorate of Security operatives, inspectors of the High Office of Inspection, internal auditors of ministries and governmental institutions and officials of Anti-Corruption Institution.²⁴⁰

²³³ *The law on the oversight and follow up of the decrees and edicts, Official Gazette 1435, 2023, Art 5*

²³⁴ *The law on the oversight and follow up of the decrees and edicts, Official Gazette 1435, 2023, Art 16*

²³⁵ *Online interview with defense lawyer # 5, Date of interview 22.05.2024*

(Due to security reasons, the interviewee does not want his identity to be revealed)

²³⁶ *Online interview with defense lawyer # 5, Date of interview 22.05.2024*

(Due to security reasons, the interviewee does not want his identity to be revealed)

²³⁷ *The Constitution of Afghanistan, 1977, Art 106*

²³⁸ *Islamic Republic of Afghanistan, The Constitution, Official Gazette..., Art 134*

²³⁹ *Islamic Republic of Afghanistan, Criminal Procedure Code, Official Gazette 1132, Article 4 (1)*

²⁴⁰ *Islamic Republic of Afghanistan, Criminal Procedure Code, Official Gazette 1132, Article 4 (2)*

The police was duty bound to refer the detected crime to the prosecutors for investigation and prosecution within 72 hours after the detection of the crime in case of arrest of the suspect.²⁴¹ However, due to the nature of the crime being detected by the other institutions, this requirement of submission of the case and the relevant documents to the prosecutor within 72 hours was not enshrined in the law.

3.2.2. The criminal justice related duties under the Taliban

The police as a detective institution have also faced changes in the scope and type of its work since the fall of the country in the hands of the Taliban. However, unlike the Attorney General's Office, there has been a substantial increase in the duties of the police in the field of criminal justice without any legal basis.²⁴² Currently the police, apart from detection, can investigate crimes, which has increased the authority of the police to a dangerous degree. The police are furthering this duty without any oversight or control of its authority and work by the prosecutors that existed under the 2004 constitutional framework. Although the law on the organization and authority of the high directorate of oversight on the decrees and edicts gives the duty of observation of legality of the work of the detective institutions to this high directorate²⁴³, in practice, due to the fact that the police do not have any obligation to send the cases to this office, this oversight and control does not exist.²⁴⁴ This unleashed authority of the police, which often makes the basis for the decision of the courts, has left the institution with lots of discretionary powers that is unprecedented in the criminal justice history of Afghanistan.²⁴⁵

Another detective institution that has gained extraordinary powers under the Taliban is the directorate of national security. This institution has unlimited powers and its jurisdiction can be extended to any crime that they deem necessary. Ironically, the scope of the work of this institution is not limited to detection anymore. It rather has turned into a full-fledged criminal justice institution that in the words of experts can do A to Z of the criminal proceedings from detection to enforcement of punishment without being bound by any laws or being responsible to any institution.²⁴⁶

This increase of the authorities of detective institutions, particularly, the directorate of national security, certainly has a devastating impact on the rights of the individuals whose cases are before the criminal justice institutions.

4. The impact of these transformations on the rights of citizens

Taking into account the above transformations in the mandate and jurisdiction of constitutionally protected criminal justice institutions by the Taliban, the said institutions are neither able nor willing to fulfill their professional duties. The mechanism of division of labor amongst the executive criminal justice institutions under the 2004 constitution, inter alia, was for the purpose of safeguarding the fundamental procedural and substantive rights of the individuals in the criminal justice system. In the words of Zabihullah Kalim, the last Attorney General of the Republic, the components of the criminal justice system and hence the fair trial are missing under the Taliban, which in turn makes the criminal justice unachievable.²⁴⁷ This has significantly reduced the trust and confidence of people in the ability and willingness of the Taliban to provide people with justice in the criminal cases. This reality is proving the baselessness of the arguments in favor of the criminal justice system of the Taliban for being speedy, less corrupt and effective before the takeover of the country by them in 2021.

²⁴¹ Islamic Republic of Afghanistan, Criminal Procedure Code, Official Gazette 1132, Article 87

²⁴² Online interview with defense lawyer # 1, date of interview 15, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁴³ The law on the oversight and follow up of the decrees and edicts, Official Gazette 1435, 2023, Art 7

²⁴⁴ Online interview with defense lawyer # 2, date of interview 12, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁴⁵ Online interview with defense lawyer # 5, date of interview 22, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁴⁶ Online interview with defense lawyer # 5, date of interview 22, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁴⁷ Online interview with Zabihullah Kalim, Former Attorney General of Afghanistan, Date of interview: 27. 05.2024

In a criminal justice system, similar to the essence of protection of the rights of citizens as individuals, safeguarding the rights of the society as a collective is also of a vital importance which has a significant impact on the security and safety in a society and thus the existence of rule of law there. Any imbalance between the two would certainly affect society negatively. Further elaboration on different aspects of this malfunction of the criminal justice institutions will be provided in the following sections.

4.1. From a procedural justice point of view

In a criminal justice system, safeguarding and protection of procedural rights of individuals is a fundamental duty of governments that due to their importance are enshrined in the constitutions. The articulated procedural rights under chapter two of the 2004 constitution are left with no protection under the Taliban criminal justice system.

Presumption of innocence, stipulated in article 25 of the 2004 constitution, is not considered in the criminal justice system of the Taliban. Being merely a suspect is more than enough to create the status of guilt for you before the criminal justice institutions.²⁴⁸

Similarly, under article 27 of the 2004 constitution, pursuing, arrest and detention of people without provisions of the law are forbidden. Considering this maxim, the number of pre-trial detentions should be limited to exceptional circumstances. However, there are hundreds of arbitrary detentions that have taken place only in the year 2023.²⁴⁹ Moreover, this article of the constitution also articulates that there will be no punishment for a person unless it is issued by an authorized court in accordance with the law adopted before the conduct. In practice, neither the institutions are authorized nor the provisions are foreseeable and predictable respectively due to lack of legitimacy and non-existence of promulgated laws that make the basis of those decisions.

Furthermore, article 28 of the 2004 constitution prohibits torture and inhumane treatment at any phases of criminal justice proceedings. Contrary to this ruling, there is pervasive practice of torture and inhumane treatment in the criminal justice system of the Taliban to the extent that majority of the released detainees and prisoners or their lawyers interviewed in 2023 have confirmed being exposed to torture at least once.²⁵⁰ Based on the assertion of the experts, this practice of torture is very common in the General Directorate of Intelligence which currently has an unlimited jurisdiction over all the crimes. The experts even claim that the means and ways of torture in the General Directorate of Intelligence is very similar to the practices of torture in Bagram and many other prisons by the American forces during their presence in Afghanistan.²⁵¹

The right of having a free defense lawyer articulated in article 31 of the 2004 constitution is extensively undermined by the criminal justice institutions of the Taliban. The principle of equal arms of a criminal justice system that requires the presence of a defense lawyer, is not recognized by the Taliban. The limitations pertaining to defense lawyers is not limited to the free defense lawyers but also extended to having a defense lawyer in general.²⁵² The common belief amongst the actors in the criminal justice institutions of the Taliban is that having a defense lawyer in criminal cases is immoral and against Islamic Sharia.²⁵³ The current tendency of the criminal justice institutions has created this fear that sooner or later, there might be a ban on the presence of the defense lawyers in the criminal cases before the criminal justice institutions of the Taliban.

²⁴⁸ Online interview with defense lawyer # 3, date of interview 25, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁴⁹ Afghanistan Human Rights Situation Report 2023, Rawadari, 2024, P 15

²⁵⁰ Afghanistan Human Rights Situation Report 2023, Rawadari, 2024, P 19

²⁵¹ Online interview with defense lawyer # 1 from Kabul, date of interview 15, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁵² Online interview with defense lawyer # 2 from Kabul, date of interview 15, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

²⁵³ Online interview with defense lawyer # 5 from Kabul, date of interview 22, 05, 2024 (Due to security reasons, the interviewee does not want his identity to be revealed)

4.2. From a substantive justice perspective

Similar to the procedural area, the area of substantive criminal justice is also paralyzed under the Taliban. Deciding on the merits of the case would require the existence of specific substantive provisions that constitute the basis for the decision making in a criminal justice system. The lack of reference to any specific laws in the decisions of the criminal justice institutions is a clear indication of the catastrophic situation of substantive criminal justice. All the decisions on the merits of the case that are being made are coming from the desire and personal understanding of the actors of the institutions without any legal basis in the legislative documents.²⁵⁴

5. Conclusions

In summary, the status of criminal justice delivery is very alarming in Afghanistan. The lack of legislative documents to form the basis of procedural and substantive decisions is making criminal justice unachievable. Islamic Sharia as a substitute for the penal legislation is not responding in practice. This is mainly emerging from the lack of tools and approaches for creation of a mechanism of division of labor between Sharia and the state laws which existed under the 2004 constitutional framework.

The executive criminal justice institutions are neither able nor willing to deliver criminal justice. The division of labor amongst the executive criminal justice institutions is not there at all. Furthering the duties that are beyond the capacity and authority of the actors and institutions is one of the main challenges of the criminal justice system under the Taliban. Lack of existence of very important institutions such the investigative and prosecutorial and assigning no institution to legally further this vital task is an indicator of a superfluous view of the Taliban to the criminal justice system.

This chaos in the arena of criminal justice has a tremendous negative impact on both procedural and substantive rights of the individuals that causes an evolving distrust of the public in the criminal justice institutions. Life, bodily integrity and freedom are the fundamental values that restriction of them should only be possible by just and fair laws within a constitutional framework that are enforced by credible and trusted institutions. Under the current mechanism and practice, the aforementioned values are left with no legal and moral protection that in turn yields the ground for an evolving chaotic situation.

²⁵⁴ Online interview with defense lawyer # 3 from Kabul, date of interview 25, 05, 2024(Due to security reasons, the interviewee does not want his identity to be revealed)



About the Afghanistan Constitutional Law Expert Group

Afghanistan Constitutional Law Expert Group consists of a group of highly qualified constitutional lawyers, legal experts and academics who have experience of working in or contributing to the development of Afghanistan's legal system. The Group is established, within the Center for Dialogue and Progress, to support and promote discussions on the legal and constitutional aspects of governance in Afghanistan and highlight the importance of this theme as part of the agenda of a national dialogue.

The work of the Afghanistan Constitutional Law Expert Group is based on three overarching principles:

- 1. Constitutionalism based on popular participation must be the basis of the governance in Afghanistan and state legitimacy must come from the will of the people. These would require adherence to the separation of powers, checks and balances, decentralization of power, the rule of law, respect for human rights, participation and inclusivity, among others.*
- 2. Afghanistan is a pluralistic society, and its legal system should reflect and be based on pluralism in the sources of law-making.*
- 3. Afghan citizens, men and women, shall equally enjoy universally accepted fundamental rights and freedoms, provided for, guaranteed, and protected by the Constitution. The people of Afghanistan should not be discriminated against based on their ethnicity, race, gender, age, language, religion or other considerations.*



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