



The Afghan Taliban Constitution Drafting between theory and practice, new beginnings and calculated continuity

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Ozair Khan
Ahmed-Waleed Kakar



CORDOBA PEACE INSTITUTE
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معهد قرطبة للسلام

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Chemin des Vignes 2 bis, 1209 Geneva, Switzerland

Tel: +41 (0) 22 734 15 03

info@cpi-geneva.org

www.cpi-geneva.org

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Author: Ozair Khan & Ahmed-Waleed Kakar

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1. Introduction

Since August 2021, the Taliban have regained power in Afghanistan twenty years after their first controversial rule. The Taliban's government is the only one in the Sunni world ruled by a religious class. It identifies itself with the Deobandi movement and its administration therefore advocates a strict application of Sharia Islam based on Hanafi jurisprudence. Almost all the Afghan population is Muslim, and the overwhelming majority are Sunni Hanafis. The Shia minority predominantly belongs to the Ja'fari Twelver branch of Shi'ism, with a smaller group belonging to the Ismaili subsect within Shi'ism. Another critical element to take into account in Afghanistan is ethnicity. The majority of the Taliban are Pashtun: historically the predominant ethnic group in Afghanistan. Almost all Afghan leaders in power since 1747 have been Pashtun. The other important ethnic groups in Afghanistan are the Tajiks, the Uzbeks, and the Hazaras, who are majority Shiite. The situation in Afghanistan is challenging on many fronts, mainly these three aspects: (1) Economic situation, notably due to the lack of international aid and the freezing of funds; (2) Security tensions with the emergence of ISKP; (3) An uncoded and opaque governance system, featuring relatively controversial policies such as banning girls' education.

Over the past years, various Taliban officials made several and contradictory allusions to drafting a new constitution. A noteworthy characteristic of Taliban governance is their demonstrated reluctance to take any binding and, in particular, codified positions which they may be accountable to. Whilst an edict of laws governing the Ministry of Vice and Virtue has been promulgated since the completion of this fieldwork and report, news on any future constitution remains confined to the domain of theoretical discussion and guesswork, albeit the constitutional issue remaining a window to outlining the Taliban's future governance in Afghanistan. CPI experts conducted fieldwork in Pakistan and Afghanistan in Summer 2023 to understand the dynamics surrounding the drafting of the supposedly upcoming new constitution of the Islamic Emirate and the religious ethos guiding its drafting. Interviews were conducted with numerous actors including members of the de facto Taliban government and religious scholars, experts and civil society actors in Afghanistan and Pakistan.

This study presents an analysis of the dynamics and different opinions of key stakeholders regarding the debate on the drafting of the new constitution in Afghanistan. The different readings and interpretations of the constitutional history and political culture of Afghanistan, most notably the 1964 constitution, play a cornerstone role in this debate up to this day.

2. Background

The Taliban triumphantly entered Kabul on 15 August 2021. Victorious in what was their bloody two-decade long jihad against the US (and its NATO and Afghan allies), their takeover triggered a worldwide flurry of concerns. Had the Taliban evolved in their politics, and if so, how? What would their agenda be in their now-second stint in government? How would they, most importantly, adapt their characteristic and unyielding Islamic traditionalism to the requirements of the modern state they now ruled? Over three years since the takeover, many of the questions still remain unanswered.

Forecasting the future by definition necessitates examining its (recent) past. In attempting to diagnose Afghanistan's tormented modern history, existing literature has identified and focussed on a variety of factors. These include, but are not restricted to, the country's geography and resultant vulnerability to foreign powers, its difficult terrain, poor infrastructure, historically weak central government as well its ethnolinguistic diversity; the latter often interpreted as an inevitable stepping stone for politico-ideological polarisation.

Relatively little attention, however, has been paid toward the recurring national cycle of attempted, and failed, state building. That pattern, in turn, represents a wider and now centuries-old phenomenon: the friction between what historians have termed as modernity versus the pre-modernity of classical Islam, to which Afghanistan, if not wholly, largely belongs. With the unresolved tension palpable across the globe, its convulsions have been felt in Afghanistan in particular.

As the time of writing this report, the Taliban's Islamic Emirate is busy with state building attempts, the final result of which is agreed will be sui generis to the Taliban, but the details of which remain hotly contested by analysts. The modern state, Wael Hallaq points out, is a historically contingent entity far removed from the classical Islam that forms the blueprint for the Taliban, but with which the Taliban now seeks to synthesise their state.¹ The state building endeavour, however, is by no means unique to the Taliban. Initial attempts were first made over a century ago, and the difficulties posed by it are not unique to Afghanistan; much of the Islamic world has grappled with the challenge, with varying levels of success. In the driver's seat of a one-party state,² the Taliban serve as judge, jury and executioner; they occupy a commanding position from which to decide the country's future constitutional makeup. The templates of previous Afghan governments are available to them. Which facets are concurred with, and which details are diverged from, are exclusively the domain of the Taliban.

Relying on interviews with Taliban officials and affiliated scholars, religious scholars as well as figures from the previous American-backed Republic, this report will seek to explain the practical implications behind Taliban-politik, including the daunting task of promulgating yet another Afghan constitution. Assuming that they intend to do so.

¹ Wael Hallaq, *The Impossible State - Islam, Politics, and Modern Predicament* (New York: Columbia University Press, 2012).

² Ayaz Gul, "Taliban Ban Afghan Political Parties, Citing Sharia Violations," *Voice of America*, August 16, 2023, <https://www.voanews.com/a/taliban-ban-afghan-political-parties-citing-sharia-violations/7228136.html>.

“The [idea of the] separation of powers does not fit into the framework of an Emirate. The source of power is one.”

Abdul Salam Zaeef, Taliban co-founder and later ambassador to Pakistan

3. Historical Context

The modern Afghan state emerged as a rump state in the aftermath of the collapse of the short-lived Afghan Durrani Empire. Ahmad Shah Durrani, generally considered the father ('Baba') of the nation, founded that Empire in 1747, expanding Afghan frontiers as far as Persia and India. His military prowess was undeniable, yet was not, to Afghan misfortune, accompanied by a capacity for institution building. This became painfully evident as his Empire unravelled in dynastic feuds in the mere decades following his death. The following decades would reveal that imperial collapse was only the beginning; the downfall of the Durrani Empire ripened the country to the interference and eventually two separate invasions by the ascendant British Empire. The fact they did so firmly based in the subcontinent to which Ahmad Shah's influence once extended only further embittered the indignity.

The foundational blocks of the modern state were thus only put in place in the late 19th century. This was overwhelmingly in response to the pure necessity of doing so after falling prey to the forces of modern European imperialism, against which Afghanistan was practically helpless. Initial and limited attempts had been made in the mid-19th century by the Amir Sher Ali³, but it was the reign of Emir Abdurrahman Khan (the Iron Emir) that marked a watershed moment. Installed by the British as they evacuated Kabul in the aftermath of the Second Anglo-Afghan War, the Emir's two-decade long reign saw an unprecedented centralisation. This was forged through his subjugation of the clergy and, in more practical terms, the twin pillars of his indefatigable brutality and access to copious stockpiles of British armaments. Abdurrahman's successors built on this. During the reign of his son and successor Habibullah, a tentative modernisation was attempted. Part and parcel of this was a greater attempt at legitimising itself, including through a reliance on religion. This included the first Pashto text published by the government: a treatise on the religious necessity of government, written originally in Dari by Mawlawi



Abdurrah Akhundzada, later translated into Pashto.⁴

The translation into Pashto was telling for two reasons. It firstly coincided with the beginnings of concerted attempts to elevate Pashto to at least parity with Dari. Secondly, the pamphlet's addressees: the Pashtuns, were noteworthy. The Pashtuns were Afghanistan's most powerful ethnic group to whom the royal family belonged. They also happened, historically, to be most prone to rebellion and resisting state authority.⁵

The first concerted attempt at enshrining the rules of state into a (proto)constitution occurred in the aftermath of the Third and final Anglo-Afghan War of 1919. The war resulted in Kabul regaining total independence over its foreign affairs, and King Amanullah was keen to modernise his Kingdom, partly motivated by the desire to 'show Europe that Afghanistan had its [own] place on the map of the world.'⁶ Soon thereafter, he commissioned a collection of ulama: Turkish, Indian and Afghan. They were tasked with drafting a constitution under the aegis of a modern state, subject to firm adherence to Islamic law as per the predominant Hanafi school of

law. An exhaustive and consultative process headed by Mawlawi Abdul Wasi produced the *Nizamnama*, a proto constitution, in addition to penal codes.⁷ The then-daring modernity of the *Nizamnama*, however, need bear in mind the exertions made in their compliance with the Sharia. Abdul Hakim Haqqani, the Taliban's current Chief Justice, despite excoriating Amanullah's licentiousness, acknowledges the reforms' adherence to the Sharia. Judges derived criminal rulings from general Sharia penal codes; commercial and legal disputes referred to Mawlawi Abdul Wasi's *Tamassuk-al-Qudat-al-Amaniyya*. 'All laws,' during Amanullah's era, Haqqani ultimately declares, 'whether in legal, commercial, or criminal affairs, were in accordance with the Sharia's jurisprudence.'⁸ Amanullah's reforms, despite serious attempts at adherence to the Islamic canon, still triggered stringent opposition. The reasons for this backlash were varied, the sum of which, however, point to the ill-preparedness of the wider country to be subsumed into modern statecraft and the nation-state model.

Disillusioned, Amanullah's failure led him to a subsequent radicalisation. It featured a final

attempt at reform, including the banning of otherwise religiously mandated segregation between men and women, the outlawing of traditional Sufi relationships between holy men (*pir*) and their disciples (*mureed*), and prohibiting foreign-educated religious scholars from preaching. Amanullah also forced members of a hastily convened *jirga* to wear Western clothes, which was soon extended to all of Kabul's male residents.⁹ These methods resembled Ataturk's secularisation of Turkey more than administrative and legal modernisation. After nationwide upheavals, the throne was seized by Amanullah's distant cousin, Nader. A new constitution was signed into effect in 1931. It quietly preserved Amanullah's less controversial reforms whilst conferring powerful privileges on the clergy and leaving the country, in effect, governed by royal decree.¹⁰ Modest strides in terms of modernisation were made, the hiatus of which was the promulgation of the 1964 constitution: a blueprint for subsequent Afghan governments, including, ostensibly, the Taliban. Ironic was the fact that the Taliban are products of the same social context that had only a century earlier opposed the *Nizamnama*.

³ Muhammad Hasan Kakar, *A Political and Diplomatic History of Afghanistan, 1863-1901*, Brill's Inner Asian Library, Volume 17 (Leiden, Boston: Brill, 2006).

⁴ Abd al-Rabb Khān, *Risālah-'i Puṣhto, Itā'at-i ūl'a al-amr (Kābul: Maṭṭba' Sinkī Māshīnkānah Dār al-Salṭānah Kābul, 1915)*, <https://www.loc.gov/resource/amedpllc.00062196658/>.

⁵ Muhammad Hasan Kakar, *Afghanistan in the Reign of Amir Abd al-Rahman Khan* (University of London, 1974).

⁶ Faiz Ahmed, *Afghanistan Rising: Islamic Law and Statecraft between the Ottoman and British Empires* (Cambridge, Massachusetts: Harvard University Press, 2017).

⁷ Ibid.

⁸ Abdul Hakim Haqqani, *History of the Judiciary* (Manchester: Qasim al-Uloom, 2023), 293.

⁹ Phil Halton, *Blood Washing Blood: Afghanistan's Hundred-Year War* (Toronto: Dundurn, 2021), 35.

¹⁰ Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernization, 1880 - 1946* (Stanford, California: Stanford University Press, 1969).

4. Constitution Drafting Between Past and Present

The aftermath of the Taliban's 2021 takeover has triggered a whirlwind of heated discussions regarding the group's governance system. Many of these have been shaped by attempts to pinpoint precisely what drives the Taliban's conceptualisation of government, and how this differs from Western norms. Such diagnoses have typically emphasised the stark contrast between prevalent Western ideas of government as opposed to pre-modern Islam's frameworks. This disproportionate focus on theory in Western coverage is hardly a coincidence, and, especially in a post 9/11 world, has often been rooted in the impulse to reproach the Taliban. By emphasising the Taliban's palpable divergence from contemporary secular norms, the aim of placing the group beyond the pale of acceptability and making them the object of suspicion, fear, and hostility is more easily achieved. Nowhere does this divergence appear more so than in the legal theory undergirding their politics. Whilst theory is by no means unimportant, and this report will elucidate upon it, the manner in which the metaphysical becomes physical, where theory becomes practice, is equally important. As a yet evolving politico-military organisation, the twin pillars shaping what is a maturing approach to governance are the legal traditions to which the group subscribes coupled with the political considerations characterising Afghanistan since their takeover in 2021.

A brief reversion to pre-Taliban, and indeed, pre-war Afghanistan is needed. The royal constitution of 1964 was a milestone in Afghan history. It marked a break in many areas from its 1931 predecessor as it codified into law the socio-political changes resulting from a three-decade long state-building process. Widely lauded as a progressive catalyst for Afghanistan's further development, its preamble included a stated aim of achieving 'political, social and economic democracy' and its salient features were female suffrage, universal education and an elected legislature.¹¹ It also formed the basis of the 2004 constitution, promulgated after the invasion

and during the occupation of the United States.

The 1964 constitution was Afghanistan's 'first modern constitution,' as Faiz Muhammad Zaland, Kabul University's professor of public administration, was keen to emphasise during our interview. Wael Hallaq, Professor of Humanities at Columbia University, would agree with him. Per Hallaq's understanding expounded in his book 'The Impossible State,' the creation of a modern state required a near total 'dismantlement of the Sharia.'¹² The proof, for Hallaq, would be in the 1964 constitution reversing the 1931 constitution insofar as it bifurcated between state courts and Sharia courts. State law, in 1964, would become superior to and inclusive of the Sharia. This was subject to constitutional requirement: legislation could not contravene the Sharia, though what exactly contravened the Sharia was seldom decided upon by religiously trained jurists. The condition was termed aptly by Haroun Rahimi, Assistant Professor of Law at the American University of Afghanistan, as a 'repugnancy clause.'¹³ Pakistan is another country with a similar repugnancy clause. This absolved it, according to Hamid ul-Haq, of the routine charges of blasphemy levelled against it. The clause was only incorporated in the 1970s after extensive lobbying by the religious establishment, including his late father. Whilst he urged the Taliban to adopt a constitution as a matter of priority, he pointed his belief that the Taliban should not, in this regard, aim to imitate Pakistan, as the opportunity to start constitutionally anew should not be missed. Irrespective, the repugnancy clause stood in contrast to the pre-modern paradigm of a historically devolved Sharia implemented by local judges without considerable recourse to the machinery of a state. By standardising a set of laws to be implemented uniformly across the country, the royal constitution of 1964 accomplished 'modernity' and dismantled pre-modern Sharia par excellence, achieving what Amanullah and the Nizamnama had failed to do in 1923.

It also directly enshrined, most problematically

¹¹ Government of Afghanistan, "Constitution of Afghanistan = Assasi Qanun (1964)," Arthur Paul Afghanistan Collection, 2005, <https://digital-commons.unl.edu/cgi/viewcontent.cgi?article=1005&context=afghanenglish>.

¹² Hallaq, *The Impossible State - Islam, Politics, and Modern Predicament*.

¹³ Haroun Rahimi, "A Constitutional Reckoning with the Taliban's Brand of Islamist Politics: The Hard Path Ahead," *Peace Studies VIII* (Afghan Institute for Strategic Studies, 2021), https://www.aiss.af/assets/aiss_publication/Reckoning_with_Islamist_Politics.pdf.



for the Taliban, the concept of popular sovereignty. Sovereignty, the constitution made clear, belonged not to God, but to the nation. This sovereignty was embodied in the King. The repugnancy clause, however, belied the declaration and extent, in a bleak demonstration as to the contradictions of modern Islamic statecraft. Neither religious conservatives nor ardent secularists were placated by it. For Hallaq, popular sovereignty as an idea is the cornerstone and prerequisite (or 'form-property') of the nation-state, the rejection of which would belie the Taliban's commitment to a 'modern' political project within the parameters of the Afghan state. Yet the concept is controversial for another, and more important reason, as a result of which it forms the focal point of conservative Islamic agitation worldwide. It contradicted the classical understanding of the Quran's designation of God: it was to God alone that 'belong[ed] the Sovereignty of the heavens and the Earth' (3:189). Rulership, in principle, was strictly the prerogative of God, who alone was the Sovereign. Mufti Taj Muhammad Sohaib, the Emir's appointed principal of a Qandahar madrasa, thus lambasted the 1964 constitution as unIslamic for including 'deviant concepts,' which also included, but were not restricted to, ideas of 'equality between men and women.'

Professor Gul Rahman Qazi was similarly frank. His conversations with Taliban leaders following their takeover had been revelatory. Qazi diverged from

the not uncommon charge levelled at the Taliban; they were not, as some critics had claimed, content to govern the country in the absence of a legal code indefinitely. 'They accept,' Qazi said, '[the notion of] a constitution,' despite their rejection of both the 2004 and 1964 constitutions, which 'they [the Taliban] say have to be changed.' Yet Qazi's narrating the desire to change, as opposed to nullifying, the previous constitutions, was illuminating. Constitutional amendments, Qazi speculated, would focus primarily on enshrining and reinforcing the primacy of the Sharia. This would happen in tandem with redacting any references to ideals of democracy and equality. Much of what Qazi surmised, though, remained speculative; many of the Taliban's positions remained characteristically vague. 'It's not yet clear,' Qazi said 'to which [exact] clauses they object [most strongly.]' The analysis of the Taliban's desire to reform, and not nullify, previous constitutions was also relayed to us by another Taliban official. Speaking on condition of anonymity, a Taliban official relayed to us a gathering convened by the Emir in Qandahar. Whilst previous constitutions, the Emir stated, required 'foundational reforms', insofar as their perceived deviance in theory were concerned, in *furu'* (branchal) elements and the application of their clauses, much of the content remained acceptable.

5. Political Considerations Behind Adopting the 1964 Constitution

Notwithstanding palpable philosophical tensions between 1964 and Taliban-politik, the royal constitution was not entirely a non-starter. There were political considerations to which even the Taliban could not turn a blind eye. The 2021 takeover had achieved a breakthrough by ending a four-decade long war in Afghanistan; the Taliban, not without some justification, wasted no time in claiming credit for this. An ex-government participant in Doha negotiations, saw two principal reasons for this. The takeover had indeed ended a four-decade long war. It had also led the country into a legal vacuum; even the Taliban could not afford to turn a blind eye to the pressing need for at least some continuity. The announcement of partially and temporarily implementing the 1964 constitution, therefore, could plausibly have been motivated by the desire to assuage widespread uncertainty during a political emergency and ongoing legal limbo. It could also, as the former Taliban negotiator in Doha put it, have been politically calculated to ‘hoodwink America,’ and by extension the world.

The latter view, whilst cynical, is not implausible. This is especially so bearing in mind the nature of announcing the temporary and limited implementation of the royal constitution. The announcement quoted a remark initially made privately by the interim-Minister of Justice to the Chinese ambassador.¹⁴ The

question of why a judicial official was meeting a foreign diplomat was overshadowed by a bigger question: how and why were issues of statecraft constituting talking points in such meetings? The question only grows in significance when accounting for the Taliban’s sensitivity as to what they perceive as domestic issues being opined on by foreigners. The remark was quoted by international media as domestic interest and coverage was relatively muted and moved on, reflecting a potential timing intended to decrease domestic backlash over the constitution’s perceived lack of Islamic propriety. Haroun Rahimi conveyed his belief that the announcement’s importance had been overstated. There was, he said, near-total lack of subsequent public recourse to the royal constitution following the brief announcement. Rahimi pointed out a greater Taliban commonality with the draft Islamic constitution of the post-1992 Rabbani government than with the 1964 constitution. It was for this reason, Rahimi has previously written, that the Taliban’s draft constitution of the late 1990s was so ‘unimpressive’; it had, with some alterations, largely copied, sometimes verbatim, sizeable chunks of what Rabbani’s government before them had drafted.¹⁵



¹⁴ Ayaz Gul, “Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now,” Voice of America, September 28, 2021, <https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>.

¹⁵ Haroun Rahimi, “Remaking of Afghanistan: How the Taliban Are Changing Afghanistan’s Laws and Legal Institutions,” NUS Institute of South Asian Studies (ISAS), July 26, 2022, <https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanistans-laws-and-legal-institutions/>.

5.1 The Role of the King in the 1964 Constitution Versus the Emir's

Beyond the pressing needs for projecting an image of stability or even manipulating global coverage, though, there were other political considerations. The 1964 constitution stipulated the criteria of the King as head of state: male, of Afghan nationality, and an adherent of Sunni Islam's Hanafi school of canon. The Taliban's Emir is all three. 1964's emphasis on the Hanafi school was also highlighted by Abdul Salam Zaeef, Taliban co-founder and later ambassador to Pakistan and Guantanamo Bay detainee. The emphasis on the Hanafi madhab, according to Zaeef, made it particularly appealing. This was doubly so given its contrast with and Taliban antipathy toward the 2004 constitution and its omission of the Hanafi school, then reflective of the increased power of political blocs composed of minorities like the Shia. 'To agree with or accept the [2004] constitution,' Zaeef said, 'would be a legitimisation of the [American-backed] government.' This would only, ipso facto, delegitimise the Taliban themselves.

The royal constitution also featured, as highlighted by Faiz Muhammad Zaland, a royal veto, in addition to its repugnancy clause. Even as the (limited) popular sovereignty was personified in the person of the King; he sat outside and above the practical manifestation of popular sovereignty and representation: the legislature, whose laws he could grant or withhold assent. The King's exalted position could perhaps explain why the Taliban opted for the 1964 constitution, notwithstanding, as Haroun Rahimi pointed out, their otherwise stringent opposition to its democratic ideals remaining firmly in place. The draft mujahideen constitution of 1992 to which Rahimi pointed, and which the Taliban largely regurgitated in the late 1990s, was still republican in essence; the executive (President Rabbani) was placed within the broader parameters of popular representation: a *fait accompli* as far as republics were concerned. Republicanism in 2021, however, or any semblance of it, was much more contentious

than in the late 1990s.

The 1964 arrangement was therefore easier to duplicate and modify, at least as far as the executive was concerned. Sitting above the legislature, the position of the King remained largely intact; his person only needed to be replaced by that of the Emir. Sovereignty belonged not to the worldly nation, but metaphysically to God Himself. The physical materialisation of this was summarised in a longstanding idiom: the Sultan (ruler) functioned, according to classical jurists, as 'the shadow of God on Earth.' This was a characterisation applicable to the Taliban; it is how Chief Justice Abdul Hakim Haqqani refers to Mullah Omar, the Taliban's founder.¹⁶

In this capacity, the ruler was not invested with supernatural authority inherent to his person, and neither was his station derived from any worldly consideration. He was the reflection of and the vessel through which God's will (the Sharia) and resultant Sovereignty, was executed. 'The true source of law,' Haqqani writes, 'is [from] the rulings of Allah Almighty, and His Prophets and Messengers.'¹⁷ Mufti Taqi Usmani, the Pakistani cleric with whom the Taliban have a generally warm relationship summarises this bluntly: 'worldly rulers only act as a consequence of this [Divine] Sovereignty, and subservient to it.'¹⁸ By definition, a ruler falling short of executing divine command, manifested in the Sharia, ipso facto disqualified him from rulership.

What was, then, the Sharia? Derived from a variety of sources including the Quran, Prophetic tradition, consensus of classical scholars, it also incorporated an interpretive legal tradition taking into strong consideration prevalent circumstances in given areas and the results of consultations. Islam, Haqqani elucidates, had laid down the fundamental precepts and conditions of common law, the details of which could therefore be delegated to religious



jurists to determine. This was to be based on deliberately vague 'public interest': an essential yet malleable ingredient given its inherent temporal and spatial contingency. The Sharia's characteristic distinctiveness across locales was because of, and not despite, adherence to its fundamental precepts. Public participation in the political process was thus not anathema to nor mutually exclusive with the Sharia, but part and parcel of it. What distinguished this from post-Enlightenment ideals of government by consent and popular sovereignty was the priority afforded public participation. In premodern Islam, public participation was a determinant. In post-Enlightenment Europe, it was enshrined as the determinant.

Similar too is the Taliban's understanding of Afghanistan's essence to the royal constitution's designation. Afghanistan was, per the 1964 constitution, declared an 'independent, unitary and indivisible state': a designation with which the Taliban's actions are in conformity. Calls for federalism, overwhelmingly restricted to once marginalised and now exiled warlords, grew in prominence as the American occupation collapsed. The centralisation-oriented Taliban predictably ignored these, even as the lack of federalism constituted a purported *casus belli* for a short rebellion against the Taliban that was largely neutralised. Centralisation notwithstanding, where power is centralised is where the principal difference between 1964 and 2021 comes to the fore. Kabul was and remains the official capital. It is where foreign diplomats are based, the cabinet assembles, and from which the official duties

of governance are executed.

Qandahar, however, serves as the base of the Emir. Far from international spectators and close to his immediate circle of advisors, it is in Qandahar that the Emir heads a parallel quasi-cabinet that dictates key policies whilst vetoing others, most infamously that of postponing the opening of girls' schools and universities. The 1964 constitution mandated provincial council members would be elected locally and that they, in turn, would elect provincial governors. Yet, as Zaland highlighted, this never materialised. Financial constraints and generally low literacy levels militated against successful provincial elections, the lack of which meant provincial governors became 'royal representatives' due to their direct appointment by the King. No such dichotomy between *de facto* and *de jure* exists in the Taliban's Afghanistan. This is partly due to the lack of codified norms, and partly due to the probable objection the Taliban would have to elections. What effectively remains in 2023 is the practical continuation of what in 1964 was the failure to properly enact constitutional requirements. Provincial governors are appointed from Qandahar, in addition to its routine reshuffling and infrequent summoning of Kabul's cabinet, the latter in particular demonstrating the primacy of Qandahar and its cabinet over that of the official capital. Islamic polities had recognised relatively early the need for executive power to be effectively delegated as governance grew in scope and sophistication. Thus, as the former Taliban negotiator in Doha noted, the cabinet existed not despite the Emir's paramount authority. It existed as a by-product and because of it.

¹⁶ Haqqani, *History of the Judiciary*, 297.

¹⁷ Haqqani, *History of the Judiciary*, 19.

¹⁸ Mufti Muhammad Taqi Usmani, *Islam and Politics: A Translation of Islam Awr Syasi Nazarizat* (Turath Publishing, 2017).

“The Taliban’s compromise is the middle path: largely Afghan historical norms in practice, religious insignia in appearance.”

5.2 Counterbalancing the Executive

If the Emir was God’s figurative shadow, who, then, held him to account? None but God himself, according to Zaland. From the perspective of theory, Zaland is not incorrect. As with all matters political, theory only constitutes half of a holistic understanding. In practical terms, at least according to Mullah Zaeef, the future establishment of a consultative body to advise the Emir remained perfectly possible. Whilst officially lacking any binding power, it would ‘advise’ the Emir, potentially stringently, in favour of or against given policies. There was, despite its lack of officially binding power, a caveat. Such a body would in most likelihood be staffed overwhelmingly by qualified religious jurists, whose ‘advice’ would be duly weighty and the repeated disavowal of which would make the Emir liable to charges of ignoring consultation: a cornerstone of the Sharia itself. An advisory body of this sort would also be well-placed to decide on the compliance of policies, or lack thereof, with the spirit of the Sharia. It could also opine on issues of general public wellbeing (maslaha), though the ultimate decision regarding this would lay with the Emir. In doing so, ultimately, it could hold the Emir to account. Zaeef did, however, confess that no such body existed yet in an official capacity. More recently, Zaeef has publicly called for the codification of a constitution to alleviate growing questions as to Taliban governance.¹⁹

The former Taliban negotiator in Doha, however, took a more finalistic look at Taliban governance. The recent announcement of the convening provincial Shura-ye-Ulama (scholar’s councils) had largely finalised the broader edifice of Taliban governance.²⁰ The provincial Shura, much like Mullah Zaeef’s hypothesised advisory body, was devoid of official power. They were mu’lim (informative), not mulzim (binding). In addition to ‘advising’, they were also expected to serve as local representatives despite the lack of official elections. In the overwhelmingly patriarchal paradigm pervasive across Afghanistan, social rank and station was gained through seniority, either in age, knowledge, or wealth. It was as a result of this seniority that they were deemed qualified for membership in the Shura. Their influence lay insofar as they possessed influence locally and were positioned to accurately represent public sentiment. Inversely, their almost unhindered access to the Emir aggrandised their communal influence in their localities. It is also worth mentioning that recently at the more local level the Islamic Emirate has decided to designate a representative from a minority group who will advocate on behalf of the Hindu and Sikh communities in Kabul. This appointed representative is named Buljit Singh and is Sikh. He is set to assume a position within the Council of Representatives encompassing the 22 Municipality Districts of Kabul City. His primary role will

revolve around advocating for the rights and concerns of Hindus and Sikhs residing in the region.²¹

The title of scholars’ councils, however, was something of a misnomer; the councils also included tribal elders and businessmen, and also minority representatives as was mentioned. The choice of terming these councils as Shura, in accordance with religious terminology, was significant, given that what could be dismissed as trivial terminology hid behind it greater detail. The term Shura was chosen in opposition to the more historically apt, nationally used and locally prevalent term jirga: a traditional tribal council. The same choice could be observed at a national level in Kabul in June 2022. A ‘grand gathering of Afghanistan’s [religious] scholars,’ saw 3,500 delegates from across the country invited by the government to attend. Like the provincial shura, the misnomer was visible: delegates were not exclusively religious scholars. They also included tribal elders and businessmen. The gathering was finalised by an in-person speech of the Emir that was concluded by a unanimous pledge of allegiance to the Emir.²²

The gathering fit the Afghan historical norm neatly; the previous century had seen many such choreographed assemblies to sanctify government power and display its legitimacy through highlighting its approval by a national assembly. The difference, however, lay in what that

assembly was called. Such gatherings had previously been called ‘jirgas,’ emphasising their national credentials and embrace of cultural terminology. The Taliban’s iteration, however, was an exception. As noted by Mullah Zaeef, this could partly be due to the impulse to distinguish themselves from previous governments. More importantly, it could also be due to a keenness to avoid being too nationally-oriented at the expense of their religious credentials: a charge routinely levelled against them by their foes like IS. The Taliban’s compromise is the middle path: largely Afghan historical norms in practice, religious insignia in appearance.

Given the centrality of the executive branch and notwithstanding the real but indirect power wielded by consultative bodies, the notion of the separation of powers is vividly missing. ‘The [idea of the] separation of powers does not fit into the framework of an Emirate,’ Mullah Zaeef said. ‘The source of power is one.’ That sole source was the Emir, as Zaland explained, in addition to emphasising the lack of a recognition of three separate branches of government in classical Islamic polities. The job of government, Zaland expounded, was the implementation of the Sharia, for which the executive was responsible. The series of decrees from the Emir’s office in Qandahar, as highlighted by Zaland, only further proved executive’s predominance.

¹⁹ د افغانستان د روان وضعیت په اړه د محترم ضعیف صاحب خانګرې مرګه. #حل لارې او پشنهادونه (Youtube, 2023), <https://www.youtube.com/watch?v=IPz5M5wlK0w>.

²⁰ د عالیقدر امیر المؤمنین حفظه الله د فرمان پر اساس د بامیانو، غور، نورستان، لغمان، میدان وردګو، سرپل او دایکندي ولایتونو د علماوو شوراوې جوړې شوې دي. ۱/۷. (Twitter/X, 2023), <https://x.com/rtapashto/status/1703419940663939146>.

²¹ Kabul Municipality, “کابل ښاروالۍ / شاروالی کابل / Kabul Municipality,” X (formerly Twitter), October 16, 2023, <https://x.com/KblMunicipality/status/1713834926163079430>.

²² RFE/RL’s Radio Azadi, “Tightly Controlled Afghan Assembly Closes With Call For Nations To Recognize Taliban Government,” RadioFreeEurope, Radio Liberty, July 2, 2022, <https://www.rferl.org/a/afghanistan-taliban-jirga-ends/31926224.html>.

5.3 The Judiciary

The judiciary was perhaps the most active body of government in undergoing a post-Taliban overhaul. The fact that the Emir had served as a senior judge in the Taliban's previous Emirate only further illustrated the importance of the judiciary. Adam Baczko, a researcher on Afghanistan and author of a book on Taliban courts,²³ highlights the importance of law as a sacred instrument of moralisation, the importance of which could not be overstated. Baczko's analysis is backed up by Abdul Hakim Haqqani himself.²⁴ 'Adjudication,' Haqqani writes, in no uncertain terms 'is amongst [...] the highest of deeds and amongst the strongest of obligations, after belief in God Almighty.' The Emirate's foremost ideologue, current Chief Justice as well as a teacher and confidante of the Emir, it was Haqqani who was entrusted with overseeing wide-ranging judicial reforms. Despite the undoubtedly personal relationship between the Emir and Haqqani, it was unlikely this could override the textual importance afforded to judicial independence; it is heavily emphasised in traditional texts. There were a plethora of narrations dating as far back as the Prophet's companions and immediate successors highlighting the independence of judges after their appointment by the centre. Even Haqqani had pointed to the growing independence of the courts during the era of Zahir Shah (1933-1973) in implicit approval.²⁵

In the absence of a binding central code, local judges exercised a high degree of independence and when uncertain, referred almost exclusively to Hanafi legal texts. Reference to these texts took place because, and not in spite of, the lack of a central code. The Taliban ambivalence toward state law, especially if exalted above classical fiqh (jurisprudence), was noted by Rahimi.²⁶ The ambivalence found itself translated in practice. The pre-modern modus operandi of judges adjudicating with a high degree of flexibility and without recourse to a government code was the order of the day. How long this status quo persisted, however, was uncertain. A central code, according to the Taliban official, could only be compiled and made feasible as part of a wider constitution given that 'judicial affairs [were already] crystal clear in the books of jurisprudence.'

A jurist close to the Chief Justice and familiar with Supreme Court proceedings, revealed during his interview that Haqqani undertook frequent visits across the country. According to the jurist, the purpose for these visits was the supervision of and liaisons with judges on court proceedings. The ultimate goal, which Haqqani was reportedly keen to keep away from media attention, was the compilation of a common judicial code. This was not, the jurist underscored, intended to function as a binding code to be enforced uniformly, but to serve as an overall series of

guidelines. The sole requirement for judges, according to the jurist, extended insofar that it mandated their rulings to be within the parameters of rulings found within the Hanafi madhab. The jurist was aware that this could be criticised for its lack of accommodation of other Islamic traditions, but was keen to highlight that the requirement was broad. It would be designed and phrased to allow judges the flexibility to enforce rulings and opinions that constituted exceptions and were not necessarily in conformity with established or more commonly held positions. The books and texts currently used as guides by judges were diverse; they include those from the Hanafi school's founders (like Shaybani and Abu Yusuf), as well as 19th century Ottoman civil code. Notwithstanding the current delegation to local initiative, critically little is known or reported on local judicial proceedings. Instances of judges displaying their independence against political interests, as a result, remain virtually unknown.

Zaland, meanwhile, was keen to emphasise the Emir's present centrality; sentences of qisas (retributive capital punishments) were sent to him for final approval. Given this centrality, coupled with Qandahar's increased assertiveness, the prospect of the promulgation of a central code, even a binding one, could not be ruled out. If so, per Hallaq's understanding, it would make the Taliban

at once true modernists, and true dismantlers of the Sharia. The judicial overhaul, however, presses on. A source in the Supreme Court, reported the dismissals of thousands of civil servants by the Taliban. Their Western-oriented legal training, he relayed, was widely seen with disdain and as obsolete in Taliban country. The hundreds of Muftis gradually replacing them included many unfamiliar with the machinery of the government's bureaucracy or how to translate the legal theory from which they had graduated into practice. Hundreds of Muftis had, in August 2023, been enrolled into a ten-day intensive course to better equip them for government service. The Supreme Court official was, though, keen to emphasise that the legal and judicial regime of old had not been totally swept aside. Administrative procedures and protocols still adhered to older governments and scholars, including Mawlawi Abdul Wasi's Tamassuk al-Quzzat al-Amaniyya from the 1920s. The bureaucracy remained, by and large, regulated by the legal regime of the previous government.

²³ Adam Baczko, *La guerre par le droit. Les tribunaux Taliban en Afghanistan* (CNRS éditions, 2021).

²⁴ Haqqani, *History of the Judiciary*, 16.

²⁵ Haqqani, *History of the Judiciary*, 297.

²⁶ Rahimi, "A Constitutional Reckoning with the Taliban's Brand of Islamist Politics: The Hard Path Ahead."

6. Conclusion

Predicting future Taliban behaviour is no easy feat. Many of the group's ideas and plans, especially at the upper echelons, remain shrouded in mystery. This is partly due to a secretive zeitgeist that is the product of decades of war, in addition to the politically calculated preference for vagueness and remaining thus unaccountable to any commitments. Another critically underreported factor is their relative inexperience in government and the communications necessary to it. Keeping in mind their characteristically conservative outlook and classical Islamic training, however, what can be gauged is their attempt to preserve and act in conformity with Afghan culture and political history coupled with a keenness to polish this with as much Islamic apparel as possible. A prime example of this is the provincial Shura, as well as the national gathering of June 2022. As Shura by name, they functioned much like traditional Jirgas, and neither were members limited to religious scholars.

As mentioned, the governors, by virtue of their direct appointment by the Emir, can be considered to represent the attitudes predominant within the executive. A recent announcement by the governor of Parwan province was thus noteworthy. The governor, in a gathering, lambasted the 2004 and 1964 constitutions alike as being thoroughly unIslamic, to the extent that they were akin to pork in their impermissibility.²⁷ This, however, was belied by the aforementioned confession of the Emir who himself appointed the governor in question. There was, according to the Emir's confession and stringent standards, an acceptability in the practical application of previous law. Even if, per Taliban-politik, previous constitutions were philosophically deviant, the outward acceptability of the constitutions was far removed from the total proscription relating to pork. Political showmanship and interests, therefore, must be borne in mind.

One thing is certain: the theoretical approach of

the Taliban in issues of governance is highly traditional, highly centred on the office of the executive, and divergent from modern and globally predominant theories of government. Terms such as democracy, popular representation, separation of powers, checks and balances, are largely anathema to Taliban vocabulary or understanding. The executive remains paramount; the Emir's appointed committee for constitutional review, a Taliban official told us, was based in Qandahar. Its sessions were not only held in Kabul's absence, but even its members remained unknown in Kabul. Executive predominance notwithstanding, the existence of organs such as the Councils of Scholars precludes the possibility for the Taliban from remaining totally aloof from public opinion and on this basis they are already attempting to build legitimacy. Whether or not awareness of public opinion will result in policy changes going forth remains unknown; the results, thus far, have been mixed.

The information gathered during this field mission indicates the high unlikelihood of the Taliban departing completely from previous constitutions given the pre-existing and enshrined importance allotted to Islam. Moreover, given the inability of previous governments to successfully socially engineer Afghanistan or even successfully implement, even avowedly secular ideals, any legislative changes by the Taliban would seldom be groundbreaking in practise. This failure of previous governments could be tracked at a macro-level. A weakness of the 2004 constitution, Qazi emphasised, was the predominance of the executive branch despite the formalisation of the separation of powers. According to Taliban-politik, this was not a weakness; all that was required was the codification of a pre-existing reality, and not, as was previously the case, the opposite. Any previous theoretical framework or practical application, therefore, would be amended where not fit for Islamic purpose (per the Taliban's understanding). Where neither were found to be objectionable, as the Taliban's demonstrated political showmanship display, these would remain quietly in place.

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Cordoba Peace Institute - Geneva
Chemin des Vignes 2bis
1209 Geneva
Switzerland

Tel: +41 (0) 22 734 15 03
E-mail: info@cpi-geneva.org
www.cpi-geneva.org



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