

# Legal Systems in Afghanistan

A FACTSHEET

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# INTRODUCTION

After years of insurgency, the Taliban (a militant, Islamic fundamentalist political movement) seized control of Afghanistan on 15 August 2021. Since then, the country has been engulfed in a major humanitarian, legal, and political crisis. The progress of the past 20 years in human rights, women's rights, and overall development has reversed with the enforcement of the Talibanized interpretation of Sharia, a body of religious law drawn from Islamic principles and scriptures, as the country's law. Today, girls as young as 11 are banned from receiving education. Women's faces are forcefully veiled; and they are not allowed to work except at a few fields or travel alone. Theft, child and forced marriages, and sexual violence have dramatically increased. The legal and judicial systems have collapsed among every other government institution, while the need for justice and accountability is at its most pressing for Afghan citizens. In this context, iProbono is creating this factsheet to inform the global community about Afghanistan's legal history and spread awareness of the current situation. This brief guide provides a quick historical overview and explains the current legal system prevalent in the country.



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## THE AFGHAN UNDERSTANDING OF JUSTICE

For the Afghan people, justice has always been influenced by and defined by culture and religious beliefs. Like many religious nations, Afghanistan's legal system was built around its religious identity and heavily informed by Islamic law, although other sources of law developed eventually.<sup>[1]</sup> Moreover, justice is viewed in Afghan culture as communal, wherein the entire community is seen as being affected by legal outcomes, and thus the results of legal processes should be beneficial to the community as a whole as opposed to being focused on the individual.<sup>[2]</sup> Nevertheless, there isn't a specific definition of what justice is. However, understanding legal history—what worked, what proved challenging, and how laws in a given period reflected the values of the people – could help understand the concept of justice.<sup>[3]</sup>



Photo Credits: New York Times

[1] Eli Sugarman and others, *An Introduction to the Law of Afghanistan* (3rd edn, Afghanistan Legal Education Project, Stanford Law School 2011) 2.

[2] *ibid.*

[3] *ibid.*



# LEGAL PLURALISM, THE FORMAL AND INFORMAL LEGAL SYSTEMS



Before Afghanistan had any formal legal system, disputes were settled by tribal laws, shuras, and jirgas.<sup>[4]</sup> This is referred to as an informal or alternative justice system. Shuras and jirgas are the gathering of community elders to resolve the disputes of individuals using unwritten laws, the sharia law, customary tribal

law, or the (assumed) collective wisdom of these elders. They have prevailed as the widely used mechanism of settling disputes even with the existence of the formal justice systems, courts, and legal institutions.<sup>[5]</sup> The informal justice system has had significant effects and control over the behaviour of individuals. It functioned as complementary to the formal legal system.<sup>[6]</sup> To understand the earlier Afghan legal systems, it is vital to first understand the interaction of formal and informal laws.

[4] ibid 3-4.

[5] ibid.

[6] ibid.

# LEGAL HISTORY

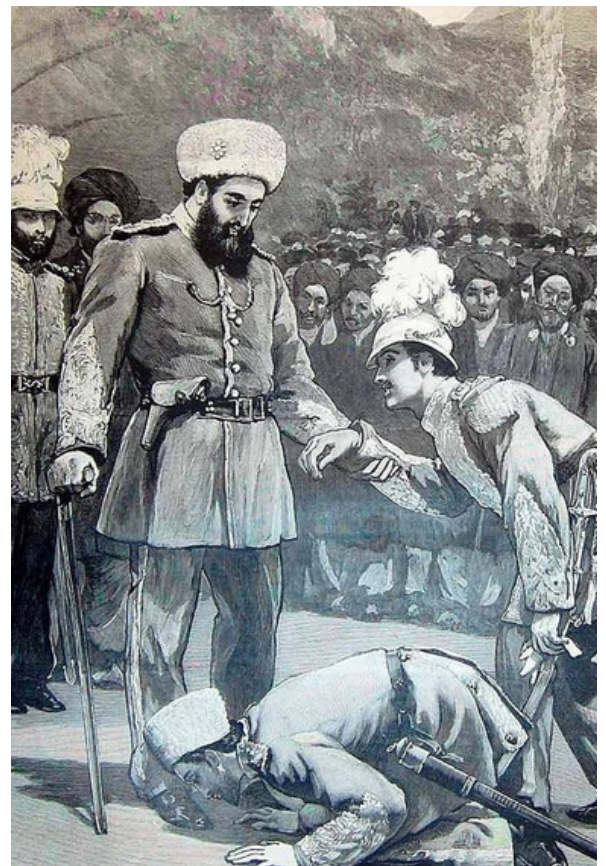
This factsheet will focus on the following six legal periods in Afghanistan:

## THE CENTRALISATION OF THE STATE (1880–1923)

Afghanistan's earliest constitution and legal history dates back to 1880, under the reign of King Amir Abdur-Rahman Khan.<sup>[7]</sup> He used the constitution to consolidate the power and control of the state into his hands. Hanafi jurisprudence and royal edict were used by King Rahman to systematise the legal system and create the court system to enforce Sharia law.<sup>[8]</sup> One of the fundamental achievements of his time was the creation of a Judges' Manual aiming to standardise legal procedures. King Rahman also installed justice boxes to allow individuals to directly petition the king.<sup>[9]</sup>

There were in fact dual judicial systems:

- 1.State Courts, which handled commerce, taxation, civil services, and other government related matters, and
- 2.Religious Courts, which heard criminal, personal and family issues such as divorce; endowment and inheritance, and property cases.<sup>[10]</sup>



[7] ibid 6- 23.

[8] ibid.

[9] ibid 6-7.

[10] ibid 6-7.

## CONSTITUTIONAL PERIOD (1923–1979)

The 1923 Constitutional Period sought to intensify legal and social reforms beyond the centralisation of government. The informal justice system was outlawed, and the authority of traditional tribe and religious leaders was constrained by the constitution. It vested all the power and authority in King Amanullah Khan, without any constitutional provision for a legislative body.<sup>[11]</sup> The constitution granted an unprecedented recognition of equality. All citizens were granted the same basic rights, regardless of gender and religion.<sup>[12]</sup> However, taking power from the local and religious leaders to govern and resolve disputes resulted in them rebelling against the king. Although the king made amendments in 1925 to officially reintegrate religion into the constitution as part of efforts to compromise with the leaders in a Loya Jirga,<sup>[13]</sup> he was overthrown soon afterward.<sup>[14]</sup>



Photo Credits: ullstein bild via Getty Images

[11] *ibid* 6-7.

[12] *ibid* 6-7.

[13] A mass national gathering that brings together representatives from the various ethnic, religious, and tribal communities in Afghanistan, convened at times of national crisis, to settle national issues, to approve a new constitution, declare war, choose a new king, or to make sweeping social or political reforms.

[14] Eli Sugarman and others, *An Introduction to the Law of Afghanistan* (3rd edn, Afghanistan Legal Education Project, Stanford Law School 2011) 6- 23.



The 1931 constitution was then used to abolish the earlier reforms and institutionalise the Hanafi school of Islamic jurisprudence again, while a secular code governed the court systems.<sup>[15]</sup> The constitution established Afghanistan's first legislative body, a bicameral system comprised of the Upper House (Majlis-e-ai'yan), appointed by the king, and the National Assembly (Majlis-e-shurae-milli), elected by the people.<sup>[16]</sup>

However, the legislatures only recommended laws to the king, with no power to make binding laws. Nevertheless, this new system of government did gradually lead to reforms like permitting freedom of the press and granting the people of Afghanistan other liberties.<sup>[17]</sup>

This gradual pace of reform successfully avoided creating dissent, and consequently, in 1953, revolutionary domestic reforms, such as opening public education to women, were brought through the existing constitutional structure.<sup>[18]</sup>

The 1964 constitution gave birth to a constitutional monarchy. It separated religion from the state's governing institutions for the first time,<sup>[19]</sup> and established a government based on the sovereignty of the people rather than religion. However, Islam remained the country's official religion.<sup>[20]</sup>

[15] *ibid.*

[16] *ibid.*

[17] *ibid.*

[18] *ibid.*

[19] *ibid.*

[20] *ibid.*

Other innovative provisions included the formal recognition of the equality of men and women, and of the equality of all tribes before the law, as well as freedom of thought and expression, the protection of private property, and the right to form political parties.<sup>[21]</sup>

In 1976, President Daoud enacted the first comprehensive penal code, which was in effect until 2021.<sup>[22]</sup> Daoud continued the legal reforms and adopted the 1977 constitution, which reflected certain elements of Marxist ideology.<sup>[23]</sup>

The constitution proclaimed Afghanistan a republic and abolished the monarchy. However, before the constitution could come into effect, Daoud was ousted after a coup. The new government was a Soviet style politburo, and side-lined legislative action, instead ruling by decree, without any representation of the people. Laws were rewritten, and several decrees were passed to ensure equal rights for women, equal land distribution, and mandatory literacy.<sup>[24]</sup>

Due to the numerous legal reforms in this period, it is known as the Constitutional period.

[21] *ibid.*

[22] *ibid.*

[23] *ibid.*

[24] *ibid.*

## SOVIET INVASION AND THE CIVIL WAR (1979–1996)

The Soviet Union invaded Afghanistan in 1979. Following the invasion, the 1980 Provisional Constitution containing the fundamental principles of the Democratic Republic was issued.<sup>[25]</sup> It was the only constitution that did not recognise Islam as the country's official religion. The role of religion was weakened and hostilities against those practising Islam increased. This led to growing enmity and insurgency against the Soviets, which encouraged the drafting of the 1987 Constitution, which once again recognized Islam as the official national religion, and the National Assembly as the highest legislative organ to implement a Soviet-style legal system.<sup>[26]</sup> However, the insurgencies continued, and eventually birthed the Mujahedeen, who began attacking the Soviets. The Soviet Union consequently withdrew from Afghanistan, but their departure was followed by a civil war. The militant Mujahedeen, who initially fought against the Soviet, then started fighting with each other over power.

As the civil war continued, the Taliban, a movement of religious students born out of the frustration from the civil war, won the battlefield.<sup>[27]</sup>



Photo Credits:Hans Paul/AFP/Getty Images

[25] *ibid.*

[26] *ibid.*

[27] *ibid.*

## TALIBAN RULE (1996–2001)



Photo Credits: REUTERS/Yannis Behrakis

The Taliban set up their government in Kabul and Kandahar in 1996. They established an Islamic emirate and turned all the courts into Sharia courts.<sup>[28]</sup> Statutory laws were replaced with Sharia law and customary laws were banned. The Taliban ruled by edict based on a radical interpretation of Sharia law. These edicts, enforced by The Department for the Promotion of Virtue and the Prevention of Vice, controlled most aspects of life, including how a woman should cover her body, the length of a man's beard, and family activities.<sup>[29]</sup> The religious edicts were enforced through violence, and law enforcement was sporadic and unequal. There were only a few written laws and formal legal processes.<sup>[30]</sup>

[28] *ibid.*

[29] *ibid.*

[30] *ibid.*



## DEMOCRATIC CONSTITUTIONAL REFORMS (2001–2021)

The Taliban lost power in 2001, and in 2004, a new constitution, envisaging a democratic political system, was written and adopted by the Loya Jirga.<sup>[31]</sup> It laid out a foundation for a Republican form of government informed by both traditional Islamic and progressive values. The government had three branches – the executive, the legislative, and the judiciary. The legislative branch passed laws, the Supreme Court interpreted them, and the police force enforced them. Power was divided between the President, the National Assembly, the Grand Assembly, and the Supreme Court. The constitution gave supreme authority to the judgments of the courts, requiring them to be enforced as law.<sup>[32]</sup>

Informed by history, this constitution was carefully designed to consider the dynamics, and the diverse social, religious, cultural and political sensitivities of the Afghan population.<sup>[33]</sup> It granted equal rights and liberties to both men and women. In conformity with international norms, new laws and legal procedures were enacted.<sup>[34]</sup>

To promote rule of law, progress towards reform, and modernise the legal system, many development programs were implemented. Most legal practitioners received a robust legal education and benefitted from opportunities to travel abroad and learn from different legal systems. Thousands of educated people entered the

[31] Mahir Hazim, '[Going Back to Zero: How the Afghan Legal and Judicial System is Collapsing Under the Taliban Regime](#)' Jurist (March 7 2022) accessed 25 July 2022.

[32] *ibid.*

[33] *ibid.*

[34] *ibid.*

legal and judicial systems as judges, attorneys, prosecutors, administrators and clerks.<sup>[35]</sup> The constitution, however, was flawed, and suffered from a particularly a weak system of checks and balances, and was poorly implemented.<sup>[36]</sup>

The progress achieved through the new constitution would be threatened by the resurgence of the Taliban. After seizing control of several major cities, Taliban militants entered Kabul on 15 August 2021, and eventually reached the presidential palace. They took over the city and overthrew Afghanistan's republican government.<sup>[37]</sup>

With the Taliban takeover, democratic progress has completely stalled. The foundation of rule of law and the legal system are now in a state of disrepair, and the nation is rapidly approaching complete anarchy and lawlessness.<sup>[38]</sup>



Photo Credits: Representative Image (Reuters)

[35] *ibid.*

[36] *ibid.*

[37] Centre for Preventive Action, '[War in Afghanistan | Global Conflict Tracker](#)' Council on Foreign Relations (May 11 2022) accessed 25 July 2022.

[38] Hazim (n 31).

## THE CURRENT LEGAL SYSTEM, SECOND RULE OF TALIBAN (2021– ONGOING)



Photo Credits: Jim Huylebroek/The New York Times/Redux

After the Taliban overthrew the government, the 2004 Islamic Republic Constitution was substituted with a vague but radical interpretation of Sharia law as the law of the state. Although Taliban leadership consistently emphasise governing on the basis of Sharia law, they have not provided specific details about their interpretation and definition of Sharia.<sup>[39]</sup> Their laws are not formalised or uniformly applied across Afghanistan and are interpreted differently in different regions. For instance, the Taliban does not penalise consistently for theft. They have occasionally sliced the robber's hands. In other instances, they have only threatened to do so. In several other cases, they have entirely discarded this model of punishment and have instead just blackened the faces of the thieves. Additionally, the Taliban have neither officially rescinded or endorsed any laws from the 2004 Constitution, but their applied justice demonstrates no regard for its text.<sup>[40]</sup>

[39] *ibid.*

[40] *ibid.*

Laws are disregarded unless they serve the interest of Taliban leadership. On 28 September 2021, they stated that they might consider adopting the 1964 Constitution on a temporary basis.<sup>[41]</sup>

Other than on that occasion, they have not discussed a constitution or any other formalised laws.

They also announced the enforcement of harsher punishments including whipping or stoning in public<sup>[42]</sup> for crimes like adultery, often without trial.<sup>[43]</sup> Moreover, as per reports, many inmates, including children, are imprisoned in Herat province with "no proof, no evidence and no trials" indefinitely.<sup>[44]</sup>

Moreover, the Taliban promised to respect and comply with the international laws that Afghanistan is a party to, but their actions demonstrate otherwise.<sup>[45]</sup> They dissolved the Afghanistan Independent Bar Association, requiring the 6000 bar members to re-certify under a new qualification process set by the Ministry. They ruled that only Taliban-approved lawyers will be permitted to practise in Islamic courts. This is in an effort to strip lawyers of their independence. The Taliban also dismissed almost 2000 experienced and educated judges, replacing them with their fighters, who do not possess any judicial knowledge or qualifications.

[41] Ayaz Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now' VoA News (Islamabad, September 28 2021) accessed 25 July 2022.

[42] Hazim (n 31).

[43] *ibid.*

[44] *ibid.*

[45] Emma Farge, 'Taliban have broken promises on rights, outgoing Afghan envoy says' Reuters (Geneva, September 14 2021) accessed 25 July 2022.



Additionally, Taliban also specifically decreed that female lawyers are banned from practising law.<sup>[46]</sup>

In the absence of a formal legal structure, the future of criminal procedure is unclear, and are the fates of criminal law, family law, juvenile law, and women's rights.<sup>[47]</sup> The legal procedure is dependent on the whims of Taliban soldiers and commanders.

Complaints and grievances are referred to the nearest commander in the area's Police District Administration (PDA), who has total authority over the case (with no oversight) and refers it to the religious elder of the area. If parties to the dispute agree with the commander's decisions, they inform the PDA of their consent, and if a conflict arises the case is referred to the courts.

The present situation is concerning for human rights, particularly the rights of women, children and LGBTQI community.

**The section below briefly discusses the current situation in the country for women, children and LGBTQI+ persons -**

[46] Hazim (n 31).

[47] *ibid.*

## CHILD MARRIAGE

Child marriage is on the rise. Before the Taliban takeover, 28% of Afghan women were married before 18. Now, the ongoing economic crisis, exacerbated by COVID-19, has spurred more families to marry off girls and put their dowries towards the rest of the family's financial survival. Girls are married off to resolve disputes and pay debts, and patriarchal social norms allow families to act without considering their often underage daughters' lives and health. Although it was flawed, the prior legal system had at least attempted to act against the regressive social customs that permitted child marriage, and without it there is no possibility of justice for the victims. Furthermore, education, which to some extent reduced child marriage and child labour, has also been banned for girls beyond sixth grade, thus contributing to this growing emergency.



Photo Credits: Stephanie Sinclair for The New York Times

[48] [‘Girls increasingly at risk of child marriage in Afghanistan | Statement by UNICEF Executive Director Henrietta Fore’](#) UNICEF (New York, Kathmandu, Kabul, 12 November 2021) accessed 25 July 2022.

## DOMESTIC VIOLENCE

Gender-based violence, domestic violence, discrimination, and various forms of harassment directed towards women have been on the rise since the collapse of institutions and laws that protected women and girls.<sup>[49]</sup> Domestic and sexual violence are pervasive in Afghanistan, and are widely unreported due to discriminatory, patriarchal social norms, which breed stigma against victims, encourage victim-blaming, and leave victims who seek justice living in fear of reprisals from their perpetrators.

The current system has resulted in a weakened position for women in all spheres of national life, and barred them from education and work. A woman's place is considered to be in the home or the grave. Husbands are entitled to be violent or sexually abusive towards their wives. Polygamy (often without the wife's consent) is been on the rise. Divorce is discouraged, especially when the petitioner is a woman, and due to the dearth of services like women's shelters, the vast majority of women have no option but to silently endure violent marriages.<sup>[50]</sup> To make matters worse, the Taliban have released thousands of perpetrators of domestic and sexual violence, who have returned home.<sup>[51]</sup> They are living with their victims, and are free to retaliate against them for seeking justice, endangering thousands of women.

[49] Judy Trinh, '[Afghan women brace for an uptick in domestic violence under Taliban](#)' CBC (5 October 2021) accessed 25 July 2022.

[50] Sara Perry, '[Protections for women facing violence have vanished under the Taliban](#)' The New Humanitarian (Bamiyan, 20 April 2022) accessed 25 July 2022.

[51] '[Taliban releases over 1,000 criminals, drug traffickers from prison after capturing key cities](#)' The Times of India (12 August 2021) accessed 25 July 2022.

## LGBT COMMUNITY

Afghanistan remains a dangerous place for the lesbian, gay, bisexual, and transgender (LGBT) community and anyone not conforming to rigid gender norms. In 2018, President Ashraf Ghani passed a law that explicitly criminalised same-sex relations, and the 2017 Penal Code included vague language widely interpreted as making same-sex relations a criminal offence. Since the Taliban recaptured Kabul in 2021, the situation has worsened.<sup>[52]</sup> The LGBT community faces an increasingly desperate situation and grave threats to their safety and lives. They are routinely attacked, sexually assaulted, or directly threatened by the Taliban simply because of their sexual orientation or gender identity. Some face abuse from their family members, neighbours, and romantic partners, who now support the Taliban or believed they had to take action against LGBT people close to them to ensure their own safety. Some members of the community fled their homes due to attacks by Taliban members or their supporters. Others watched, as lives they had built carefully over the years disappeared overnight and they found themselves at risk of being targeted because of their sexual orientation or gender identity.

[52] “[Even If You Go to the Skies, We’ll Find You](#)” LGBT People in Afghanistan After the Taliban Takeover’ Outright International (January 2022) accessed 25 July 2022.



## CHILD LABOUR

Families have had no choice but to send their children to the streets for work due to decades of war and humanitarian disasters. More than one million children are currently engaged in child labour in Afghanistan as the last one year have seen family incomes plummet.<sup>[53]</sup> This means that those one million children are exposed to abuse and sexual violence on the streets. Furthermore, the responsibility of feeding their families cuts childhood short and denies children their inalienable right to access education and attend school.



Photo Credits: Reuters/File

[53] [‘Estimated one million Afghan children engaged in labour: NGO’ Aljazeera](#) (February 14 2022) accessed 25 July 2022.

iProbono continues its program of comprehensive care to support Afghans at risk and evacuees across the region.

Over the past decade, Afghan women cyclists initiated the 'right to ride' movement. They defied gender stereotypes, inspired the world, and risked their lives to ride a bike. For these trailblazing women, the Taliban's takeover of Afghanistan ends life as they know it and they are at high risk of retribution. iProbono is supporting these women and has established a fund to evacuate and resettle them, along with their families and allied activists. To support our work, please contribute to the fund.

For more information about our work in Afghanistan, reach out to Mariam Faruqi, iProbono's Managing Director, at [mariam.faruqi@i-probono.com](mailto:mariam.faruqi@i-probono.com) and Zakira Rasooli, Afghanistan Country Representative, at [zakira.rasooli@i-probono.com](mailto:zakira.rasooli@i-probono.com).