

## BALANCING TRADITION AND INCLUSION: FRAMEWORK PRINCIPLES FOR AN AFGHAN ACCORD

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### ABSTRACT

This Article examines the turbulent constitutional history of Afghanistan and proposes a pragmatic constitutional framework balancing Islamic principles with rights, protections, and constraints on power. After analyzing the Taliban's current extra-constitutional rule and ideological objections to an inclusive order, it makes the case for principled compromise. The first step to constitutional reform for Afghanistan is to recognize that Afghans, the Taliban, and the international community pay a high price for disregarding law and accountability in governance. To that end, this Article canvasses the many factors that could motivate the Taliban to accept the rule of law, despite the constraints it would impose on their authority.

This Article then proposes a constitutional framework that affirms Afghanistan's Islamic foundations while integrating participatory mechanisms and institutional checks drawn from comparative global precedents. Core principles include safeguarding citizens' basic rights, decentralizing some provincial authorities, upholding judicial independence, and enshrining equality protections for women and minorities. The goal is to balance religious values with accountable, stable governance.

This framework incorporates beneficial aspects of participatory Islamic models in nations like Iran, Malaysia, and Indonesia without outright adopting Western norms. It represents an incremental adaptation rooted in the country's unique needs and constraints. The flexible provisions allow future enhancement of rights and accountability as conditions permit. While risks remain regarding implementation, this modest vision charts a realistic pathway from instability towards participatory constitutional order. Afghanistan's diverse voices deserve recognition, and its citizens warrant basic protections, regardless of regime type. This imperfect but flexible and adaptable framework provides initial foundations to escape the vacuum of dictatorship and slowly build participatory consensus suited to local realities.

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## INTRODUCTION

For over a century, Afghanistan has experienced continual cycles of political instability and constitutional volatility. With nearly every change of regime, the newly empowered faction would swiftly abolish the existing constitution and governing framework, replacing them with new ones aligned to its own interests while excluding opposition groups.<sup>1</sup> This pattern has resulted in at least 10 different constitutions and frequent coups or violent transitions of power over the past 100 years.<sup>2</sup> For example, the country adopted its first constitution in 1923 under King Amanullah Khan,<sup>3</sup> who attempted to rapidly modernize the country.<sup>4</sup> However, conservative backlash led to his deposition in 1929 by Habibullah Kalakani,<sup>5</sup> and then King Mohammad Nadir Khan<sup>6</sup> abolished Amanullah's constitution.<sup>7</sup> Decades later, in 1964, King Zahir Shah introduced a new constitution aimed at transitioning towards democracy.<sup>8</sup> But he carefully curtailed the influence of his cousin and Prime Minister Mohammad

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<sup>1</sup> Shamshad Pasarlay, *The Making and the Breaking of Constitutions in Afghanistan*, 40 ARIZ. J. INT'L & COMPAR. L. 59, 62–63 (2023).

<sup>2</sup> *Id.* at 61–62.

<sup>3</sup> Amanullah Khan was the King of Afghanistan from 1919 to 1929. *Amānullāh Khan*, BRITANNICA (July 1, 2024), <https://www.britannica.com/biography/Amanullah-Khan> [<https://perma.cc/R5GL-PLP6>]. He declared full independence from Britain and introduced social reforms like giving women rights and modernizing education. *Id.* However, his rapid changes led to tribal unrest. *Id.* Amanullah was forced to abdicate in 1929 after a civil war broke out over his reforms. *Id.* He spent the rest of his life in exile. *Id.*

<sup>4</sup> See Pasarlay, *supra* note 1, at 70; see also J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 559–60 (2006).

<sup>5</sup> Kalakani came from humble beginnings but built support opposing King Amanullah's reforms. See Thomas Ruttig, *Who Was King Habibullah II? A Query From the Literature*, AFG. ANALYSTS NETWORK (Sept. 16, 2016), <https://www.afghanistan-analysts.org/en/reports/context-culture/who-was-king-habibullah-ii-a-query-from-the-literature/> [<https://perma.cc/8U3H-6RMC>]. In 1928, he led a revolt driving Amanullah into exile. *Id.* Kalakani captured Kabul in January 1929, declaring himself Amir. *Id.* However, his nine-month rule was chaotic as tribal leaders rejected his authority and religious conservatives opposed his policies. *Id.* Finally in October 1929, Mohammed Nadir Shah's forces ousted Kalakani, defeating his troops decisively in the Battle of Kabul. *Id.* Kalakani was subsequently captured and executed. *Id.*

<sup>6</sup> Nadir Khan was a military leader who became King of Afghanistan (1929–1933). See Scott Mehl, *Assassination of Mohammad Nadir Shah, King of Afghanistan (1933)*, UNOFFICIAL ROYALTY (Feb. 13, 2020), <https://www.unofficialroyalty.com/assassination-of-mohammed-nadir-shah-king-of-afghanistan-1933/> [<https://perma.cc/A3W3-V69Y>].

<sup>7</sup> M. Nazif Shahrani, *King Aman-Allah of Afghanistan's Failed Nation-Building Project and Its Aftermath*, 38 IRANIAN STUD. 661 (2005) (reviewing SENZIL K. NAWID, *RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN 1919–29: KING AMAN-ALLAH AND THE AFGHAN ULAMA* (1990) and ROBERT D. MCCHESENEY, *KABUL UNDER SIEGE: FAYZ MUHAMMAD'S ACCOUNT OF THE 1929 UPRISING* (1999)).

<sup>8</sup> See Thier, *supra* note 4, at 560.

Daoud in its drafting.<sup>9</sup> By prohibiting the royal family's direct involvement in politics or appointments, Daoud was denied constitutional succession rights.<sup>10</sup> This embittered him and ultimately led Daoud to overthrow the King in a 1973 coup with help from the Parcham faction, installing himself as President and promulgating a new republican constitution in 1977.<sup>11</sup> But later he distanced himself from the Soviets and Parcham, leading the PDPA factions to reunite and overthrow Daoud in another coup in 1978.<sup>12</sup> Subsequent constitutions were then drafted under the Soviet-backed Babrak Karmal in 1980 and Najibullah in 1987 and 1990.<sup>13</sup> This turbulence has continued into current times after almost five decades of chronic conflict. Upon seizing control in August 2021, after 20 years of insurgency, the Taliban movement dissolved the 2004 constitution, which they had been excluded from drafting,<sup>14</sup> and instead ruled by their strict interpretation of Islamic law without an established constitutional framework. This legal vacuum enables ongoing uncertainty and arbitrariness in ruling the country.

The Taliban currently wield absolute control over the country after routing former Republic forces and facing no meaningful political opposition. However, former Mujahideen leaders and anti-Taliban groups retain local popularity in certain regions.<sup>15</sup> They could pose a threat should they unify and gain external support.<sup>16</sup> As noted by Amir Ismail Khan, a former Jahadi commander, and many others, while these groups and Taliban opponents currently seek dialogue, armed resistance remains an ever-present last resort should negotiations fail to deliver results.<sup>17</sup>

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<sup>9</sup> See Pasarlay, *supra* note 1, at 79.

<sup>10</sup> *Id.* at 79–80.

<sup>11</sup> *Id.* at 79–83.

<sup>12</sup> See Patricia Gossman, *Afghanistan: The Forgotten War: Human Rights Abuses and Violations of the Laws of War Since the Soviet Withdrawal*, HUM. RTS. WATCH (Feb. 1, 1991), <https://www.hrw.org/reports/1991/afghanistan/1AFGHAN.html> [<https://perma.cc/F7EK-JURT>].

<sup>13</sup> See Thier, *supra* note 4, at 560–61.

<sup>14</sup> See KAWUN KAKAR, LESSONS FROM THE 2004 CONSTITUTIONAL PROCESS FOR THE INTRA-AFGHAN PEACE NEGOTIATIONS 1–2 (U.S. Inst. of Peace 2020), <https://www.usip.org/sites/default/files/Afghanistan-Peace-Process-Lessons-from-the-2004-Constitutional-Process.pdf> [<https://perma.cc/GZL6-55NG>]; OFF. OF INT'L RELIGIOUS FREEDOM, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: AFGHANISTAN 1, 10 (U.S. Dep't of State 2022) [hereinafter 2021 AFGHANISTAN REPORT], <https://www.state.gov/reports/2021-report-on-international-religious-freedom/afghanistan/> [<https://perma.cc/3HXC-M9RC>].

<sup>15</sup> See Akmal Dawi, *Afghan Insurgent Groups Step Up Attacks, Political Campaign Against Taliban*, VOICE OF AM. NEWS (Dec. 5, 2023, 7:57 PM), <https://www.voanews.com/a/afghan-insurgent-groups-step-up-attacks-political-campaign-against-taliban-/7386099.html> [<https://perma.cc/L5CQ-F3F5>].

<sup>16</sup> See *id.*; see also Besmellah Zahidi, *Biden's Afghanistan Policy Under Criticism Ahead of U.S. Elections*, KABULNOW (Jan. 13, 2024), <https://kabulnow.com/2024/01/bidens-afghanistan-policy-under-criticism-ahead-of-us-elections/> [<https://perma.cc/YF33-5HJT>].

<sup>17</sup> See Mohammad Ismail Khan, *Az Rahbaran Arshad Zede Taliban-Goftogoe Wezha* [Mohammad Ismail Khan, *One of the Senior Anti-Taliban Leaders—Special Interview*],

In addition, groups like the National Resistance Front (NRF) led by Ahmad Massoud and Amrullah Saleh, the former vice president, and the Afghan Freedom Front (AFF) continue to actively oppose Taliban control with frequent attacks.<sup>18</sup> Furthermore, recent anti-Taliban gatherings of Afghan diaspora in Vienna and neighboring countries, like Tajikistan, demonstrate that unified opposition groups still have the potential to challenge the Taliban's dominance should conditions align.<sup>19</sup>

Afghanistan's long history of successful coups and resistance campaigns over the past fifty years often saw ousted regimes leverage foreign backing from sympathetic regional powers to help regain domestic power after periods of exile.<sup>20</sup> With Taliban control still tenuous despite the lack of a current wide-scale domestic insurgency, any resurgence of organized resistance could portend another turbulent chapter. Especially if such rivals gain material support from Iran, Tajikistan, India, or other regional or transregional actors wishing to counteract Chinese, Pakistani, or Russian influence over Afghanistan.

The Taliban must recognize that the total exclusion and unchecked domination of outsiders and minorities has consistently alienated past governments' leadership from the population, leading to their eventual downfall. As evidenced by recent statements from the former Iranian foreign minister, the Taliban and their primarily Pashtun support base represent just one key faction in Afghanistan.<sup>21</sup> Enduring stability requires authentic compromise and consensus between all of the country's ethnic groups, religious sects, and major political constituencies.

Therefore, stability in Afghanistan moving forward fundamentally relies on three key stakeholder groups to collectively establish an agreed upon rights framework and lasting settlement through principled compromise:

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YOUTUBE (Dec. 4, 2023, 12:34 PM), <https://www.youtube.com/watch?v=LFB-piOwrxc> [<https://perma.cc/7XWF-25WU>].

<sup>18</sup> See ASENA KARACALTI & ASHIK KC, AFGHANISTAN: HIGH RISK OF VIOLENCE TARGETING CIVILIANS UNDER TALIBAN RULE 22 (Timothy Lay et al. eds., 2022), <https://acleddata.com/10-conflicts-to-worry-about-in-2022/afghanistan/mid-year-update/> [<https://perma.cc/6RM3-HFZ4>]; Saewomeen Neshast Mokhalefan seyasi Taliban Dar Vienna Haghaz Shod [*The Third Meeting of Political Opponents of the Taliban Began in Vienna*], HASHT-E-SUB DAILY (Dec. 3, 2023) [hereinafter *The Third Meeting*], <https://8am.media/fa/the-third-meeting-of-political-opponents-of-the-taliban-began-in-vienna/>.

<sup>19</sup> See *The Third Meeting*, *supra* note 18.

<sup>20</sup> See generally *The Soviet Invasion of Afghanistan and the U.S. Response, 1978–1980*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1977-1980/soviet-invasion-afghanistan> [<https://perma.cc/RGQ9-2K5F>] (last visited Sept. 25, 2024); Ctr. for Preventive Action, *Instability in Afghanistan*, GLOB. CONFLICT TRACKER, COUNCIL ON FOREIGN RELS. (Aug. 17, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/war-afghanistan> [<https://perma.cc/4AHD-HE2R>].

<sup>21</sup> See Amir Abdullahyan, *Taliban Hama Waqeait Afghanistan Nest Wa Ta Tashkil Dowlat Farahgir Hanha ra Ba Rasmeyat Nameshenasem* [*Amir Abdullahyan, The Taliban Does Not Represent All of Afghanistan's Reality and We Do Not Recognize Them as Legitimate Until an Inclusive Government is Formed*], BBC NEWS PERSIAN (May 25, 2023), <https://www.bbc.com/persian/articles/c887z5g59n7o> [<https://perma.cc/8H5N-KJMU>].

1. The international community must pressure the Taliban to agree to a rights framework through compromise, guaranteeing citizens' rights and a stable future for Afghanistan, while understanding the country's historical, cultural, religious, and social realities.
2. Moderate Taliban members and affiliate parties should firmly leverage their influence within Taliban leadership circles to drive further internal reforms and pragmatism to meet popular demands. While satisfying hardliners when necessary, energetic reformers must also sideline radical voices unwilling to compromise and pursue a progressive, forward-thinking vision for the country that invites investment and goodwill. This group could positively influence other Taliban cadres over the long term and more easily gain acceptance among war weary Afghans by delivering economic relief and restored public services.
3. Taliban opponents in previous Republic administrations and the Mujahideen should reflect on the shortcomings and overreaches while holding centralized power over the past twenty years despite ample resources and international support. Now in exile or laying low within the country, leading critics could pursue creating a broad-based inclusive system that ensures basic rights, pluralistic civil institutions, and dignity for the diverse Afghan people should conditions allow their voices to be heard again.

Therefore, given the turmoil of the last three years, this Article aims to address the vital question: What constitutional framework can be developed for Afghanistan that balances adherence to Islamic principles and local norms with inclusion of ethnic minorities, women, and major political groups—one that is not only acceptable for the current Taliban regime but also has potential over time to gain acceptance among a broad base of Afghans as well as the international community?

To examine this complex question, this Article will first provide essential context by discussing the Taliban's current governing structure and explore why the regime has so far delayed putting any permanent constitutional order in place, highlighting problems arising from this legal uncertainty. Subsequently, it will analyze the historical effects of unconstitutional or uncontrolled rule in Afghanistan while emphasizing the importance of codified laws and processes to motivate Taliban leaders to embrace inclusive rule of law with appropriate checks and balances. This Part further makes the case for embedding flexibility in any constitutional order to enable gradual consensus-building over time.

Ultimately, it will suggest a practical framework for feasible constitutional reform to resolve the current legal vacuum, focusing on pragmatism and assurances that all sides can accept; it is vital to balance religious adherence with modern governmental roles and realities. Finally, this Article will proactively address likely objections across the political spectrum to refine and bolster the viability of the proposed constitutional approach.

The painful lessons of Afghanistan's numerous past constitutional failures underscore the desperate need for principled compromise and foresight. Constitutional frameworks imposed by narrow ideological interests without proper checks and balances have consistently unraveled in volatility and misery. By contrast, broad participation in shaping a pragmatic order with flexibility to adapt can better produce a sustainable equilibrium acceptable to various competing groups. Such consensus and power balance are essential to finally break the tragic cycle of instability and usher in a more peaceful constitutional chapter for long-suffering Afghans. With wisdom and courage on all sides, a better path forward can still emerge from the rubble of history.

### I. THE CURRENT SITUATION

This Part provides an overview of the current situation in Afghanistan, focusing on the Taliban's attempt to govern the country without a written constitution. It begins by explaining the basic structure and form of the Taliban's de facto governance. More specifically, it explains the history of the Taliban's formation; the duties and competencies of the Amir al-Mu'minin (The Leader of Believer "The Amir") and his role heading the Taliban regime; the separation of powers and lack of checks and balances; the duties and role of the prime minister; the role of the judiciary in enforcing punishments; and the lack of a legislative body. With this background in place, this Part then explores how the Taliban has managed to run Afghanistan without a constitution after twenty years of constitutional government. It explains why the Taliban is interested in ruling the country without a constitution and what motivates its leaders to repudiate the rule of law.

#### *A. The Current De Facto Government Structures*

The structure of the Taliban regime and distribution of power among its leaders is crucial to understanding the Taliban's approach to governance. To that end, this Section provides a capsule history of the Taliban's origins and explains the organizational structure of the current Taliban administration. The most noteworthy features of that structure are that it has neither any legislative body nor system of checks and balances.

##### 1. Taliban's Origins and History

The Taliban emerged in September 1994 in northern Pakistan, formed by Pashtun students who became radicalized in the Madrassas (religious schools) during the Soviet-Afghan war.<sup>22</sup> These students were influenced by the "Deobandi movement"<sup>23</sup>

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<sup>22</sup> See *Who Are the Taliban?*, BBC NEWS (Aug. 12, 2022), <https://www.bbc.com/news/world-south-asia-11451718> [<https://perma.cc/7A6Y-V946>].

<sup>23</sup> See Lauren Frayer, *The Taliban's Ideology Has Surprising Roots in British-Ruled*

and radical Mujahideen groups fighting the Soviet occupation of Afghanistan.<sup>24</sup> They aimed to impose stability after the Afghan civil war and establish a “pure” Islamic state.<sup>25</sup>

The Taliban seized Kandahar, which was predominantly Pashtun and had been embroiled in civil war, and quickly took control of southern Afghanistan with support from Pakistan’s ISI.<sup>26</sup> Gradually, they expanded and captured Herat in 1995 and Kabul in 1996,<sup>27</sup> “establish[ing] the Islamic Emirate of Afghanistan [IEA].”<sup>28</sup> Embracing a strict interpretation of Sharia law, the Taliban banned women from work and school; required “Chadari” or Burqas to be worn in all public places; outlawed music; and carried out punishments like stoning, amputations, and public executions in the first five years of its regime.<sup>29</sup>

During this period, poverty and unemployment skyrocketed and millions of Afghans migrated to other countries.<sup>30</sup> Afghanistan’s administrative system collapsed, and the Taliban operated the government based on its interpretation of Sharia.<sup>31</sup> Terrorist groups like al-Qaeda took root and thrived in the country.<sup>32</sup> The Taliban gave shelter to Osama Bin Laden, who fled Sudan and was seeking a new base of operations for al-Qaeda.<sup>33</sup> No other countries recognized the Taliban as a legitimate government except Pakistan, United Arab Emirates, and Saudi Arabia.<sup>34</sup> Meanwhile,

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*India*, NPR (Sept. 8, 2021, 5:08 AM), <https://www.npr.org/2021/09/08/1034754547/taliban-ideology-roots-deobandi-islam-india> [<https://perma.cc/5PPC-YATJ>].

<sup>24</sup> See OLIVIER ROY, *ISLAMIC RADICALISM IN AFGHANISTAN AND PAKISTAN* 19 (WriteNet ed., 2002).

<sup>25</sup> See Ali A. Olomi, *The History of the Taliban is Crucial in Understanding Their Success Now—And Also What Might Happen Next*, CONVERSATION (Aug. 26, 2021, 8:14 AM), <https://theconversation.com/the-history-of-the-taliban-is-crucial-in-understanding-their-success-now-and-also-what-might-happen-next-166630> [<https://perma.cc/7BPC-2NY4>].

<sup>26</sup> See *Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fueling the Civil War in Afghanistan*, HUM. RTS. WATCH (July 1, 2001), <https://www.hrw.org/report/2001/07/01/crisis-impunity-role-pakistan-russia-and-iran-fueling-civil-war-afghanistan> [<https://perma.cc/X4GT-QMPP>].

<sup>27</sup> *Who Are the Taliban?*, *supra* note 22.

<sup>28</sup> Olomi, *supra* note 25.

<sup>29</sup> See Eric Nagourney & Christina Goldbaum, *Who Are the Taliban?*, N.Y. TIMES (Aug. 11, 2022), <https://www.nytimes.com/article/who-are-the-taliban.html> [<https://perma.cc/E4WX-XSRT>].

<sup>30</sup> See Ahmed Rashid, *The Taliban: Exporting Extremism*, 78 FOREIGN AFFS. 22, 35 (1999); U.S. Comm. Refugees & Immigrants, *U.S. Committee for Refugees World Refugee Survey 1997—Afghanistan*, REF WORLD (Jan. 1, 1997), <https://www.refworld.org/reference/annualreport/uscir/1997/en/92282> [<https://perma.cc/2DKT-XH4B>].

<sup>31</sup> Daniel P. Sullivan, *Tinder, Spark, Oxygen, and Fuel: The Mysterious Rise of the Taliban*, 44 J. PEACE RSCH. 93, 102 (2007).

<sup>32</sup> See CLAYTON THOMAS, CONG. RSCH. SERV., R46955, *TALIBAN GOVERNMENT IN AFGHANISTAN: BACKGROUND AND ISSUES FOR CONGRESS 2* (2021).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

opposition mounted mostly in the non-Pashtun Northern Alliance, which had maintained control of parts of northern Afghanistan when the Taliban took over, led by Ahmad Shah Massoud who was assassinated on September 9, 2001.<sup>35</sup>

Shortly after the 9/11 attacks on New York City and Washington, D.C., the United States demanded the Taliban surrender Bin Laden.<sup>36</sup> The Taliban refused, leading to the U.S. invasion of Afghanistan.<sup>37</sup> Aided by the Northern Alliance and U.S. air strikes, the Taliban were quickly driven from power.<sup>38</sup> However, they regrouped as an insurgency, using “guerilla tactics” and terrorist attacks to destabilize the Afghan government.<sup>39</sup> Finally, in the summer of 2021, they retook the country after two decades of fighting.<sup>40</sup>

## 2. Organizational Structure

Upon regaining power, the Taliban fundamentally changed the structure of Afghanistan’s government across all three branches that were in place under the 2004 constitution before the Taliban takeover: an executive branch led by a president, a bicameral legislative branch (with a Wolesi Jirga lower house and Meshrano Jirga upper house), and a judicial branch with a Supreme Court.<sup>41</sup> In the executive branch, the Taliban created the post of Prime Minister to lead most executive functions and changed the name of the Independent Directorate of Local Governance (IDLG) which had authority over provincial governors,<sup>42</sup> to the General Directorate of Municipalities.<sup>43</sup> Meanwhile, the Taliban transferred the IDLG’s authority over the governors to the Ministry of Interior.<sup>44</sup> Apparently, this was to consolidate more

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<sup>35</sup> Amin Saikal, *Al-Qaeda, the Taliban and the Tragedy of Afghanistan*, AUSTL. STRATEGIC POL’Y INST.: THE STRATEGIST (Sept. 9, 2022), <https://www.aspistrategist.org.au/al-qaeda-the-taliban-and-the-tragedy-of-afghanistan/> [https://perma.cc/Q92D-4VAQ].

<sup>36</sup> THOMAS, *supra* note 32.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 2–3.

<sup>39</sup> *See* LEAD INSPECTOR GEN., 12TH QUARTERLY REPORT OPERATION FREEDOM’S SENTINEL 13 (2018), [https://media.defense.gov/2018/May/21/2001919976/-1/-1/1/FY2018\\_LIG\\_OCO\\_OFS2\\_MAR2018\\_3.PDF](https://media.defense.gov/2018/May/21/2001919976/-1/-1/1/FY2018_LIG_OCO_OFS2_MAR2018_3.PDF) [https://perma.cc/VNT4-GTFH].

<sup>40</sup> THOMAS, *supra* note 32, at 7–8.

<sup>41</sup> QUNUN ASSASI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN], OFFICIAL GAZETTE 818, 1383 (2004), arts. 60, 81, 82, 116 [hereinafter THE 2004 AFGHANISTAN CONSTITUTION].

<sup>42</sup> *Independent Directorate of Local Governance IDLG (Afghanistan)*, ACTED, <https://www.acted.org/en/partners/independent-directorate-of-local-governance-idlg-afghanistan/> [https://perma.cc/4VHW-BGM9] (last visited Sept. 25, 2024).

<sup>43</sup> Ahmad Shah Erfanyar, *Edare Organ Hai Mahali Ba Reyasat homome Sharwali ha Tagheer Nam shod* [Independent Directorate of Local Governance Was Renamed to General Directorate of Municipalities], PAJHWOK NEWS AGENCY (Jan. 13, 2022, 5:30 PM), <https://pajhwok.com/fa/2022/01/13/the-department-of-local-authorities-was-renamed-the-general-directorate-of-municipalities/> [https://perma.cc/B9NU-BKVR].

<sup>44</sup> *Rahber Taliban Reyasat Humume Shardari Hah Ra Monhal Kar* [Taliban Leader Dissolves the General Directorate of Municipalities], ETILAAATROZ (Nov. 18, 2022), <https://>

control over local governance under the Interior Ministry, rather than allowing it to remain more independent. This allows the Taliban to exert more direct supervision and oversight on provincial administrations. The previous IDLG, now called the General Directorate of Municipalities, currently focuses more narrowly on municipal services rather than provincial governance.<sup>45</sup> In addition, the Taliban abolished the Ministries of Women's Affairs and Parliamentary Affairs, and in their place, created a new Ministry for the Propagation of Virtue and Prevention of Vice.<sup>46</sup> Furthermore, the Taliban nominally retained the judiciary, but it abolished the previous legal code<sup>47</sup> and dismissed all professional judges and staff, replacing them with its own Mullahs.<sup>48</sup> They also transferred investigative powers from the Attorney General to the Supreme Court, limiting its role and changing its name to the Directorate of Supervision and Prosecution of Decrees.<sup>49</sup> Stripping investigatory authority away from the Attorney General and handing it to the Supreme Court was likely aimed at enabling more centralized control and politically motivated application of law by Taliban-aligned hardliners newly appointed to lead the judiciary.

On the legislative front, the Taliban also abolished the bicameral parliament.<sup>50</sup> Legislative duties were instead delegated to government ministries, especially the Ministry of Justice and the Office of the Supreme Leader.<sup>51</sup>

All these changes, made either by Supreme Leader decree or cabinet decisions, undermine the separation of powers. To provide more clarity, the structure and roles of the executive, judiciary, and legislature under the Taliban will be examined separately.

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[www.etilaatroz.com/159777/%D8%B1%D9%87%D8%A8%D8%B1-%D8%B7%D8%A7%D9%84%D8%A8%D8%A7%D9%86-3/](http://www.etilaatroz.com/159777/%D8%B1%D9%87%D8%A8%D8%B1-%D8%B7%D8%A7%D9%84%D8%A8%D8%A7%D9%86-3/) [https://perma.cc/GX5N-4F8P].

<sup>45</sup> See *id.*

<sup>46</sup> See Heather Barr, *For Afghan Women, the Frightening Return of 'Vice and Virtue,'* HUM. RTS. WATCH (Sept. 29, 2021, 10:00 AM), <https://www.hrw.org/news/2021/09/29/afghan-women-frightening-return-vice-and-virtue> [https://perma.cc/VZ32-8QHL].

<sup>47</sup> See Mahir Hazim, *Going Back to Zero: How the Afghan Legal and Judicial System Is Collapsing Under the Taliban Regime*, JURIST (Mar. 7, 2022, 9:00 AM), <https://www.jurist.org/commentary/2022/03/mahir-hazim-afghan-legal-judicial-system-collapsing-taliban-regime/> [https://perma.cc/DR2M-RKU9].

<sup>48</sup> *Id.*

<sup>49</sup> *Qunun Wazahif Wa Salayatha Loye Reyasat Nezarat Wa Tahqeeb Framein Wa Hakam* [The Law on the Duties and Authorities of the High Directorate of Supervision and Prosecution of Decrees and Edicts], OFFICIAL GAZETTE 1434, 1402 (2023) (Islamic Emirate of Afghanistan) [hereinafter *Law on the Duties and Authorities*].

<sup>50</sup> Amin Kawa, *Payamad Hai Gheyabat Qunun wa Hazfe Nehad Ha* [Consequences of the Absence of Law and Elimination of Institutions], HASHT-E-SUB DAILY (May 18, 2022), <https://8am.media/fa/consequences-of-the-absence-of-law-and-elimination-of-institutions/> [https://perma.cc/RS6R-D323].

<sup>51</sup> *Hakam Wa Hedayat Hali Qader Amir Al-Mu'minin Hafizaullah* [The Decrees, Edicts, and Instructions of His Excellency Amir Al-Mu'minin], OFFICIAL GAZETTE 1432, 1402 (2023) (Islamic Emirate of Afghanistan), Decree No. 9, arts. 1–4 [hereinafter *The Amir's 1432 Decrees and Edicts*].

*a. Amir al-Mu'minin and the Leadership Council*

The Taliban movement is led by a Supreme Leader referred to as Amir al-Mu'minin (The Leader of the Faithful), as well as a Leadership Council known as the "Rahbari Shura," which is also headed by the Amir.<sup>52</sup> Over the centuries, various Muslim rulers have adopted this title to assert their legitimacy as the preeminent political and spiritual guide for Muslims.<sup>53</sup>

As the Taliban came to power for the first time in 1996, they selected Mullah Mohammad Omar as their leader and gave him the title of "Amir al-Mu'minin" in Kandahar, believing this granted him religious authority.<sup>54</sup> In this capacity, Mullah Omar had unlimited authority to appoint both low- and high-ranking officials.<sup>55</sup> His rulings were applicable as law in the country, and he imposed many restrictions in the form of executive orders.<sup>56</sup> However, Mullah Omar fled and lived covertly after the U.S. invasion of Afghanistan.<sup>57</sup> Finally, he died in 2013, although the news of his death was not published until 2015.<sup>58</sup> After Mullah Omar, the Rahbari Shura appointed Mullah Akhtar Mansour,<sup>59</sup> but he was killed in Pakistan in 2016 by a U.S. air strike.<sup>60</sup> Mullah Mansour was succeeded by Mullah Haibatullah Akhundzada,

<sup>52</sup> See Tahir Khan & Ayesha Tanzeem, *Taliban Close to Formation of Cabinet, Announcement of New Government*, VOICE OF AM. NEWS (Aug. 29, 2021, 7:37 AM), [https://www.voa-news.com/a/us-afghanistan-troop-withdrawal\\_taliban-close-formation-cabinet-announcement-new-government/6210116.html](https://www.voa-news.com/a/us-afghanistan-troop-withdrawal_taliban-close-formation-cabinet-announcement-new-government/6210116.html) [https://perma.cc/NWW3-GUBG].

<sup>53</sup> Sakhi Khalid, *A Trouble Called "Amir Al-Mu'minin,"* HASHT-E-SUB DAILY (May 28, 2022), <https://8am.media/eng/a-trouble-called-amir-al-muminin/> [https://perma.cc/YBV4-6NA2].

<sup>54</sup> See *Zendagi Namae Mullah Omar; Pasukhi Ba Dahesh [Mullah Omar Biography Answer for ISIS]*, BBC NEWS (Apr. 5, 2015), [https://www.bbc.com/persian/afghanistan/2015/04/150405\\_157\\_mullahomar\\_biography](https://www.bbc.com/persian/afghanistan/2015/04/150405_157_mullahomar_biography) [https://perma.cc/8FH2-CNFJ].

<sup>55</sup> Antonio Giustozzi, *Afghanistan: The Taliban Seek a Negotiated Path to Power. Will it Work?*, RUSI (Apr. 26, 2021), <https://rusi.org/explore-our-research/publications/commentary/afghanistan-taliban-seek-negotiated-path-power-will-it-work> [https://perma.cc/G2VB-8YKN].

<sup>56</sup> See generally RFE/RL's Radio Azadi & Ron Synovitz, *Who's Who in the Taliban: The Men Who Run the Extremist Group and How They Operate*, RFE/RL (Aug. 6, 2021), <https://www.rferl.org/a/taliban-leadership-structure-afghan/31397337.html> [https://perma.cc/RT4M-JF9T].

<sup>57</sup> See THOMAS, *supra* note 32, at 3.

<sup>58</sup> Bill Neely, *Mullah Omar is Dead: Father of Afghanistan's Taliban Died in Pakistan*, NBC NEWS (July 29, 2015, 12:31 PM), <https://www.nbcnews.com/news/world/mullah-omar-dead-father-afghanistans-taliban-died-pakistan-n400451> [https://perma.cc/Z8YF-8UX7].

<sup>59</sup> Mullah Akhtar Mansour, born in the 1960s in Kandahar province, has long been seen as the acting head of the Taliban and maintains a close relationship to the group's founder Mullah Omar. *Taliban Leader Mullah Akhtar Mansour Killed, Afghans Confirm*, BBC NEWS (May 22, 2016), <https://www.bbc.com/news/world-asia-36352559> [https://perma.cc/5L47-79XA]. Mansour served as civil aviation minister during the Taliban's previous rule in Afghanistan and later as shadow governor of Kandahar after their fall from power. *Id.* He has allegedly had an active role in drug trafficking according to the United Nations. *Id.*

<sup>60</sup> Cassandra Vinograd et al., *Afghanistan: Taliban Leader Mullah Akhtar Mansoor Is*

who currently oversees the Taliban's Leadership Council, holds absolute power, and makes unilateral decisions appointing ministers and governors while restricting women's rights, despite objections.<sup>61</sup> Since the Taliban do not have an organized governmental structure, there is limited publicly available information on the specifics of how the Rahbari Shura functions in relation to the Amir under the Taliban's system. However, based on the Taliban's 1998 draft constitution, statements, and media reporting, there are few public details on the workings of the Rahbari Shura in relation to the Amir. As the Amir, Mullah Haibatullah has sweeping authority, and it would be difficult for the council to remove him.<sup>62</sup> He likely has some ability to reshape the council's membership by appointing or dismissing members to ensure alignment with his decisions and the Taliban's ideology.<sup>63</sup> The council includes senior religious scholars and Taliban veterans loyal to the leadership.<sup>64</sup> Mullah Haibatullah as Amir likely has final say on appointments to ensure members are ideologically aligned and loyal.<sup>65</sup> Selection may involve internal nominations and consensus among Taliban top leadership. Therefore, the Amir wields unlimited authority across all government functions—executive, legislative, and judicial.<sup>66</sup>

#### *b. The Executive*

The Taliban government's executive branch is led by the Prime Minister.<sup>67</sup> The Prime Minister appears to hold the second-highest position of power in the government, after the Amir.<sup>68</sup> He is head of the Taliban cabinet which includes more than twenty ministries, and he has three deputies, all of whom are appointed by the Amir.<sup>69</sup>

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*Dead*, NBCNEWS (May 23, 2016, 3:46 AM), <https://www.nbcnews.com/news/world/afghan-istan-taliban-chief-mullah-akhtar-mansoor-dead-n578211> [<https://perma.cc/DBN6-4TJX>].

<sup>61</sup> See Sudha Ramachandran, *What Role Will the Taliban's 'Supreme Leader' Play in the New Government?*, DIPLOMAT (Sept. 10, 2021), <https://thediplomat.com/2021/09/what-role-will-the-talibans-supreme-leader-play-in-the-new-government/> [<https://perma.cc/K2WA-EDX7>].

<sup>62</sup> See Fardows Kawoosh, *Peshnawise Qunun Asasi Taliban [The Draft Constitution of the Taliban]*, HASHT-E-SUB DAILY (June 29, 2019), <https://8am.media/fa/draft-constitution-of-the-taliban/> [<https://perma.cc/AAM2-7BE5>].

<sup>63</sup> See Akmal Dawi, *Unseen Taliban Leader Wields Godlike Powers in Afghanistan*, VOICE OF AM. NEWS (Mar. 28, 2023, 6:18 PM), <https://www.voanews.com/a/unseen-taliban-leader-wields-godlike-powers-in-afghanistan-/7026112.html> [<https://perma.cc/85G5-ZPAX>].

<sup>64</sup> See Giustozzi, *supra* note 55.

<sup>65</sup> Seth G. Jones, *Afghanistan's Future Emirate? The Taliban and the Struggle for Afghanistan*, 13 COMBATING TERRORISM CTR. 1, 1–3 (2020).

<sup>66</sup> See Ramachandran, *supra* note 61.

<sup>67</sup> See *Hardliners Get Key Posts in New Taliban Government*, BBC NEWS (Sept. 7, 2021), <https://www.bbc.com/news/world-asia-58479750> [<https://perma.cc/2K4Y-HPW7>].

<sup>68</sup> See Antonio Giustozzi, *Transfer of Government from Kabul to Kandahar; What is the Plan of the Taliban Leader?*, BBCNEWS PERSIAN (May 20, 2023), <https://www.bbc.com/persian/articles/cxrdwg2d5xgo> [<https://perma.cc/U8GZ-P5VZ>].

<sup>69</sup> Jones, *supra* note 65; Mohammad Abdul Kabir Ba Onwan Nokhust Wazire Sarparast *Hokomat Taliban Moqarar Shod [Mohammed Abdul Kabir Has Been Appointed as the*

Apparently, the Prime Minister, his deputies, and his ministries possess executive authority to administer the government.<sup>70</sup> However, in practice, the powers of the Prime Minister and the cabinet are limited.<sup>71</sup> While the Prime Minister attends cabinet meetings in Kabul and often sends proposals to the Amir for final approval in Kandahar, he must obtain authorization for major decisions.<sup>72</sup> For example, when the Taliban cabinet approved proposed university curriculum changes, which they developed, it awaited the Amir's confirmation before proceeding.<sup>73</sup> Since the Amir must confirm all significant policies, the Prime Minister and his cabinet do not have much independent executive competence. Although the Prime Minister's formal duties are unclear and there is no specific law or regulation, he frequently oversees cabinet meetings and represents the government at official ceremonies, providing visible leadership.<sup>74</sup> However, the "unseen" Amir ultimately holds supreme decision-making authority, significantly restricting the Prime Minister's ability to exercise independent control over the administration.<sup>75</sup>

### *c. The Judiciary*

Since recapturing Kabul in August 2021, the Taliban has radically transformed the Afghan judiciary by removing experienced and professional judges and appointing their own people, alleging that they previously worked in the "shadow courts,"<sup>76</sup> which were run by the Taliban while they had control in part of Afghanistan, especially in the villages and districts.<sup>77</sup>

Currently, the Supreme Court is led by Abdul Hakim Haqqani, a powerful Taliban ideologue.<sup>78</sup> Haqqani authored the Taliban's manifesto and does not believe in the

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*Caretaker Prime Minister of the Taliban Government*], BBC NEWS PERSIAN (May 17, 2023), <https://www.bbc.com/persian/articles/ckdy927r5kpo> [<https://perma.cc/7ZN3-P4SC>].

<sup>70</sup> See *Afghanistan: Who's Who in the Taliban Leadership*, BBC NEWS (Sept. 7, 2021), <https://www.bbc.com/news/world-asia-58235639> [<https://perma.cc/H5SL-M7LE>].

<sup>71</sup> See Giustozzi, *supra* note 68.

<sup>72</sup> See Mahdi Orozghani, *Taliban Wa Modireyat Qudrat* [*Taliban and Power Management*], RADIO ZAMANEH (Apr. 24, 2022), <https://www.radiozamaneh.com/711457/> [<https://perma.cc/6Q3H-VWH9>].

<sup>73</sup> See The Amir's 1432 Decrees and Edicts, *supra* note 51, Decree No. 427.

<sup>74</sup> Orozghani, *supra* note 72.

<sup>75</sup> See SANA TARIQ & MOHAMMAD EHSAN ZIA, THE TALIBAN'S CRISIS OF DIPLOMACY 6 (U.S. Inst. of Peace 2022), [https://www.usip.org/sites/default/files/Afghanistan-Peace-Process\\_The-Talibans-Crisis-of-Diplomacy.pdf](https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_The-Talibans-Crisis-of-Diplomacy.pdf) [<https://perma.cc/73Z2-TR3Y>].

<sup>76</sup> Ron Synovitz, *Taliban Courts Publicly Execute, Amputate and Flog Afghans*, RFE/RL (Sept. 8, 2021), <https://www.rferl.org/a/taliban-courts-public-executions/31449392.html> [<https://perma.cc/KM3R-JGH9>].

<sup>77</sup> See Antonio Giustozzi & Adam Baczko, *The Politics of the Taliban's Shadow Judiciary, 2003–2013*, 1 CENT. ASIAN AFFS. 199, 204–07 (2014).

<sup>78</sup> See Ali Ahmadi, *The Manifesto of Darkness: An Examination of Taliban's Ideals*, GLOB. CAMPUS HUM. RTS. (June 10, 2022), <https://gchumanrights.org/gc-preparedness/pre>

principles of the rule of law.<sup>79</sup> His leadership raises serious concerns about ideological beliefs overriding proper legal procedures.<sup>80</sup> With no established legal framework in place, Taliban judges issue rulings on a case-by-case basis based on their individual interpretations of Sharia law<sup>81</sup> and Majjalah.<sup>82</sup>

The lack of codified laws leads to inconsistent and arbitrary judgements across the country.<sup>83</sup> In carrying out justice, Taliban courts have already handed out harsh punishments like public executions, floggings or lashings<sup>84</sup> without granting due process rights to the accused, in violation of international norms and standards.<sup>85</sup> At the directive of the Amir, judges have been called to rigorously impose Sharia law punishments.<sup>86</sup> However, traditional Sharia jurisprudence requires extremely high evidentiary standards before applying the Hudud penalties.<sup>87</sup> The Taliban courts seem to ignore these strict procedural requirements.<sup>88</sup>

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paredness-conflict/article-detail/the-manifesto-of-darkness-an-examination-of-talibans-ideals.html [https://perma.cc/LKH8-Q8XL].

<sup>79</sup> *Id.*; see *A Look at Abdul Hakim Haqqani's Book*, INST. E. STRATEGIC STUD. (July 11, 2022, 8:13 AM), <https://www.iess.ir/en/analysis/3149/> [https://perma.cc/BE43-EUVX].

<sup>80</sup> See Ahmadi, *supra* note 78.

<sup>81</sup> Sharia law is derived from Quran, hadith, and fatwas. See MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 2–5 (2008). It covers all aspects of Muslim life including rituals, family, business, crime, punishment, and governance and it is seen as a righteous path, not just legal code. See *id.* Fiqh is the human scholarly effort to interpret and implement Sharia. *Id.* Scholars study texts to derive guidance on issues not explicitly addressed. See *id.* Different interpretations lead to variations in how Sharia applied across contexts. So, Sharia is the overall principles and ideals, while Fiqh refers to the scholarly work in determining practical applications of Sharia in law and way of life. See *id.*

<sup>82</sup> Majjalah is a codification of Hanafi Jurisprudence from the era of the Ottoman Empire. See Haroun Rahimi, *Remaking of Afghanistan: How the Taliban are Changing Afghanistan's Laws and Legal Institutions*, NAT. UNIV. SING.: INST. S. ASIAN STUD. (July 26, 2022), <https://www.isas.nus.edu.sg/papers/remaking-of-afghanistan-how-the-taliban-are-changing-afghanis-tans-laws-and-legal-institutions/> [https://perma.cc/7YQZ-MH6H].

<sup>83</sup> See Synovitz, *supra* note 76.

<sup>84</sup> See *Taliban-Led Supreme Court Says 19 People Lashed in Northeastern Afghanistan*, REUTERS (Nov. 21, 2022, 11:37 AM), <https://www.reuters.com/world/asia-pacific/taliban-led-supreme-court-says-19-people-lashed-northeastern-afghanistan-2022-11-21/> [https://perma.cc/H5UE-LUZC].

<sup>85</sup> *Id.*

<sup>86</sup> *Rahber Taliban Ba Quzat Dastoore Ejrae Hudud Wa Qisas Dad* [The Taliban Leader Ordered Judges to Implement “hudud and Qisas”], BBC NEWS PERSIAN (Nov. 14, 2022), <https://www.bbc.com/persian/articles/cprej1z3p99o> [https://perma.cc/YW25-PULP].

<sup>87</sup> See Synovitz, *supra* note 76. Hudud refers to crimes and punishments that are specified and defined in the Quran and Sunnah (the practices and teachings of the Prophet Muhammad). See generally NUR ROFIAH & IMAM NAHE’I, *THE STUDY OF LAW AND PUNISHMENT IN ISLAM: THE IDEAL CONCEPT OF HUDUD AND ITS PRACTICES*, at xiii, 113 (2016). The word “hudud” literally means “boundaries” in Arabic. *Id.* Under Islamic law, Hudud crimes are considered violations of the boundaries and rights of God. *Id.*

<sup>88</sup> See Synovitz, *supra* note 76.

Furthermore, in a move consolidating power and undermining the separation of powers, the Taliban transferred the prosecutorial powers of the Attorney General's office directly to the Supreme Court.<sup>89</sup> This removal of the previous separation between the judiciary and prosecution reduces accountability within the system.<sup>90</sup> It seems that the Taliban made this change in line with their strict Islamic beliefs that only courts, not prosecutors, have the authority to impose punishments under Islam.<sup>91</sup> By consolidating prosecutorial powers under the Supreme Court, the Taliban aimed to align prosecutions more closely with their fundamentalist interpretation of Sharia law.<sup>92</sup> However, legal experts argue that combining judicial and prosecutorial powers in one body risks weakening the checks and balances needed to prevent abuse of power and ensure fair trials.<sup>93</sup> Specifically, it eliminates the independent oversight the Attorney General's office previously provided over prosecutions.

Under the 2004 constitution, the President appointed the Attorney General subject to parliamentary approval.<sup>94</sup> Parliament then held oversight powers including summoning, questioning, and potentially impeaching the Attorney General for misconduct.<sup>95</sup> This provided a check between prosecutors and the democratically elected legislature. The Taliban's ongoing changes to the judicial system aim to centralize authority, but they come at the cost of the judicial independence and separation of powers seen as vital to the rule of law.

#### *d. The Legislature*

The Taliban has no active legislative branch. The former bicameral parliament,<sup>96</sup> which included an elected lower house (Wolesi Jirga) and upper house (Meshrano Jirga), was formally dissolved and all staff dismissed after the Taliban retook power.<sup>97</sup>

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<sup>89</sup> *Law on the Duties and Authorities*, *supra* note 49.

<sup>90</sup> See Amin Kawa, *Enhesar Qudrat, Nezarat Shakhsi; Rahbar Taliban Ba Dadsetani Kul Chi Kard?* [Monopoly of Power and Personal Supervision; What Has the Taliban Leader Done with the Attorney General?], HASHT-E-SUB DAILY (Apr. 8, 2023), <https://8am.media/fa/monopoly-power-and-personal-control-what-has-the-taliban-leader-done-with-the-attorney-general/> [https://perma.cc/QMQ4-JEHZ].

<sup>91</sup> Amin Kawa, *Dustor Taza Rahber Taliban; Dadsetani Ha Degar Salaheyat Nezarat Wa Taqiq Rah Nadarand* [The Taliban Leader's New Order: Prosecutor's Offices No Longer Have the Authority to Supervise and Investigate], HASHT-E-SUB DAILY (Aug. 23, 2022), <https://8am.media/fa/taliban-leaders-new-order-prosecutors-no-longer-have-the-authority-to-monitor-and-investigate/> [https://perma.cc/FNK9-B4QA].

<sup>92</sup> See Sahar Akbarzai, Shafi Kakar & Rhea Mogul, *Taliban to Impose Their Interpretation of Sharia Law in Afghanistan*, CNN (Nov. 15, 2022), <https://www.cnn.com/2022/11/15/asia/taliban-afghanistan-sharia-law-intl-hnk/index.html> [https://perma.cc/RM49-USHM].

<sup>93</sup> See Kawa, *supra* note 91.

<sup>94</sup> See THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, art. 64, § 11.

<sup>95</sup> *Id.* art. 134.

<sup>96</sup> *Id.* art. 82.

<sup>97</sup> Rahimi, *supra* note 82; see also *Taliban Dissolve Parliament in Afghanistan*, AL MAYADEEN (May 17, 2022, 1:43 PM), <https://english.almayadeen.net/news/politics/taliban>

Decrees issued by the Amir now hold supreme legal authority.<sup>98</sup> Without a parliament to debate and ratify laws, the formal legislative process is highly centralized under the Amir.<sup>99</sup> The Amir has concentrated lawmaking power solely in his hands, with no checks and balances.<sup>100</sup> Ministries can theoretically propose new laws or regulations in their areas of responsibility, according to the Ministry of Justice.<sup>101</sup> However, proposed legislation must be reviewed by the Legislation Commission, an advisory body established by the Amir decree in 2022.<sup>102</sup> The Commission examines whether draft laws comply with Islamic principles before sending approved versions to the Amir for final endorsement.<sup>103</sup>

In contrast to Afghanistan's former democratic system, the Taliban have removed institutional constraints on the unelected Amir's authority.<sup>104</sup> The review commission and ministry proposals may shape the Taliban's laws and policies but have no real independent authority.<sup>105</sup> The Amir can approve, reject, or amend laws as he sees fit.<sup>106</sup> With no parliament, the creation and imposition of law is dictated unilaterally from the top. This highly centralized process eliminates the separation of powers and consolidates absolute authority under the Amir.

### *B. Extra-Constitutional Government*

The Taliban has shown no willingness to govern the country with a constitution since taking over Afghanistan in August 2021.<sup>107</sup> This reluctance is consistent with the Taliban's approach during its previous five years in power, which ended without a constitution.<sup>108</sup> During that initial period, the Taliban ruled Afghanistan according to its own interpretation of Islamic laws and tribal customs rather than establishing

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-dissolve-parliament-in-afghanistan [https://perma.cc/UQ25-LP9T].

<sup>98</sup> See The Amir's 1432 Decrees and Edicts, *supra* note 50.

<sup>99</sup> See Akmal Dawi, *Taliban Leader Considers New Afghan Media Law*, VOICE OF AM. NEWS (Aug. 24, 2023, 3:23 PM), <https://www.voanews.com/a/taliban-leader-considers-new-afghan-media-law/7239886.html> [https://perma.cc/YN65-3MSF].

<sup>100</sup> *Id.*

<sup>101</sup> The Amir's 1432 Decrees and Edicts, *supra* note 51, at 67–68.

<sup>102</sup> *Id.* at 68.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *id.* at 65–68.

<sup>107</sup> OFF. OF INT'L RELIGIOUS FREEDOM, 2022 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: AFGHANISTAN § 2 (U.S. Dep't of State 2022) [hereinafter 2022 AFGHANISTAN REPORT], <https://www.state.gov/reports/2022-report-on-international-religious-freedom/afghanistan/> [https://perma.cc/2J23-4HV6].

<sup>108</sup> BARNETT R. RUBIN, CONSTITUTIONAL ISSUES IN THE AFGHAN PEACE NEGOTIATIONS: PROCESS AND SUBSTANCE 19 (U.S. Inst. of Peace, Spec. Rep. No. 488, Nov. 2020), [https://www.usip.org/sites/default/files/2020-11/20201116-sr\\_488-constitutional\\_issues\\_in\\_the\\_afghan\\_peace\\_negotiations\\_process\\_and\\_substance-sr.pdf](https://www.usip.org/sites/default/files/2020-11/20201116-sr_488-constitutional_issues_in_the_afghan_peace_negotiations_process_and_substance-sr.pdf) [https://perma.cc/CL8T-EQAW].

a formal codified legal system.<sup>109</sup> During the “peace talks”<sup>110</sup> that preceded the U.S. withdrawal, the Taliban and its leaders repeatedly promised the international community and the Afghan people that they would protect the people’s rights by laws consistent with Islam.<sup>111</sup> But this commitment remains unfulfilled, and the Taliban appears to be reverting to the norms of the 1990s.<sup>112</sup>

Unlike many other radical regimes that have sought constitutional legitimacy, even if only as lip service like the Bolsheviks in Russia, Fascists in Italy, Nazis in Germany, and the Khmer Rouge in Cambodia, the Taliban have no semblance of constitutional order.<sup>113</sup> This anti-constitutional approach not only undermines the Taliban’s claims to legitimacy but also raises concerns about the potential for further intensification of coercion and repression as the primary mechanism for regime survival, especially in the face of deep unpopularity among the Afghan population according to surveys by The Asia Foundation.<sup>114</sup>

The absence of a codified legal system in the country and the Taliban’s interpretation of Sharia rules have led to uncertainty, contradiction in the implementation of the rules, and heavy punishments such as public floggings.<sup>115</sup> The results for the people of Afghanistan have been nothing short of catastrophic, far worse than would have been the case even under an extremely repressive constitutional regime. The absence of a constitution has also greatly complicated the Taliban’s own task of governing a large and heterogeneous country.<sup>116</sup> This begs the question: Why has the Taliban not adopted its own constitution? There are several possible answers:

#### 1. Uncertainty About the Sustainability of the Desired Type of Government

It seems that one major reason is the Taliban’s uncertainty regarding the continuity of its desired form of government. After three years in power, the Taliban has

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<sup>109</sup> Matthew J. Nelson, *Taliban Constitutionalism in Comparative Perspective*, BERKLEY CTR. (Nov. 3, 2021), <https://berkeleycenter.georgetown.edu/responses/taliban-constitutionalism-in-comparative-perspective> [https://perma.cc/5MND-YZTJ].

<sup>110</sup> Mehdi-Jalaluddin Hakimi, *The U.S.-Taliban Agreement and the Afghan Peace Process*, STAN. L. SCH. (Dec. 7, 2020), <https://law.stanford.edu/2020/12/07/the-u-s-taliban-agreement-and-the-afghan-peace-process/> [https://perma.cc/E965-TXFJ].

<sup>111</sup> S. Yaqub Ibrahimi, *False Negotiations and the Fall of Afghanistan to the Taliban*, 77 INT’L J. 168, 186 (2022).

<sup>112</sup> Saphora Smith, *The Taliban Want the World to Think They’ve Changed. But Have They?*, NBC NEWS (Aug. 18, 2021, 12:54 PM), <https://www.nbcnews.com/news/world/taliban-wants-world-think-they-ve-changed-have-they-n1276947> [https://perma.cc/8ZQS-AYL3].

<sup>113</sup> William Maley, *Taliban Rule and Anti-Constitutionalism*, AUSTL. INST. INT’L AFFS. (Aug. 23, 2023), <https://www.internationalaffairs.org.au/australianoutlook/taliban-rule-and-anti-constitutionalism/> [https://perma.cc/UM6S-6SSF].

<sup>114</sup> *Id.*

<sup>115</sup> *Afghanistan: Taliban Urged to Halt Public Floggings and Executions*, U.N. NEWS (Dec. 16, 2022), <https://news.un.org/en/story/2022/12/1131782> [https://perma.cc/XWU6-UBJU].

<sup>116</sup> Maley, *supra* note 113.

repeatedly postponed constitution-drafting to buy time for negotiating international acceptance and to avoid the compromises involved in establishing an inclusive government.<sup>117</sup> It is obvious that an extremist constitution unpalatable to Afghans and the world community jeopardizes the stability and durability of their rule. Specifically, the Taliban seek to govern Afghanistan on their own strict ideological terms, rejecting power sharing and pluralism.<sup>118</sup> However, they know constitutions require broad representation, consensus, and limitations on power. The Taliban harbor doubts whether their radical Islamic emirate can withstand domestic and global scrutiny.<sup>119</sup> Hence, by deferring the constitutional drafting process, the Taliban aim to solidify control and shape conditions to entrench their authority. They continue temporizing while angling to extract concessions that further enable imposition of their preferred, exclusionary governance model. In essence, it seems that the Taliban is gambling that it can coerce Afghans and cajole the international community into eventually accepting its totalitarian rule.

## 2. Fundamentalism and Belief in the Adequacy of Divine Laws for Governance

Another major reason the Taliban has refused to draft a constitution is their fundamentalist belief that divine law is wholly sufficient to govern society without adaptation.<sup>120</sup> As committed adherents of Deobandi ideology, the Taliban leadership insists that their rigid interpretation of Sharia provides adequate guidance, making positive human-made law unnecessary.<sup>121</sup> The Taliban view the Quran and Prophetic teachings as overriding any modern legal frameworks other than pure theocratic rule.<sup>122</sup> Most Taliban members were educated in Pakistani madrasas reinforcing such

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<sup>117</sup> See RUBIN, *supra* note 108, at 7–19.

<sup>118</sup> Javid Ahmad, *The Taliban's Religious Roadmap for Afghanistan*, MIDDLE E. INST. (Jan. 26, 2022), <https://www.mei.edu/publications/talibans-religious-roadmap-afghanistan> [<https://perma.cc/L2B4-CXJM>]; see also *Afghanistan: U.N. Human Rights Experts Denounce Idea of "Reformed" Taliban*, U.N. HUM. RTS. (Aug. 14, 2023), <https://www.ohchr.org/en/statements/2023/08/afghanistan-un-human-rights-experts-denounce-idea-reformed-taliban> [<https://perma.cc/7QRU-6LTM>].

<sup>119</sup> Asgar Asgarov, *Future of Taliban's International Standing Seems Uncertain as Challenges Loom*, VOICE OF AM. NEWS (Aug. 11, 2022, 8:16 AM), <https://www.voanews.com/a/future-of-taliban-s-international-standing-seems-uncertain-as-challenges-loom/6697253.html> [<https://perma.cc/TQ72-9GVP>].

<sup>120</sup> Nargis Etamed, *Chura Taliban Ba Quanun Asasi Neyaz Nadarand? [Why Don't the Taliban Need a Constitution?]*, JOMHORN NEWS (Feb. 25, 2024, 12:04 AM), <https://www.jomhornnews.com/fa/note/169257/2024/02/25> [<https://perma.cc/2TMM-MKNZ>].

<sup>121</sup> *Rahber Taliban: Qawanin Sakhte Bashar Ra Kenar Begzared Wa Shariyat Ra Tatbeq Koned [Taliban Leader: Put Aside Man-made Laws and Implement Sharia]*, BBC NEWS PERSIAN (July 28, 2022), <https://www.bbc.com/persian/articles/cjm1248xklxo> [<https://perma.cc/BK84-WKTK>].

<sup>122</sup> CLARK B. LOMBARDI & ANDREW F. MARCH, *AFGHAN TALIBAN VIEWS ON LEGITIMATE ISLAMIC GOVERNANCE: CERTAINTIES, AMBIGUITIES, AND AREAS FOR COMPROMISE* 6–14

uncompromising worldviews intolerant of dissent.<sup>123</sup> Upon seizing total power, the Taliban immediately abolished Afghanistan's existing laws and constitution as illegitimate, refusing to codify protections limiting their control.<sup>124</sup> Ultimately, the Taliban's orthodox ideological rigidity rejects the pluralism and constraints on government authority inherent in all-inclusive constitutional systems.

### 3. Totalitarianism and Inflexibility

Another significant factor behind the Taliban avoiding constitutional ratification is their totalitarian impulses and political inflexibility. As an absolutist militant group, it seems the Taliban believes its violent takeover provides license to dictate the terms of Afghanistan's governance without input from other societal factions. This winner-takes-all mentality has led the Taliban to seize virtually supreme authority over the Afghan state and society. Such extreme concentration of control obviously violates basic principles of constitutional governance requiring dispersion and balancing of political power. Moreover, constitutions inherently demand flexibility and pluralistic consensus from diverse societal voices, which clashes with the Taliban's rigid majoritarian mindset. Ultimately the Taliban's totalitarian instincts of omnipotence and uniformity seem to constitute a barrier to embracing constitutionalism's culture of modesty, restraint, and compromise.

### 4. Internal Disputes and Lack of Consensus

Internal disputes within the Taliban pose major obstacles for constitutional progress. Ideological divides separate hardliners who advocate for strict Islamic rule from moderates open to limited reforms.<sup>125</sup> Ethnic tensions also simmer between the predominantly Pashtun leadership belonging to (Durrani and Ghilzai)<sup>126</sup> tribes and minority groups like the Tajiks, Hazara, and Uzbeks.<sup>127</sup>

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(U.S. Inst. of Peace 2022), [https://www.usip.org/sites/default/files/2022-09/pw\\_182-afghan\\_taliban\\_views\\_on\\_legitimate\\_islamic\\_governance.pdf](https://www.usip.org/sites/default/files/2022-09/pw_182-afghan_taliban_views_on_legitimate_islamic_governance.pdf) [<https://perma.cc/2T4K-NRGL>].

<sup>123</sup> PAUL M.P. BELL, PAKISTAN'S MADRASSAS—WEAPONS OF MASS INSTRUCTION? 33–34 (2007), <https://apps.dtic.mil/sti/tr/pdf/ADA467143.pdf> [<https://perma.cc/FPZ4-C7B6>].

<sup>124</sup> *Taliban Restrictions on Women's Rights Deepen Afghanistan's Crisis*, INT'L CRISIS GRP. (Feb. 23, 2023), <https://www.crisisgroup.org/asia/south-asia/afghanistan/329-taliban-restrictions-womens-rights-deepen-afghanistans-crisis> [<https://perma.cc/4AJF-STWX>].

<sup>125</sup> Abubakar Siddique, 'Unprecedented Differences': Rifts Within The Taliban Come Out in the Open, RFE/RL (June 2, 2022), <https://www.rferl.org/a/taliban-rifts-exposed-afghanistan/31880018.html> [<https://perma.cc/7CRM-RYV9>].

<sup>126</sup> The Durrani and Ghilzai are two major Pashtun tribes. The Durrani mostly lives south and are known as political leaders, having ruled Afghanistan for most of its history. See generally Hayder Mili & Jacob Townsend, *Tribal Dynamics of the Afghanistan and Pakistan Insurgencies*, 2 COMBATING TERRORISM CTR. SENTINEL 1, 1–2 (2009). The Ghilzai are mostly located east and are known as fighters. See *id.*

<sup>127</sup> Siddique, *supra* note 125.

Organizational splits also plague the Taliban as the powerful “Haqqani network”<sup>128</sup> pursues its own agenda, alarming Taliban figures outside the lucrative operations in eastern Afghanistan. These multifaceted internal disagreements have badly hindered consensus on governance norms. While some Taliban members argue for more inclusive politics, hardliners fiercely oppose reforms threatening their power.<sup>129</sup> It seems that the Amir, Mullah Haibatullah Akhundzada, and his predominantly Durrani inner circle wield preeminent authority, refusing to dilute control through constitutional constraint.

After waging a twenty-year insurgency culminating in victory, it seems that the senior leadership remains anxious that formally devolving power could enable opposing Taliban factions to undermine central command. Granting rights and pluralism also seems to clash with their narrow vision of absolute Islamic rule. Core Taliban elites reject concessions in response to demands for constitutional order and shared governance.<sup>130</sup> Their fixation on total dominance and anxiety about factional divisions reenforce opposition to any leadership restrictions.

## 5. Fear of Rival Factions Gaining Power

The Taliban have also opposed any move to draft a new constitution due to acute concerns that inclusive governance could empower rival groups threatening their unilateral control. Fundamentally, constitutions require guaranteeing citizens’ civil liberties and political participation rights, including for opposing parties and factions.<sup>131</sup> However, having survived brutal conflict to achieve domination, the Taliban now view formally sharing power and legitimacy with ethnic, religious, or political rivals as profoundly jeopardizing their totalitarian ambitions. By enshrining pluralism and facilitating peaceful democratic rotations of power, constitutions inherently curb domination by one unwavering ideology like the Taliban’s. Therefore, it seems that they have deliberately delayed and obstructed constitution-drafting to prevent rights, liberties, and consensus processes from enabling competitor groups

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<sup>128</sup> See *Haqqani Network*, STAN. UNIV.: MAPPING MILITANTS PROJECT (July 1, 2018), <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/haqqani-network> [<https://perma.cc/UC8Y-TTYC>]. The Haqqani network, founded by Jalaluddin Haqqani, has its origins in the Zadran tribe, a Pashtun tribe within the larger Ghilzai tribal confederation located primarily in the Paktia and Khost provinces of eastern Afghanistan. Mili & Townsend, *supra* note 126. Haqqani was a commander in the Afghan Mujahideen fighting the Soviet occupation in the 1980s. See *id.*

<sup>129</sup> Susannah George, *Taliban Hard-Liners Consolidate Control with Crackdown on Women*, WASH. POST (Jan. 10, 2023, 2:00 AM), <https://www.washingtonpost.com/world/2023/01/10/taliban-hardliners-women-work-universities/> [<https://perma.cc/T6WB-CPTQ>].

<sup>130</sup> Marvin G. Weinbaum, *A Reassessment of American Policy Toward Taliban Afghanistan*, MIDDLE E. INST. (Apr. 26, 2023), <https://www.mei.edu/publications/reassessment-american-policy-toward-taliban-afghanistan> [<https://perma.cc/XNP7-QYZE>].

<sup>131</sup> Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1359 (2008).

from gaining influence that could pave way for unwinding the Taliban's ideological hegemony and unseat them from power.

## 6. Preserving Individual and Group Economic Interests

Another major reason the Taliban opposes the adoption of a new constitution is their economic interests, which can easily be secured in the absence of a constitution. Over the years of war with the former government, the Taliban had various ways to meet their economic needs.<sup>132</sup> For example, the Taliban extorted money from vehicles on unsecure roads, government and private companies and organizations, small and large traders and investors, telecommunications companies, poppy cultivation and opium trafficking;<sup>133</sup> and they received support from intelligence agencies of some countries.<sup>134</sup>

Even though some of those economic benefits no longer exist, the Taliban have sought and currently have other ways of raising revenue which the adoption of a constitution would impede or inhibit. These include: bribery; securing large government contracts without competitive bidding by infiltrating procurement processes; benefiting financially from unfair and opaque mining deals and concessions; participating in illegal mining extraction operations; benefiting from international aid;<sup>135</sup> and embezzling public funds, including customs and mining revenues.<sup>136</sup>

A constitution that guarantees basic individual rights, especially the right to freedom of expression and access to information, would be a major obstacle to these activities.<sup>137</sup> It should be acknowledged that corruption predated the Taliban's

<sup>132</sup> Gabriel Domínguez, *How the Taliban Get Their Money*, DEUTSCHE WELLE (Jan. 21, 2016), <https://www.dw.com/en/how-the-taliban-get-their-money/a-18995315> [<https://perma.cc/2FGU-8QZZ>].

<sup>133</sup> GRETCHEN PETERS, HOW OPIUM PROFITS THE TALIBAN 3 (U.S. Inst. of Peace 2009), [https://www.usip.org/sites/default/files/resources/taliban\\_opium\\_1.pdf](https://www.usip.org/sites/default/files/resources/taliban_opium_1.pdf) [<https://perma.cc/VF3A-YVLH>].

<sup>134</sup> Dawood Azami, *Taliban Az Che Rahie Pul Dar Mehawarand?* [*How Do the Taliban Make Money?*], BBC NEWS PERSIAN (Dec. 26, 2018), <https://www.bbc.com/persian/afghanistan-46679714> [<https://perma.cc/LB87-V2ZH>]; see also Dawood Azami, *Afghanistan: How Do the Taliban Make Money?*, BBC NEWS (Aug. 27, 2021), <https://www.bbc.com/news/world-46554097> [<https://perma.cc/6292-A2LJ>]; *Taliban Az Koja Pul Ba Dust Mehawarand, Hehana Ya Fahaleyat haie Jorme?* [*Where Does the Taliban Get Their Money From, Aid or Criminal Activities?*], VOICE OF AM. NEWS (Aug. 14, 2021), <https://www.darivoo.com/a/where-are-the-taliban-getting-their-money-/6002696.html> [<https://perma.cc/X5NV-J2TJ>].

<sup>135</sup> Lynne O'Donnell, *The Taliban Have 'Infiltrated' U.N. Deliveries of Aid*, FOREIGN POL'Y (July 24, 2023, 3:01 PM), <https://foreignpolicy.com/2023/07/24/afghanistan-taliban-un-foreign-aid-assistance-development/> [<https://perma.cc/SHZ9-76L7>].

<sup>136</sup> Abubakar Siddique, *Taliban Hying Huge Mining Deals, But Afghanistan Still Far From Cashing In*, RFE/RL (Sept. 23, 2023), <https://www.rferl.org/a/afghanistan-mining-deals-taliban-poverty-mineral-wealth/32605965.html> [<https://perma.cc/PQ38-2LAU>].

<sup>137</sup> See generally Zabihullah Obaidy, *The Power of Access to Information: How Involving*

return.<sup>138</sup> Afghanistan ranked slightly better in 2022 under the Taliban compared to the previous government in 2021 (150th versus 174th).<sup>139</sup> However, it declined again in 2023 under the Taliban, falling back down to 162nd place, indicating worsening corruption issues in the past year.<sup>140</sup> However, a constitution could provide some mitigation by codifying transparency rights and separation of powers. It would not be a perfect or complete solution to any of these problems, especially with a regime like the Taliban in power, but it would represent an improvement over the current situation. For example, freedom of information principles could increase public oversight of contracts and funds, frustrating the opacity that currently enables graft.<sup>141</sup> While a constitution could not eliminate prior corruption issues, it could impose checks on Taliban authorities accustomed to unilateral control. Statistics and reports show that the Taliban have set their sights on international aid and are enriching themselves and their supporters from this aid.<sup>142</sup> A constitution would make this considerably more difficult.

## 7. The Taliban's Lack of Understanding of the Concept of a Modern Government

Finally, the Taliban lack familiarity with fundamental concepts of modern governance that enable drafting a constitution aligned to contemporary norms.<sup>143</sup> Here, “modern governance” refers specifically to notions like codified rule of law rather than ad hoc religious edicts; separated branches of government exercising checks and balances; democratic processes enabling orderly transitions of power; and respect for civil liberties and political rights of citizens.<sup>144</sup>

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*Civil Society in Afghanistan Could Support Sustainable Transparency and Accountability to Fight Corruption*, 4 INDON. J. INT'L & COMPAR. L. 317 (2017).

<sup>138</sup> See Akmal Dawi, *Can the Taliban Tackle Corruption in Afghanistan?*, VOICE OF AM. NEWS (Jan. 31, 2023, 6:10 PM), <https://www.voanews.com/a/can-the-taliban-tackle-corruption-in-afghanistan-/6942205.html> [https://perma.cc/535M-4E8M].

<sup>139</sup> Fidel Rahmati, *Afghanistan Drops from 150th to 162 in Corruption Fighting Index: Report*, KHAAMA PRESS (Jan. 30, 2024), <https://www.khaama.com/afghanistan-drops-from-150th-to-162-in-corruption-fighting-index-report/> [https://perma.cc/JGL8-23P9].

<sup>140</sup> *Id.*

<sup>141</sup> Obaidy, *supra* note 137, at 328–32.

<sup>142</sup> O'Donnell, *supra* note 135; see also Associated Press, *U.S. Watchdog Says the Taliban Are Benefiting From International Aid Through 'Fraudulent' NGOs*, PBS NEWS HOUR (Oct. 23, 2023, 3:42 PM), <https://www.pbs.org/newshour/politics/u-s-watchdog-says-the-taliban-are-benefiting-from-international-aid-through-fraudulent-ngos> [https://perma.cc/E9FA-2U3T].

<sup>143</sup> Amin Kawa, *Do Salage Suqut; Hakemeyat Talibani Wa Bohran Haie Ka Dar Kamen Astand [Two Years of Fall; Taliban Rule and Looming Crises]*, HASHT-E-SUB DAILY (Aug. 15, 2023), <https://8am.media/fa/wp-content/uploads/2023/08/8am.3970.pdf> [https://perma.cc/PS9W-F4SB].

<sup>144</sup> Mahmoud Masayeli, *Nasazgari Emarate Islami Ba Mufhum Dowlate Modern [Incompatibility of the Islamic Emirate with the Concept of the Modern State]*, IRAN ACADEMIA,

According to experts, the Taliban's world-view stems predominantly from militant experiences and extreme religious ideology rather than practical exposure to running administrative structures, institutions, and processes common to current states.<sup>145</sup> Their frame of reference remains seventh-century Islamic emirates rather than contemporary governance.<sup>146</sup> Taliban leaders emphasize devotion to their rigid Islamic beliefs over policymaking pragmatism or managing complex national functions.<sup>147</sup>

Consequently, the Taliban exhibit little cognizance of rudimentary modern governance concepts. They barely grasp intricate principles like social contracts, liberty, or edict versus statute, let alone nuances involved in crafting a balanced constitution. This glaring lack of basic knowledge poses a formidable obstacle to any Taliban attempt at drafting a constitution.

## II. THE PRICE OF LAWLESSNESS

The Taliban has governed Afghanistan without establishing a formal legal code or constitution since returning to power. This absence of codified laws and an impartial judicial system has enabled unrestrained Taliban rule, with severe consequences not just for Afghan citizens but also for the regime itself and the international community. This Part examines the detrimental impacts of the Taliban's lawlessness. The first Section details how the lack of equality before the law has endangered Afghans' rights and freedoms, from restrictions on women to arbitrary detentions. The second Section analyzes how ruling without law also undermines the Taliban's legitimacy and risks fragmenting the regime. The third Section discusses the impact of this situation on the international community.

Finally, this Part will discuss factors that could motivate the Taliban to build the rule of law, despite the constraints it would impose on their authority. The first step to constitutional reform for Afghanistan is to recognize that Afghans, the international community, and the Taliban pay a high price for disregarding law and accountability in governance.

### *A. The Price of Lawlessness for the People*

The negative consequences of lawlessness on Afghan citizens under Taliban rule are profound. In the absence of a functioning legal system, with protection for basic rights, insecurity, unpredictability, and vulnerability are ever-present features

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<https://iranacademia.com/agora/%D9%86%D8%A7%D8%B3%D8%A7%D8%B2%DA%AF%D8%A7%D8%B1%DB%8C-%D8%A7%D9%85%D8%A7%D8%B1%D8%AA-%D8%A7%D8%B3%D9%84%D8%A7%D9%85%DB%8C-%D8%A8%D8%A7-%D9%85%D9%81%D9%87%D9%88%D9%85-%D8%AF%D9%88%D9%84%D8%AA-%D9%85/> [https://perma.cc/KVN6-FMNA] (last visited Sept. 25, 2024).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

of daily life. Examples include pervasive restrictions on the rights of women to participate in civic and political life, arbitrary detentions, and a lack of rudimentary due process.<sup>148</sup> The prior constitution was far from perfect, but almost any constitution would be a significant improvement over the current situation.

### 1. Violation of Basic Rights and Freedoms

The absence of rights-protecting legal frameworks enables authoritarian abuses, as evidenced by the Taliban's restrictions on citizens' freedoms.<sup>149</sup> Without constitutional protections, the Taliban have imposed severe decrees violating the fundamental rights of Afghan women since taking power.<sup>150</sup> Examples include banning girls from pursuing education, prohibiting women from working most jobs, limiting women's ability to leave the home without a male guardian,<sup>151</sup> among others.<sup>152</sup> According to a recent report broadcast by Afghanistan International TV, on August 23, 2023, the Taliban prevented 60 girls, even when accompanied by their male guardians, from flying to Dubai for a scholarship program financially supported by a businessman.<sup>153</sup>

These harsh infringements on basic liberties are possible under regimes like the Taliban. Scholar Adam Chilton noted that, even though constitutional protections do not automatically ensure rights are respected in practice,<sup>154</sup> codifying these rights still establishes important principles and enables legal redress and civil society monitoring. Rights practiced individually often lack enforcement constituencies, making violations easier—as the Taliban is doing—but their existence would cost regimes for violating rights as Professor Mila Versteeg stated in her interview.<sup>155</sup>

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<sup>148</sup> *Taliban Restrictions on Women's Rights Deepen Afghanistan's Crisis*, *supra* note 124.

<sup>149</sup> *Id.*

<sup>150</sup> *Afghanistan Under the Taliban: The Crime Against Humanity of Gender Persecution*, HUM. RTS. WATCH, [https://www.hrw.org/sites/default/files/media\\_2023/09/Gender%20Persecution%20final\\_060923.pdf](https://www.hrw.org/sites/default/files/media_2023/09/Gender%20Persecution%20final_060923.pdf) [<https://perma.cc/U7AZ-DYSH>] (last visited Sept. 25, 2024).

<sup>151</sup> Press Release, Security Council Emphasizes That Punitive Restrictions on Women's Rights, Escalating Hunger, Insecurity Taking Devastating Toll in Afghanistan, U.N. Press Release SC/15222 (Mar. 8, 2023).

<sup>152</sup> *Tracking the Taliban's (Mis)Treatment of Women*, U.S. INST. OF PEACE, <https://www.usip.org/tracking-talibans-mistreatment-women> [<https://perma.cc/SGE8-QGZF>] (last visited Sept. 25, 2024).

<sup>153</sup> Waliullah Rahmani, *Taliban Prevents Afghan Girls from Traveling to UAE on Scholarships*, AFG. INT'L (Aug. 23, 2023), <https://afintl.com/taliban-prevents-afghan-girls-from-traveling-to-uae-on-scholarships/> [<https://perma.cc/5BBA-U7WD>].

<sup>154</sup> ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* 11 (2020).

<sup>155</sup> *Id.*; see also Jane Kelly, *Do Constitutional Rights Matter? Professor Read 700 Constitutions in Search of Answer*, UVATODAY (June 11, 2018), <https://news.virginia.edu/content/do-constitutional-rights-matter-professor-read-700-constitutions-search-answer> [<https://perma.cc/4HGK-BZE4>].

Still, constitutional rights provisions create mechanisms for addressing violations through law and public pressure, which is better than having no such provisions at all amidst the Taliban's harsh restrictions.<sup>156</sup> So, constitutional rights codification remains impactful.

The Taliban has also violently cracked down on protests and dissent, restricted independent media,<sup>157</sup> denied due process to detainees,<sup>158</sup> and provided no political space for opposition.<sup>159</sup> Reports by Human Rights Watch have exposed grave abuses under Taliban authority in the absence of legal safeguards.<sup>160</sup> In particular, the lack of lawful protections makes women and girls extremely susceptible to Taliban oppression ("war against women").<sup>161</sup> The 2004 Afghanistan Constitution enshrined important rights for men and women that are now being trampled, like access to voting, education, work, and participation in public life.<sup>162</sup> With no constitutional redress domestically, sustained international pressure provides some hope for creating incentives for better treatment of Afghan women and girls under the Taliban regime.<sup>163</sup> While the Taliban is unlikely to voluntarily uphold rights and liberties, sustained international pressure could create incentives for better treatment of women and girls. It is obvious that the Taliban seeks legitimacy on the global stage as the de facto rulers of Afghanistan.<sup>164</sup> As such, the international community retains some leverage through continued condemnation of rights violations, humanitarian aid conditions, sanctions, and by maintaining a unified stance that basic rights protections must be a precondition for formal recognition.

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<sup>156</sup> CHILTON & VERSTEEG, *supra* note 154, at 7–11.

<sup>157</sup> *Afghanistan: Dramatic Loss of Independent Media and Free Expression Over Past Two Years—Comprehensive New Report*, INT'L FED'N JOURNALISTS (Aug. 15, 2022), <https://www.ifj.org/media-centre/news/detail/article/afghanistan-dramatic-loss-of-independent-media-and-free-expression-over-past-two-years-comprehensive-new-report> [<https://perma.cc/84X6-3T5Z>].

<sup>158</sup> *The Treatment of Detainees in Afghanistan*, UNAMA (Sept. 20, 2023), <https://unama.unmissions.org/unama-urges-urgent-accelerated-action-afghanistan%E2%80%99s-de-facto-authorities-stop-torture-and-protect> [<https://perma.cc/5MFV-MMTB>].

<sup>159</sup> Ayaz Gul, *Taliban Ban Afghan Political Parties, Citing Sharia Violations*, VOICE OF AM. NEWS (Aug. 16, 2023, 6:31 PM), <https://www.voanews.com/a/taliban-ban-afghan-political-parties-citing-sharia-violations/7228136.html> [<https://perma.cc/P3ZQ-GUQ2>].

<sup>160</sup> *Afghanistan Under the Taliban: The Crime Against Humanity of Gender Persecution*, *supra* note 150.

<sup>161</sup> *Afghanistan: Events of 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/afghanistan> [<https://perma.cc/6CQV-2EZN>] (last visited Sept. 25, 2024).

<sup>162</sup> THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, arts. 22–59.

<sup>163</sup> Michelle Nichols, *Taliban Defends Record on Women as U.N. Looks at Path Forward*, REUTERS (Nov. 21, 2023, 2:52 PM), <https://www.reuters.com/world/asia-pacific/taliban-defends-record-women-un-looks-path-forward-2023-11-21/> [<https://perma.cc/V57G-FFAA>].

<sup>164</sup> Anjali Dayal, *The Taliban at The United Nations: An Unexpected Bid For Legitimacy?*, FOREIGN POL'Y RSCH. INST. (Aug. 30, 2023), <https://www.fpri.org/article/2023/08/the-taliban-at-the-united-nations-an-unexpected-bid-for-legitimacy/> [<https://perma.cc/9W7M-4AZG>].

For example, in April 27, 2023, the U.N. Security Council adopted a resolution specifying that basic rights guarantees, especially for women and girls, remain essential for stable peace and development in Afghanistan going forward.<sup>165</sup> The resolution highlighted “*deep concern*” regarding restrictions imposed on women and girls, including virtually excluding them from the workforce.<sup>166</sup> It goes on to emphasize that access to education and work are necessary for sustainable peace and urges the Taliban to respect women’s and girls’ rights to liberty.<sup>167</sup>

While a U.N. resolution alone has limited influence without enforcement mechanisms, global censure of the Taliban’s oppression of Afghan women and girls can play an incremental role by imposing reputational costs on the regime and signaling that the world is watching.<sup>168</sup> Sustained international opprobrium and demands for rights protections could slowly alter the Taliban’s calculus, especially if tied to humanitarian or economic concessions.<sup>169</sup> My argument focuses on the lack of constitutional protections that make abuse easier and dissent more difficult. Constitutions do not, of course, enforce themselves, but written law plays a vital role in upholding rights by codifying liberties, delineating governmental power, and enabling legal remedies against violations.

## 2. No Accountability for Injustices

The lack of a legal system and the rule of law for citizens has eliminated any mechanism for holding the Taliban government accountable for its actions. Codified laws serve the dual purpose of defining the duties and powers of political elites while also holding these same rulers accountable. In the absence of formal legal systems, the responsibilities of officials remain ambiguous and ill-defined and the mechanisms for accountability become toothless, as leaders face no meaningful oversight or consequences.<sup>170</sup> This environment of unaccountability enables the powerful to act with impunity, often to the detriment of citizens and society overall, as demonstrated by several recent examples in Afghanistan. For instance, according to reports by Tolo TV, on August 26, 2023, the Taliban official in charge of the Ministry of Virtue and Vice prohibited women from visiting Band-e Amir National

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<sup>165</sup> S.C. Res. 2681 (Apr. 27, 2023).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> CLAYTON THOMAS, CONG. RSCH. SERV., IF11646, AFGHAN WOMEN AND GIRLS: STATUS AND CONGRESSIONAL ACTION (June 21, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF11646> [<https://perma.cc/273P-CXA8>].

<sup>169</sup> Sharif Walid, *Dar Jalse Komete Homore Khareji Majlese Nomayandagan Dar Bahre Seyasate Khareji America Dar Qebal Afghanistan Che Mawarede Matra Shod?* [What Issues Were Raised in the Meeting of the House Foreign Affairs Committee Regarding U.S. Foreign Policy Towards Afghanistan?], BBC NEWS PERSIAN (Jan. 15, 2024), <https://www.bbc.com/persian/articles/c3gyq3x3enxo> [<https://perma.cc/74FD-F4GA>].

<sup>170</sup> See generally 2022 AFGHANISTAN REPORT, *supra* note 107.

Park during a speech in Bamiyan Province.<sup>171</sup> This discriminatory prohibition lacked any legitimate religious or cultural justification within Afghan society.<sup>172</sup> Furthermore, it illustrated the regime's disregard for the demands of the populace, since the Taliban face no legal apparatus to restrain their whims. A similar incident occurred on August 27, 2023, in Laghman province, when Taliban militia opened fire on a civilian wedding convoy due to music playing in the vehicles, resulting in the death of a young man.<sup>173</sup> With no laws or accountability measures in place, ordinary citizens cannot seek justice or retribution for such atrocities. These examples showcase the injustice and oppression facilitated by the lack of meaningful legal accountability. Therefore, establishing formal legal systems and adherence to the rule of law remain the only reliable mechanisms for compelling officials into accountability, providing justice, and resisting tyranny.

### 3. Instability, Uncertainty, and Poverty

It seems that the absence of a constitutional framework engenders societal instability, uncertainty, and increases poverty in Afghanistan. In contrast, consistent laws allow individuals to conduct personal and economic affairs with greater confidence in predictable outcomes. Without codified legal frameworks, citizens lack assurance that activities ranging from commercial enterprises to political organizing will be protected.<sup>174</sup> This environment precipitates capital flight and emigration, as evident after the Taliban's return to power in Afghanistan.<sup>175</sup> Although initially imposing minimal restrictions, Taliban officials progressively enacted more limits on social venues like women's schools, universities, café shops, and wedding halls;

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<sup>171</sup> Sky News Australia, *Taliban Bans Women from Visiting Famous National Park*, YOUTUBE (Aug. 27, 2023), <https://www.youtube.com/watch?v=5HmlSFPpP4U> [<https://perma.cc/HS8A-VHYM>]; see also Tolo News, *Mamnoiat Safar-e Banowan ba Park Meli Bande Amir Dar Bamyān [Ban on Women's Travel to Amir Band National Park in Bamyān]*, YOUTUBE (Aug. 27, 2023), <https://www.youtube.com/watch?v=TZIr7IfwUJw&t=13s> [<https://perma.cc/VUM3-JAFH>].

<sup>172</sup> Antoinette Radford, *Afghanistan: Taliban Ban Women from Visiting Popular National Park*, BBC NEWS (Aug. 27, 2023), <https://www.bbc.com/news/world-asia-66633178> [<https://perma.cc/KM9E-A3KA>].

<sup>173</sup> *Teer Andazi Taliban bar Motar Hie Harosi, Ba Dalil Pakhesh Musiqi Dar Laghman, Yak Jawan Danishjo Koshta Shoud [Taliban Firing on Wedding Cars for Playing Music in Laghman; A Young Student Was Killed]*, ETILAATROZ (Aug. 28, 2023), <https://www.etilatroz.com/176035/> [<https://perma.cc/7NH6-LYRM>].

<sup>174</sup> See generally Ari Aisen & Francisco Jose Veiga, *How Does Political Instability Affect Economic Growth?* (IMF, Working Paper No. WP/11/12, 2011), <https://www.imf.org/external/pubs/ft/wp/2011/wp1112.pdf> [<https://perma.cc/V96N-H8P4>].

<sup>175</sup> D. Parvaz, *Since the Taliban Takeover, Afghans Hoping to Leave Afghanistan Have Few Ways Out*, NPR (Oct. 3, 2022, 4:59 PM), <https://www.npr.org/2022/10/03/1121053865/afghanistan-refugees-visas> [<https://perma.cc/24RZ-RV9S>].

banning musical performance;<sup>176</sup> and prohibiting grooms from attending women's ceremonies.<sup>177</sup> By undermining the ability of businesses to operate profitably, such unpredictable interference reduces investor certainty and increases poverty.<sup>178</sup> The Taliban's constraints on Afghan women's participation in public life violate their human rights while also detrimentally impacting families' and small businesses' financial stability, ultimately weakening the economy.<sup>179</sup> For instance, banning women and girls from attending schools and universities has severely disrupted hundreds of private institutions, forcing widespread closures.<sup>180</sup> Taliban officials have similarly prohibited women from accessing public spaces like bathhouses and parks, damaging proprietors' revenue and operations irreparably.<sup>181</sup> These restrictions reduced consumption from taxi services, stores, women's bathhouses, and more.<sup>182</sup> Denying women rights and economic participation propagates unemployment, poverty, and national economic decline.<sup>183</sup> According to the previous government's Ministry of Industry and Commerce, female traders were responsible for ten percent of exports and fifty percent of domestic production.<sup>184</sup> In addition, according to the Afghanistan

<sup>176</sup> 'Wedding or a Funeral?' Taliban Bans Music at Kabul Wedding Halls, AL JAZEERA (June 12, 2023), <https://www.aljazeera.com/news/2023/6/12/wedding-or-a-funeral-taliban-bans-music-at-kabul-wedding-halls> [https://perma.cc/UB2J-9L3R].

<sup>177</sup> Saboor Bayat, *Taliban Imposes Ban on Groom Entering Women's Wedding Hall in Herat*, BNNBREAKING (Jan. 15, 2023), <https://bnnbreaking.com/policy/taliban-imposes-ban-on-groom-entering-womens-wedding-hall-in-herat/> [https://perma.cc/PKH9-3WHT].

<sup>178</sup> Aisen & Veiga, *supra* note 174, at 17.

<sup>179</sup> William Byrd, *Two Years into Taliban Rule, New Shocks Weaken Afghan Economy*, U.S. INST. OF PEACE (Aug. 10, 2023), <https://www.usip.org/publications/2023/08/two-years-taliban-rule-new-shocks-weaken-afghan-economy> [https://perma.cc/2D7V-LN22].

<sup>180</sup> Shadi Khan Saif, *Ban on Women Students to Impact Severely on Higher Education*, UNIV. WORLDNEWS (Jan. 13, 2023), <https://www.universityworldnews.com/post.php?story=20230113070449565> [https://perma.cc/A6LT-D8C5]; Associated Press, *Private Afghan Universities Under Risk of Closure After Ban on Women: Official*, AL ARABIYA (Dec. 29, 2022, 5:26 PM), <https://english.alarabiya.net/News/world/2022/12/29/Private-Afghan-universities-under-risk-of-closure-after-ban-on-women-Official> [https://perma.cc/4PSC-DMTJ].

<sup>181</sup> RFE/RL's Radio Azadi, *Banned From Public Parks and Bathhouses, Afghan Women Say Life Under Taliban Is Like A 'Prison'*, RFE/RL (Nov. 10, 2022), <https://www.rferl.org/a/afghanistan-taliban-women-banned-parks-bathhouses-prison/32124374.html> [https://perma.cc/9X79-9J8H].

<sup>182</sup> Eltaf Najafizada, *A Taliban Ban on Women in the Workforce Can Cost Economy \$1bn*, AL JAZEERA (Dec. 1, 2021), <https://www.aljazeera.com/economy/2021/12/1/talibans-ban-on-women-in-the-workforce-can-cost-economy-1bn> [https://perma.cc/LWQ7-MCGR].

<sup>183</sup> FARIN SADDIQ & MUNISA RASHID, *AFGHANISTAN SOCIO-ECONOMIC OUTLOOK 17–20* (U.N. Dev. Program 2023), <https://www.undp.org/afghanistan/publications/afghanistan-socio-economic-outlook-2023> [https://perma.cc/PGA3-E3RA].

<sup>184</sup> *Naqshe Zanan Afghan dar Rush Towledat wa Saderat Afghanistan* [The Role of Afghan Women in the Growth of Production and Exports of Afghanistan], AL ARABIYA (Apr. 27, 2021, 11:55 AM), <https://farsi.alarabiya.net/afghanistan/2021/04/27/%D9%86%D9%82%D8%B4-%D8%B2%D9%86%D8%A7%D9%86-%D8%A7%D9%81%D8%BA%D8%A7%D9%86>

Women's Chamber of Commerce and Industry, 17,369 women-owned businesses created over 129,000 jobs.<sup>185</sup> When the Taliban prohibits women from working, most of this productive capacity is squandered. Sustainable prosperity necessitates inclusive institutions protecting the liberty of all citizens regardless of gender.

#### 4. Undermining Social Services

Citizens expect quality public services in return for tax contributions to the government, an arrangement fundamentally undermined without strong rule of law institutions. It seems that lawful and accountable governance enables the effective delivery of social welfare and healthcare to populations, while illegitimate regimes breed corruption and self-interest among leaders. This is exactly what is happening to Afghanistan under Taliban rule. For instance, according to the World Health Organization (WHO) "28.8 million people in Afghanistan require immediate assistance"<sup>186</sup> and "[t]he health sector, in 2023, requires . . . \$413 million to deliver health services to at least 14 million people nationwide."<sup>187</sup> Moreover, educational quality has likewise deteriorated severely due to faculty resignations and appointment of under-qualified religious officials in teaching and academic roles.<sup>188</sup> These realities indicate that regardless of past regime shortcomings, undermining expertise and accountability during political instability impedes provision of quality public services.<sup>189</sup> Strengthening rule of law and educational investment therefore remain essential to rebuilding Afghanistan's institutions and stemming flight of human capital.<sup>190</sup>

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<sup>185</sup> Matthew P. Funaiolo & Fina Short, *Women-Owned Businesses in Afghanistan Are in Jeopardy*, CTR. STRATEGIC & INT'L STUD. (Sept. 10, 2021), <https://www.csis.org/analysis/women-owned-businesses-afghanistan-are-jeopardy> [https://perma.cc/DA8G-SCGJ].

<sup>186</sup> Rada Akbar, *Afghanistan's Health System Suffers Critical Underfunding, Calls for Donor Support*, WHO (Aug. 18, 2023), <https://www.emro.who.int/afg/afghanistan-news/afghanistans-health-system-suffers-critical-underfunding-calls-for-donor-support.html> [https://perma.cc/N6VL-E3NT].

<sup>187</sup> WHO, ALERT ON AFGHANISTAN'S HUMANITARIAN HEALTH EMERGENCY 2 (2023), <https://www.emro.who.int/images/stories/media/WHO-Afghanistan-Emergency-ALERT.pdf> [https://perma.cc/FE8N-XHCY].

<sup>188</sup> Hafizullah Maroof, *Fara Maghz ha Pas az Tasalot Taliban; Tanha Az Sa Danishgha 229 Ustad kashwar ra Tark Karda [Brain Drain After Taliban Takeover; 229 Professors Have Left the Country from Just Three Universities]*, BBC NEWS PERSIAN (Feb. 2, 2022), <https://www.bbc.com/persian/afghanistan-60200786> [https://perma.cc/6V8M-8KFN].

<sup>189</sup> RFE/RL's Radio Azadi & Michael Scollon, *Brain Drained: Exodus of Professionals Since Taliban Takeover Leaves Afghanistan Starting from Scratch Again*, RFE/RL (Aug. 12, 2022), <https://www.rferl.org/a/afghanistan-taliban-brain-drain-workforce-anniversary/31983884.html> [https://perma.cc/2AM9-2B5V].

<sup>190</sup> *Id.*

### *B. The Price of Lawlessness for the Regime*

It is unsurprising that the Taliban's attempt to govern without law has had devastating consequences for the Afghan people. But that approach also poses significant risks to the regime itself. It seems that governing without transparent laws, accountability, and procedural protections undermines legitimacy, increases public dissatisfaction, hampers economic activity, causes internal divisions, and leads to brain drain. By enabling unchecked power, the Taliban's lawlessness thus threatens the stability and viability of their rule.

#### 1. Lack of Legitimacy

The Taliban regime faces profound domestic and international legitimacy deficits due to its repressive policies and absence of inclusive governance.

Domestically, the regime's restrictive policies like banning girls from secondary education and work, enforcing strict dress codes, and curtailing women's freedom of movement have sparked widespread opposition and protests across Afghanistan.<sup>191</sup> Major anti-Taliban resistance forces have also emerged, such as the National Resistance Front based in the Panjshir province.<sup>192</sup>

Internationally, the Taliban's human rights abuses and reimposition of harsh rules have cemented Afghanistan's pariah status. At the United Nations, the Taliban's legitimacy to represent Afghanistan were denied due to their "unconscionable" crackdown on women and girls.<sup>193</sup> No country has yet granted the Taliban government official recognition.<sup>194</sup> This deepening diplomatic isolation has tangible impacts, hindering investment, development aid, and access to global financial systems and markets.<sup>195</sup>

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<sup>191</sup> *Afghanistan Mission Chief to Taliban: Bans on Women and Girls Cost You Legitimacy at Home and Abroad*, U.N. NEWS (June 21, 2023), <https://news.un.org/en/story/2023/06/1137962> [<https://perma.cc/WK8X-BNAM>].

<sup>192</sup> *Afghanistan's Security Challenges Under the Taliban*, INT'L CRISIS GRP. (Aug. 12, 2022), <https://www.crisisgroup.org/asia/south-asia/afghanistan/afghanistans-security-challenges-under-taliban> [<https://perma.cc/T74B-85SP>]; see also Jawid Nahimi, *Moqawomat Dar Barabare Taliban; Grow Haie Ka Har Rooz Qad Buland Mekunan* [Resistance Against the Taliban; Groups That Grow Stronger Every Day], RADIO AZADI (Apr. 27, 2022), <https://da.azadiradio.com/a/31823880.html> [<https://perma.cc/USA5-3MMA>].

<sup>193</sup> Rick Gladstone, *U.N. Seats Denied, for Now, to Afghanistan's Taliban and Myanmar's Junta*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/world/americas/united-nations-taliban-myanmar.html> [<https://perma.cc/LLQ7-ETZU>].

<sup>194</sup> Roshan Noorzai, *What Will It Take for Taliban to Gain Recognition from China, Others?*, VOICE OF AM. NEWS (Dec. 10, 2023, 3:02 AM), <https://www.voanews.com/a/what-will-it-take-for-taliban-to-gain-recognition-from-china-others-/7390814.html> [<https://perma.cc/72GW-AC34>]. But see *id.* (finding that, as of December 1, 2023, China is now the first country to accept the Taliban's credentials).

<sup>195</sup> Eltaf Najafizada, *Taliban's Diplomatic Isolation Leaves Afghan Economy Squeezed*, BLOOMBERG (Nov. 29, 2022, 7:00 PM), <https://www.bloomberg.com/news/articles/2022-11>

In contrast, regimes like Russia and Saudi Arabia have managed to cultivate some degree of domestic consent and international legitimacy despite human rights issues. Russia's electoral processes, however flawed, provide a veneer of public consent that the Taliban completely lacks.<sup>196</sup> Saudi Arabia has incrementally granted some rights like allowing women to drive<sup>197</sup> or vote in municipal elections.<sup>198</sup> While still deeply repressive, it seems that these limited reforms help Saudi Arabia retain economic and geopolitical partnerships globally.

The Taliban is entirely lacking such pathways to legitimacy under their current governance model. An equitable, rights-respecting constitution guaranteeing basic civil liberties and an inclusive political system could begin establishing legitimate domestic and international standing. However, the Taliban show no current intention of pursuing such reforms.

## 2. Popular Discontent

One of the consequences of the Taliban's failure to institute a constitution is the widening rift between the group and Afghan civilians. Past experiences under Taliban rule make the populace wary, despite some early optimism.<sup>199</sup> Gradually imposed restrictions on rights and freedoms have fueled public discontent.<sup>200</sup>

The Taliban regained control in Afghanistan amid promises of moderation.<sup>201</sup> However, citizens remembered the group's past authoritarianism and waited cautiously

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-30/taliban-s-diplomatic-isolation-leaves-afghan-economy-squeezed?embedded-check-out=true [https://perma.cc/CX5Z-M79R].

<sup>196</sup> *In Russia, More Kremlin Critics Are Being Imprisoned as Intolerance of Dissent Grows*, AP NEWS (Nov. 16, 2023, 2:03 PM), <https://apnews.com/article/russia-crackdown-protest-putin-ukraine-dissent-f0006697d93d3d0553c5ccec5abbdd0f> [https://perma.cc/WC82-S4QX].

<sup>197</sup> *Karena Phan, Posts Distort Rights of Women to Get Behind the Wheel in Saudi Arabia*, AP NEWS (Mar. 8, 2023, 8:40 PM), <https://apnews.com/article/fact-check-saudi-womens-rights-driving-919795988833> [https://perma.cc/PW4W-NZX8].

<sup>198</sup> *Hala Aldosari, Analysis: The Value of Women Voting in Saudi Arabia*, AL JAZEERA (Dec. 13, 2015), <https://www.aljazeera.com/news/2015/12/13/analysis-the-value-of-women-voting-in-saudi-arabia> [https://perma.cc/P3ML-22V6].

<sup>199</sup> *Emma Farge & Emma Thomasson, UNICEF 'Quite Optimistic' After Taliban Comments on Girls' Education, Official Says*, REUTERS (Aug. 17, 2021, 7:36 AM), <https://www.reuters.com/world/asia-pacific/unicef-says-some-taliban-support-education-afghan-girls-2021-08-17/> [https://perma.cc/2AWB-NU8V].

<sup>200</sup> *Associated Press, The Taliban Have Waged a Systematic Assault on Freedom in Afghanistan, Says U.N. Human Rights Chief*, PBS NEWSHOUR (Sept. 12, 2023, 4:59 PM), <https://www.pbs.org/newshour/politics/the-taliban-have-waged-a-systematic-assault-on-free-dom-in-afghanistan-says-un-human-rights-chief> [https://perma.cc/UH64-5ES9].

<sup>201</sup> *Id. See generally Thomas Ruttig, AAN Q&A: What Came Out of the Doha Intra-Afghan Conference?*, AFG. ANALYSTS NETWORK (July 11, 2019), <https://www.afghanistan-analysts.org/en/reports/war-and-peace/aan-qa-what-came-out-of-the-doha-intra-afghan-conference/> [https://perma.cc/6LRF-DBMN] (unofficial translation in the annex).

as the Taliban proclaimed amnesty and invited government workers to remain in their posts.<sup>202</sup> This apparent change initially satisfied some that the Taliban had reformed.<sup>203</sup> However, the group soon began replacing qualified personnel with unskilled loyalists across institutions while dismissing professionals unaffiliated with the movement.<sup>204</sup> For instance, Taliban clerics with no academic expertise were installed as university leadership.<sup>205</sup> Such nepotism and exclusion of expertise have provoked reactions from academia and society, though the Taliban persists in assertive appointments. Additionally, the Taliban has continuously tightened constraints on Afghans' civil liberties, especially for women, media, and dissent.<sup>206</sup> Recently they arrested women and girls in Kabul city because of "bad Hijab."<sup>207</sup> United Nations Assistance Mission in Afghanistan (UNAMA) has expressed their deep concern over the Taliban's "recent arbitrary arrests and detentions of women and girls" for allegedly violating dress code rules.<sup>208</sup> According to UNAMA, to secure a woman's release, a male guardian must sign a guarantee of her future compliance.<sup>209</sup> UNAMA fears the crackdown is further isolating women due to fear of arbitrary arrest, and enabling men to impose even more repression at home.<sup>210</sup> Surveys indicate widespread public frustration with these encroachments on people's private lives.<sup>211</sup> Meanwhile, Taliban members have unlawfully seized property based on internal influence rather than fair judicial process, displacing rightful owners.<sup>212</sup>

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<sup>202</sup> See Ruttig, *supra* note 201.

<sup>203</sup> Sophie Tanno, *The Taliban Pledged to Honor Women's Rights in Afghanistan. Here's How It Eroded Them Instead*, CNN WORLD (Dec. 23, 2022, 8:41 PM), <https://www.cnn.com/2022/12/23/asia/taliban-women-freedoms-intl/index.html> [<https://perma.cc/B7XA-NCQ2>].

<sup>204</sup> *Tahdade Az Karmandan Hukumati: Dar Nateja Tabhez Wa Badraftare Taliban, Az Wazahif Khod Stahfah Dadem* [A Number of Government Employees: We Resigned from Our Duties as a Result of Discrimination and Mistreatment of the Taliban], RADIO AZADI (Jan. 7, 2023), <https://da.azadiradio.com/a/32213286.html> [<https://perma.cc/WX35-U2DV>].

<sup>205</sup> RFE/RL's Radio Azadi, *Afghan Professors Say Taliban-Appointed Clerics Taking University Jobs*, RFE/RL's (July 19, 2023), <https://www.rferl.org/a/afghanistan-taliban-university-top-positions-control/32510405.html> [<https://perma.cc/G8KA-V993>].

<sup>206</sup> *Taliban Detains Dozens of Women in Afghanistan for Breaking Hijab Rules With "Modeling,"* CBS NEWS (Jan. 10, 2024, 12:05 PM), <https://www.cbsnews.com/news/taliban-afghanistan-mass-arrests-women-girls-hijab-rule-violations/> [<https://perma.cc/Y7G5-7GA4>].

<sup>207</sup> *Id.*

<sup>208</sup> *UNAMA Deeply Concerned Over Detentions of Afghan Women and Girls*, UNAMA (Jan. 11, 2024), <https://unama.unmissions.org/unama-deeply-concerned-over-detentions-afghan-women-and-girls-0> [<https://perma.cc/XT3B-7SAD>].

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Khorshied Nusratty & Julie Ray, *Afghans See Women Treated Worse After a Year Under Taliban*, GALLUP NEWS (Dec. 1, 2022), <https://news.gallup.com/poll/405791/afghans-women-treated-worse-year-taliban.aspx> [<https://perma.cc/DMV2-FPV3>].

<sup>212</sup> *Taliban Yak Sharak Bah Masahat 3020 Jereb Zamen Dar Farah Ra Ba Kochi Hah Ekh tetas Dadan* [Taliban Allocate 3,020 Acres of Land in Farah to Nomads], ETILAATROZ

Land disputes already drive much conflict in Afghanistan, resisting straightforward solutions.<sup>213</sup>

As adherents of Sunni Islam, the Taliban have also imposed restrictions on Shia religious observances, alienating that large community.<sup>214</sup> Overall, the Taliban's unwillingness to moderate its positions and meet Afghans' legitimate demands regarding schools, women's rights, economic activity, and religious freedom has elevated popular dissatisfaction and risks swelling recruitment for opposition fronts like the National Resistance Front and Freedom Front.<sup>215</sup> Though currently weakened, these groups could endanger Taliban rule if public estrangement continues unabated.<sup>216</sup>

Ultimately, quelling instability requires a constitutional order reflecting national aspirations and consent. The Taliban's present course sidelines public interests, sowing the seeds of future crisis.

### 3. Economic Harms

The Taliban's inability to establish rule of law has severely damaged Afghanistan's economy by deterring investment and stability needed for growth.<sup>217</sup> After the 2021 takeover, the Taliban stabilized certain macroeconomic functions, with fiscal policies exceeding expectations for an insurgent force newly in power.<sup>218</sup> Specifically, they inherited professional technocrats across finance ministries that helped prevent currency collapse despite plunging GDP and evaporating foreign aid.<sup>219</sup> This relatively competent management aided short-term commerce amidst the turmoil.<sup>220</sup>

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(Sept. 16, 2022), <https://www.etilaatroz.com/154337/%D8%A7%D8%AE%D8%AA%D8%B5%D8%A7%D8%B5-%D8%B4%D9%87%D8%B1%DA%A9-%D8%A8%D9%87-DA%A9%D9%88%DA%86%DB%8C-%D9%87%D8%A7/> [https://perma.cc/C84P-LEJ7].

<sup>213</sup> ERICA GASTON & LILLIAN DANG, ADDRESSING LAND CONFLICT IN AFGHANISTAN 1–2 (U.S. Inst. of Peace, Spec. Rep. No. 372, June 2015), <https://www.usip.org/sites/default/files/SR372-Addressing-Land-Conflict-in-Afghanistan.pdf> [https://perma.cc/UCT4-BG2Y].

<sup>214</sup> Amin Kawa, *Concerns Over Taliban's Religious Restrictions: Shia Muslims at Risk of 'Slow' Genocide*, HASHT-E-SUBH DAILY (Aug. 6, 2023), <https://8am.media/eng/concerns-over-talibans-religious-restrictions-shia-muslims-at-risk-of-slow-genocide/> [https://perma.cc/2DKF-7AUE].

<sup>215</sup> *Afghanistan's Security Challenges Under the Taliban*, INT'L CRISIS GRP. (Aug. 12, 2022), <https://www.crisisgroup.org/asia/south-asia/afghanistan/afghanistans-security-challenges-under-taliban> [https://perma.cc/SB8C-377J]; see also Nahimi, *supra* note 192.

<sup>216</sup> Shivam Shekhawat, *Resistance to the Taliban: Current Status and Prospects for the Future*, OBSERVER RSCH. FOUND. (Jan. 10, 2023), <https://www.orfonline.org/expert-speak/resistance-to-the-taliban> [https://perma.cc/N9TY-ZLR3].

<sup>217</sup> *The World Bank in Afghanistan*, WORLD BANK (Apr. 18, 2024), <https://www.worldbank.org/en/country/afghanistan/overview> [https://perma.cc/LR26-VYKE].

<sup>218</sup> Byrd, *supra* note 179.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

However, the Taliban have constrained long-term recovery through ideological rigidity and failure to uphold rights.<sup>221</sup> Banning female education and work leaves half the population idle, wasting crucial human capital.<sup>222</sup> Aggressive taxation also risks provoking business, while lack of contract adjudication repels assets and loans.<sup>223</sup>

These policies, paired with declining international assistance, threaten renewed economic crisis. Surveys already estimate over 90% of Afghans living in desperate poverty.<sup>224</sup> Suggested constructive engagement involves cautiously re-engaging private enterprise and shifting aid to sustain rural livelihoods where possible without empowering abusive policies.

Despite defying low bars initially, the Taliban's disrespect of pluralism and law continues to prevent Afghanistan from meeting its economic and social promise. Only by ending political isolation through accountability reforms might consistent prosperity take root—an unlikely prospect given the regime's narrow vision.

#### 4. Internal Divisions and Factionalism

The Taliban faces major internal divisions along ethnic, tribal, and regional lines that threaten group cohesion.<sup>225</sup> The majority are Pashtun, but the Taliban also includes Uzbek, Hazara, and Tajik members.<sup>226</sup> Historically, Pashtuns have had significant infighting.<sup>227</sup> They are divided into subgroups like the Durrani and Ghilzais.<sup>228</sup> The semi-autonomous Haqqani network poses a key fragmentation risk.<sup>229</sup> The

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<sup>221</sup> *Id.*

<sup>222</sup> See *The World Bank in Afghanistan*, *supra* note 217.

<sup>223</sup> Hameed Hakimi, *Afghanistan's Outlook: Under Taliban Rule, the Economy Slumps as Taxation Income Rises*, BTI BLOG (Aug. 15, 2023), <https://blog.bti-project.org/2023/08/15/afghanistans-outlook-under-taliban-rule-the-economy-slumps-as-taxation-income-rises/> [<https://perma.cc/5D8C-2TTG>].

<sup>224</sup> *Afghanistan: An Entire Population Pushed into Poverty*, INT'L RESCUE COMM. (Aug. 9, 2023), <https://www.rescue.org/article/afghanistan-entire-population-pushed-poverty> [<https://perma.cc/3XGD-JNGU>].

<sup>225</sup> Abubakar Siddique, *One Year After Seizing Power, Is The Taliban Here To Stay?*, RFE/RL (Aug. 15, 2022), <https://www.rferl.org/a/afghanistan-taliban-one-year-later-solidify-power-internal-divisions/31988877.html> [<https://perma.cc/33EE-9Q44>].

<sup>226</sup> ANTONIO GIUSTOZZI, *THE TALIBAN BEYOND THE PASHTUNS* 4 (Ctr. Int'l Governance Innovation 2010), [https://www.files.ethz.ch/isn/121069/Afghanistan\\_Paper\\_5.pdf](https://www.files.ethz.ch/isn/121069/Afghanistan_Paper_5.pdf) [<https://perma.cc/PD8L-F5Q4>].

<sup>227</sup> Joseph A. Tainter & Donald G. MacGregor, *Pashtun Social Structure: Cultural Perceptions and Segmentary Lineage Organization*, OFF. OF NAVAL RSCH.: HUM. SOC. CULTURAL BEHAV. PROGRAM (Aug. 3, 2011), <https://apps.dtic.mil/sti/pdfs/ADA553265.pdf> [<https://perma.cc/C6J5-NDEM>].

<sup>228</sup> *Id.*; Mili & Townsend, *supra* note 126.

<sup>229</sup> Jon Lee Anderson, *The Taliban Confront the Realities of Power*, NEW YORKER (Feb. 21, 2022), <https://www.newyorker.com/magazine/2022/02/28/the-taliban-confront-the-realities-of-power-afghanistan> [<https://perma.cc/89NN-PWDF>].

Haqqani network is part of the Zadran tribe, which is a Pashtun tribe within the larger Ghilzai tribal confederation in Afghanistan and Pakistan.<sup>230</sup> This network was founded by Jalaluddin Haqqani, who was a leader in the Afghan Mujahideen fighting the Soviets in Afghanistan in the 1980s.<sup>231</sup> He hailed from the Zadran tribe located primarily in the Paktia and Khost provinces of eastern Afghanistan.<sup>232</sup> The Zadran tribe is part of the Ghilzai Pashtun tribal confederation, as opposed to the Durrani Pashtun tribal confederation.<sup>233</sup>

Beyond ethnicity, regional divides also fracture the Taliban, including between southern, eastern, and northern factions.<sup>234</sup> For example, when the Taliban detained senior Uzbek commander Makhdoom Alam, from the north of Afghanistan, hundreds of his supporters protested in the Faryab province alleging discrimination.<sup>235</sup> The Taliban also killed Hazara commander Mawlawi Mahdi for refusing geographic reassignment from his power base after his continued resistance.<sup>236</sup>

These cases of detention and killing illustrate early difficulties arising from competing subgroup interests within the Taliban regime. As the Taliban transitions from armed resistance to governance, tenuous loyalty among factions obstructs consolidation. Without a framework for power-sharing, representation, and compromise, subgroups will exploit resources for self-interest.

Moreover, deep disagreements reportedly exist within Taliban leadership like First Deputy Prime Minister Mullah Abdul Ghani Baradar, Acting Minister of Defense Mullah Yaqub, and Acting Minister of Interior Sirajuddin Haqqani, on restrictions and control with the Amir.<sup>237</sup> Despite attempts to persuade the Amir's dominant ruling clique to moderate, commanders have been unable.<sup>238</sup> This poses threats of internal power shifts and fragmentation of authority.<sup>239</sup>

<sup>230</sup> See Mili & Townsend, *supra* note 126.

<sup>231</sup> *Id.*; see also President Reagan's Remarks and Chairman Yunis Khalis Remarks Following a Meeting with Afghan Resistance Leaders and Members of Congress in Roosevelt Room, NAT'L ARCHIVES CATALOG (Nov. 12, 1987), <https://catalog.archives.gov/id/77443626> [<https://perma.cc/3XKF-KVEB>].

<sup>232</sup> *Haqqani Network*, *supra* note 128.

<sup>233</sup> *Id.*; Mili & Townsend, *supra* note 126.

<sup>234</sup> Siddique, *supra* note 125.

<sup>235</sup> Sudarsan Raghavan, *A Popular Uzbek Commander Fought for the Taliban for More Than Two Decades. He Was Arrested Anyway*, WASH. POST (Feb. 1, 2022, 4:00 AM), <https://www.washingtonpost.com/world/2022/02/01/taliban-uzbek-afghanistan/> [<https://perma.cc/83WN-HTVQ>].

<sup>236</sup> Mohammad Yunus Yawar & Jibran Ahmad, *Taliban Kill One of Their Ex-Leaders from Minority Hazara Community*, REUTERS (Aug. 17, 2022, 7:30 AM), <https://www.reuters.com/world/asia-pacific/taliban-kill-one-their-ex-leaders-minority-hazara-community-2022-08-17/> [<https://perma.cc/3CKZ-VFAB>].

<sup>237</sup> Vanda Felbab-Brown, *Afghanistan in 2023: Taliban Internal Power Struggles and Militancy*, BROOKINGS (Feb. 3, 2023), <https://www.brookings.edu/articles/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/> [<https://perma.cc/8GXJ-ZA4G>].

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

A constitutional system could mitigate future internal clashes by enabling non-violent dispute resolution, balancing power between groups, and fostering institutional loyalty. Decentralized federalism helped manage factionalism in places like Indonesia by accommodating demands for regional autonomy.<sup>240</sup> Enshrining group concessions and protections in a national framework sustains compromise.

By establishing rule of law and shared goals, the Taliban could potentially overcome splintering along entrenched ethnic, regional, and ideological fault lines. However, absent efforts to forge an inclusive political settlement around common interests, the centrifugal forces in Afghanistan may prove destabilizing. Without strong rule of law and legal institutions to facilitate power-sharing and compromise, these fractures within the Taliban's ranks could intensify and potentially lead to violent factionalism or fragmentation of the group.

## 5. Immigration and Exile (Brain Drain)

Lawlessness accelerates "brain drain," the emigration of a nation's most skilled professionals and intellectual capital. Without a codified legal system, minorities and experts flee regimes like the Taliban's in search of opportunity and security abroad.<sup>241</sup> After the Taliban retook power in Afghanistan, around 400 university professors left the country as the regime deprived them of academic freedom.<sup>242</sup> Thousands of Sikhs and Hindus also fled.<sup>243</sup> Many physicians have emigrated, causing healthcare systems to crumble.<sup>244</sup> The emigration of minorities stems from the absence of legal safeguards for vulnerable groups.<sup>245</sup>

This brain drain severely undermines the Taliban's ability to govern and provide basic services, as specialized human capital is crucial for running critical infrastructure

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<sup>240</sup> Rachmat Hidayat, *Political Devolution: Lessons From a Decentralized Mode of Government in Indonesia*, SAGE OPEN (Mar. 21, 2017), <https://journals.sagepub.com/doi/10.1177/2158244016686812> [<https://perma.cc/Y37Q-YNSA>].

<sup>241</sup> CBC News, *Desperate Afghans Flock to Kabul Airport in Attempts to Flee*, YOUTUBE (Aug. 16, 2021), <https://www.youtube.com/watch?v=f9Vg0iB4JRU> [<https://perma.cc/SFT2-NYKU>].

<sup>242</sup> Shadi Khan Saif, *Taliban 'Takeover' of American University Sparks Outrage*, UNIV. WORLD NEWS (Sept. 15, 2022), <https://www.universityworldnews.com/post.php?story=20220915131013672> [<https://perma.cc/D9RT-MUQ9>]; see also *229 Professors Left Afghanistan Since Taliban Takeover*, NAT'L HERALD (Feb. 3, 2022, 10:45 AM), <https://www.nationalheraldindia.com/international/229-professors-left-afghanistan-since-taliban-takeover-report> [<https://perma.cc/S9KH-VK5R>].

<sup>243</sup> Freshta Negah & Abubaker Siddique, *'Forced To Dress Like a Muslim': Taliban Imposes Restrictions on Afghanistan's Sikh, Hindu Minorities*, RFE/RL (Aug. 22, 2023), <https://www.rferl.org/a/afghanistan-sikh-hindu-muslim-taliban-restrictions/32559175.html> [<https://perma.cc/JWB5-MYNU>].

<sup>244</sup> Ngoc Phuong Hong Tao et al., *Healthcare Collapse in Afghanistan Due to Political Crises, Natural Catastrophes, and Dearth of International Aid Post-COVID*, 13 J. GLOB. HEALTH 1, 1–2 (2023).

<sup>245</sup> *Id.*

and institutions.<sup>246</sup> Without the expertise to maintain basic governance and services, public resentment against the Taliban regime will continue to build. Ultimately it seems hard for a government to survive without providing essential public goods to its citizens. The Taliban's legitimacy and control hinges on performance, and the brain drain precipitated by the lack of legal protections directly undercuts their competency and stability in power.

### *C. The Price of Lawlessness for the International Community*

The Taliban's imposition of lawlessness and disregard for human rights in Afghanistan creates significant security threats and challenges that directly impact not only regional players but also the broader international community through instability, displacement crises, and the continued existence of terrorist safe havens.<sup>247</sup> Among the major challenges the international community faces due to the Taliban's lawless governance are:

#### 1. Regional Instability and Spread of Extremism

Afghanistan's humanitarian crisis under Taliban rule risks destabilizing the wider region. Rampant poverty, lack of basic services, and human rights abuses create conditions conducive to extremism taking root.<sup>248</sup> Groups like ISIS-Khorasan have already exploited the chaos to gain a foothold and intensify attacks within Afghanistan.<sup>249</sup> If left unresolved, this extremism could spread across open borders into Pakistan, central Asia, and even potentially inspire attacks further abroad. Regional powers like Pakistan, China, Russia, and Iran all have concerns about insecurity spilling over into their territories.<sup>250</sup>

#### 2. Challenges of Refugee Flows

Insecurity, economic collapse, discrimination, revenge, and lack of food and opportunities in Taliban-controlled Afghanistan have already sparked a new refugee

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<sup>246</sup> Akmal Dawi, *Taliban Call for Stop to Afghan Brain Drain*, VOICE OF AM. NEWS (May 30, 2023, 6:14 PM), <https://www.voanews.com/a/taliban-call-for-stop-to-afghan-brain-drain-/7115958.html> [https://perma.cc/9D8G-A2U8].

<sup>247</sup> Zai Nezam, *Taliban Wa Heras O Tahamul Hamsayagan Wa Mantiqa* [*The Taliban, Fear, and Engagement of Neighbors and the Region*], HASHT-E-SUB DAILY (Mar. 24, 2024), [https://8am.media/fa/taliban-and-fear-and-the-interaction-of-neighbors-and-the-region/?fbclid=IwAR3fMgMVqvP48H1Z9hWF-1m72CBCETx9LcIQ5\\_WFzH5Fb49SuSJiFFU1fbA\\_aem\\_ARU93pGpiCkTaOvb7mdTh4bI3nrrVXAyijK0eYMdUTVmVgnDf7Z0sQmiLLLR\\_G4ljJ0](https://8am.media/fa/taliban-and-fear-and-the-interaction-of-neighbors-and-the-region/?fbclid=IwAR3fMgMVqvP48H1Z9hWF-1m72CBCETx9LcIQ5_WFzH5Fb49SuSJiFFU1fbA_aem_ARU93pGpiCkTaOvb7mdTh4bI3nrrVXAyijK0eYMdUTVmVgnDf7Z0sQmiLLLR_G4ljJ0) [https://perma.cc/6RPA-ASDC].

<sup>248</sup> See *The Taliban's Neighbourhood: Regional Diplomacy with Afghanistan*, INT'L CRISIS GRP. (Jan. 30, 2024), <https://www.crisisgroup.org/asia/south-asia/afghanistan/337-talibans-neighbourhood-regional-diplomacy-afghanistan> [https://perma.cc/YNY9-SALB].

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

crisis.<sup>251</sup> Over 3 million Afghans are internally displaced, while over 1.6 million have fled abroad, primarily to neighboring Pakistan and Iran after Taliban takeover.<sup>252</sup> This influx strains resources, risks creating tensions with host communities, and increases human trafficking and smuggling across borders.<sup>253</sup> For Europe and other regions receiving Afghan refugees and asylum seekers, there are integration challenges alongside security screening concerns about potential extremist elements.<sup>254</sup>

### 3. Absence of Counterterrorism Partner

Under the previous U.S.-backed Afghan government, counterterrorism cooperation helped degrade al-Qaeda's presence and arrested ISIS's expansion within Afghanistan.<sup>255</sup> However, the Taliban has shown an unwillingness to meaningfully confront terror groups finding safe haven in Afghanistan, despite claims they would not allow it to become a terror base again.<sup>256</sup> This poses risks of Taliban sympathizers joining or supporting these groups. For the United States and its allies, the lack of a partner able or willing to take action against terror targets in Afghanistan hampers counterterrorism efforts in the region.

#### *D. Motives for the Taliban to Embrace Rule of Law*

Currently, the Taliban has a powerful central government without a codified legal system.<sup>257</sup> As discussed previously, governance without law leads to increased factional conflict, political and economic instability, and poverty.<sup>258</sup> The important question is why the Taliban would ever adopt a constitution that limits their absolute

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<sup>251</sup> "A Disaster for the Foreseeable Future": Afghanistan's Healthcare Crisis, HUM. RTS. WATCH (Feb. 12, 2024), <https://www.hrw.org/report/2024/02/12/disaster-foreseeable-future/afghanistans-healthcare-crisis> [<https://perma.cc/2RCS-XXQQ>]; see also *Afghanistan: An Entire Population Pushed into Poverty*, *supra* note 224.

<sup>252</sup> *Afghanistan Situation*, UNHCR OPERATIONAL DATA PORTAL, <https://data.unhcr.org/en/situations/afghanistan> [<https://perma.cc/ZG5W-3UEV>] (last visited Sept. 25, 2024).

<sup>253</sup> *2023 Trafficking in Persons Report: Afghanistan*, U.S. DEP'T OF STATE, <https://www.state.gov/reports/2023-trafficking-in-persons-report/afghanistan/> [<https://perma.cc/79VK-98PG>] (last visited Sept. 25, 2024).

<sup>254</sup> See, e.g., *id.*

<sup>255</sup> See generally Asfandiyar Mir, *Al-Qaeda, the Taliban, and the Future of U.S. Counterterrorism in Afghanistan*, GEO. WASH.: PROGRAM ON EXTREMISM (Sept. 8, 2022), <https://extremism.gwu.edu/al-qaeda-the-taliban-and-future-of-us-counterterrorism> [<https://perma.cc/GSA9-JVS7>].

<sup>256</sup> *Id.*

<sup>257</sup> Frud Bezhan et al., *Draconian Decrees: The Taliban's Restrictions in Afghanistan*, RFE/RL (Aug. 14, 2023, 8:12 PM), <https://www.rferl.org/a/draconian-decrees-taliban-restrictions-afghanistan/32547882.html> [<https://perma.cc/9S6M-BFC8>].

<sup>258</sup> See generally Zahid Hussain, *Can Political Stability Hurt Economic Growth?*, WORLD BANK BLOGS (June 1, 2014), <https://blogs.worldbank.org/en/endpovertyinsouthasia/can-political-stability-hurt-economic-growth> [<https://perma.cc/J7VR-5BHB>].

power. Given these adverse consequences of lawlessness, embracing rule of law would have significant advantages for both citizens and the Taliban regime. Specifically, establishing a codified legal system offers key benefits including legitimacy, economic growth, socio-political stability, and attracting international community support for Afghanistan. It seems that businesses will invest with greater confidence knowing contracts are enforceable under a formal legal code. Neighboring countries and foreign donors will extend more aid when human rights and civil liberties are protected by law.<sup>259</sup>

In addition, it is obvious that a codified legal system enables the government to provide quality services like healthcare, education, and social welfare programs which will further strengthen public support. Citizens will reward a regime that invests in their prosperity and security. Although upending long legal traditions is difficult, modest reforms instituted gradually can strengthen both government institutions and society. Examining these benefits makes a compelling case for why the Taliban should adopt a constitutional framework embracing the rule of law and protecting core individual freedoms.

### 1. Gaining Domestic and International Legitimacy

The Taliban desires legitimacy and recognition, which are very important for this group,<sup>260</sup> even though they have resisted reforms like women's rights and democratic elections. Yet the costs of continued illegitimacy, which isolates the regime diplomatically and economically, outweigh the costs of compromising with the Afghan people and international community.<sup>261</sup> For example, Afghanistan has secured only limited aid and suffered a significant reduction in GDP since the Taliban takeover.<sup>262</sup> Rule of law, which provides a clear structure for governance, serves as a pathway to legitimacy without betraying Taliban core principles. Specifically, the

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<sup>259</sup> Haley Swedlund et al., *Foreign Aid Won't Moderate the Taliban*, FOREIGN POL'Y (Oct. 27, 2021, 4:26 PM), <https://foreignpolicy.com/2021/10/27/taliban-afghanistan-foreign-aid-assistance-moderate-human-rights/> [https://perma.cc/8MQY-87JC].

<sup>260</sup> Mark S. Cogan & Don McLain Gill, *Legitimacy and International Development in a Taliban-Dominated Afghanistan*, J. INDO-PACIFIC AFFS. (Jan. 7, 2022), <https://www.airuniversity.af.edu/JIPA/Display/Article/2891270/legitimacy-and-international-development-in-a-taliban-dominated-afghanistan/> [https://perma.cc/A2P3-R3YL].

<sup>261</sup> Dayal, *supra* note 164.

<sup>262</sup> Inbar Pe'er, *Afghanistan's Economy Under the Taliban: The Challenges Ahead*, ATL. COUNCIL (Sept. 9, 2021), <https://www.atlanticcouncil.org/blogs/afghanistans-economy-under-the-taliban-the-challenges-ahead/> [https://perma.cc/6FBH-57JP]; *see also Ten Years of Afghan Economic Growth, Reversed in Just 12 Months: UNDP*, U.N. NEWS (Oct. 5, 2022), <https://news.un.org/en/story/2022/10/1129287> [https://perma.cc/S9CU-H6PE]; MUHAMMAD WAHEED ET AL., *AFGHANISTAN DEVELOPMENT UPDATE UNCERTAINTY AFTER FLEETING STABILITY 6* (World Bank 2023), <https://thedocs.worldbank.org/en/doc/210d5f24dc33a3460beff3447fceedcf-0310012023/original/Afghanistan-Development-Update-20231003-final.pdf> [https://perma.cc/B2KA-GQ2N].

Taliban could enact laws upholding Islamic values on issues like crimes, family matters, commerce, and taxation while also protecting citizen rights like freedom of speech, education for women, work, and fair judicial processes. Indonesia, for instance, has implemented a constitutional system of this kind while still grounding governance in Islamic tradition.<sup>263</sup> Their example shows that rule of law can coexist with Sharia principles. Taliban could uphold Islamic rules and follow Sharia while adopting new laws. Such measured reforms would offer Taliban rulers religious cover while also demonstrating an evolution that would greatly enhance the regime's domestic and international legitimacy.

## 2. Attracting Foreign Investment and Aid

After decades of conflict and instability, Afghanistan is in dire need of economic growth and development. With over 90% of the population impoverished, establishing security, infrastructure, and sound economic policies is crucial for sustainable growth.<sup>264</sup>

In particular, Afghanistan urgently requires increased foreign and domestic trade and investment.<sup>265</sup> Attracting substantial investment depends first on improving security conditions to assure investors. Additionally, developing a skilled workforce and management capacity is imperative. However, the key prerequisite for investment is strengthening rule of law through formalized legal systems.<sup>266</sup> Under codified regulations enforced transparently, investors gain confidence in business contracts, rights protections, and the availability of legal remedies if disputes occur.

Importantly, a commitment to equitable rule of law also enables Afghanistan to attract more international aid and assistance.<sup>267</sup> Donors are encouraged to support countries demonstrating good governance and human rights protections. So, reforms would open access to critical humanitarian and development funding. Taliban edicts banning women's work and education have instead harmed growth and discouraged investors.<sup>268</sup> Establishing a transparent legal code for businesses would provide

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<sup>263</sup> Michael Buehler, *Islam and Democracy in Indonesia*, 11 INSIGHT TURK. 51, 51–54 (2009).

<sup>264</sup> *Afghanistan: An Entire Population Pushed into Poverty*, *supra* note 224.

<sup>265</sup> *The World Bank in Afghanistan*, *supra* note 217.

<sup>266</sup> IMPROVING THE LEGAL ENVIRONMENT FOR BUSINESS AND INVESTMENT IN CENTRAL ASIA 3 (OECD 2021), [https://www.oecd.org/en/publications/improving-the-legal-environment-for-business-and-investment-in-central-asia\\_d3d8daca-en.html](https://www.oecd.org/en/publications/improving-the-legal-environment-for-business-and-investment-in-central-asia_d3d8daca-en.html) [<https://perma.cc/FGM2-CW4M>].

<sup>267</sup> Adam Weinstein, *Keep Talking to the Taliban*, FOREIGN POL'Y (Mar. 23, 2023, 2:20 PM), <https://foreignpolicy.com/2023/03/23/taliban-afghanistan-diplomatic-strategy-united-states/> [<https://perma.cc/6HZT-ZAXK>].

<sup>268</sup> Matiullah Qazizada, *Impacts of the Taliban's Ban on Women's Work and Education*, RELIEF WEB (Feb. 9, 2024), <https://reliefweb.int/report/afghanistan/impacts-talibans-ban-womens-work-and-education> [<https://perma.cc/M3J2-YRHM>].

needed stability. With gradual reform, Afghanistan can develop robust legal institutions for sustainable growth. Enacting clear commercial, banking, and trade laws would provide predictability for investors while increasing international aid. This serves the interests of both the public and the Taliban government.

### 3. Reducing Public Discontent and Violent Opposition

The Taliban currently faces growing public discontent over policies and actions seen as ideological, oppressive, or disconnected from the needs of the Afghan people.<sup>269</sup> For example, restrictions on women's education, employment, and public life provoke frequent protests.<sup>270</sup> Limits on free speech and artistic expression also receive domestic and international condemnation.<sup>271</sup> Harsh crackdowns on dissent lead to further resentment.

Embracing rule of law provides a path for the Taliban to implement gradual reforms that address key grievances while staying true to Islamic principles. If laws allowed women's education with appropriate Islamic conditions, this could satisfy public demands while upholding Taliban values. Fair legal processes would provide outlets for legitimate dissent, reducing motivation for violence. The Taliban could gain tremendous public confidence by applying laws transparently, combating corruption, and consulting the Afghan people when shaping new legislation. This would demonstrate a willingness to listen and evolve with the changing needs of society. While rapid reforms may not be possible, a measured approach can steer the country in a stable direction-and sell the Taliban as wise stewards rather than uncompromising ideologues.

### 4. Taliban's Chance to Break the Cycle of Failed Governance

Afghanistan has experienced near continuous conflict over the past five decades, with successive governments claiming questionable ties to preceding regimes. The Saur Revolution coup on April 27, 1978, established a communist People's Democratic Party of Afghanistan (PDPA) government backed by the Soviet Union.<sup>272</sup>

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<sup>269</sup> *Rahbaran Taliban Az Hawaqibe Eejad Fasela Meyan Mardum Wa Taliban Hoshdar Dad* [Taliban Leaders Warn of Consequences of Creating Distance Between People and Taliban], RADIO AZADI (Aug. 15, 2023), <https://da.azadiradio.com/a/32549055.html> [<https://perma.cc/VJM4-5TA3>].

<sup>270</sup> Shekhawat, *supra* note 216.

<sup>271</sup> *Afghanistan: Taliban Severely Restrict Media, Journalists Arbitrarily Detained, Beaten*, HUM. RTS. WATCH (Oct. 1, 2021, 12:00 AM), <https://www.hrw.org/news/2021/10/01/afghanistan-taliban-severely-restrict-media> [<https://perma.cc/CZ5A-JNS6>].

<sup>272</sup> THE AFGHANISTAN JUSTICE PROJECT, CASTING SHADOWS: WAR CRIMES AND CRIMES AGAINST HUMANITY: 1978–2001, at 1, 4, 10 (2005), <https://www.opensocietyfoundations.org>

From 1978 to 1992, power changed hands repeatedly between PDPA factions in largely illegitimate transfers.<sup>273</sup> The Mujahideen, with purported Western support, later captured Kabul, but infighting precluded effective governance and rule of law.<sup>274</sup> The Taliban regulated society through their strict interpretation of Islamic law during their 1996–2001 rule, until the U.S.-led invasion ousted the regime.<sup>275</sup>

The post-2001 administration, though adopting a constitution and expanded legal code, faced ongoing challenges to its legitimacy from perceived alignment with Western priorities.<sup>276</sup> These claims appeared validated when the government rapidly dissolved following the withdrawal of foreign troops in 2021.<sup>277</sup>

While tactical differences exist between the Soviet and U.S. withdrawals, the accompanying Geneva Accords of 1988 and Doha Agreement of 2020 represent substantive similarities between the resulting collapses.<sup>278</sup>

With the Taliban now firmly governing Afghanistan amidst conflict containment and some opposition openness to reconciliation, an opportunity exists to depart from the instability of the past half-century. It seems that embracing inclusive and lawful governance could confer legitimacy that has eluded all predecessors. But constructing a rights-respecting constitutional order would require rejecting the expediency of unrestrained power. The allure of unconstrained rule has seduced Afghan leaders for generations, often with backing from foreign patrons. If the Taliban want to avoid the vicious circle and make stability and inclusiveness their goals and lead the country towards progress and excellence by enacting a constitution and respecting citizens' rights, they can easily gain this advantage that no government has been able to achieve in the past fifty years.

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/uploads/291156cd-c8e3-4620-a5e1-d3117ed7fb93/ajpreport\_20050718.pdf[https://perma.cc/HJS9-PQ8G].

<sup>273</sup> Thomas Ruttig, *An April Day That Changed Afghanistan 4: The Evolution of the PDPA and Its Relations with the Soviet Union*, AFG. ANALYSTS NETWORK (May 3, 2018), <https://www.afghanistan-analysts.org/en/reports/context-culture/an-april-day-that-changed-afghanistan-4-the-evolution-of-the-pdpa-and-its-relations-with-the-soviet-union/> [https://perma.cc/J83E-PARB].

<sup>274</sup> *How America Supported the Anti-Soviet Mujahideen Rebels in 1980s Afghanistan*, HISTORY IS NOW MAG. (Mar. 14, 2021), <http://www.historyisnowmagazine.com/blog/2021/3/7/how-america-supported-the-anti-soviet-mujahideen-rebels-in-1980s-afghanistan> [https://perma.cc/9DHH-5XFA].

<sup>275</sup> Shamil Shams, *How the U.S. Invasion Changed Afghanistan*, DEUTSCHE WELLE (June 10, 2021), <https://www.dw.com/en/how-the-us-invasion-changed-afghanistan/a-59427641> [https://perma.cc/QUE7-HDN9].

<sup>276</sup> NEMATULLAH BIZHAN, BUILDING LEGITIMACY AND STATE CAPACITY IN PROTRACTED FRAGILITY: THE CASE OF AFGHANISTAN 4–5 (Int'l Growth Ctr. 2018), <https://www.theigc.org/sites/default/files/2018/04/afghanistan-report-v3.pdf> [https://perma.cc/PJ34-T6U2].

<sup>277</sup> *Id.*

<sup>278</sup> Rahmat Hashemi, *The Other 'Peace Process' on Afghanistan: Geneva Talks 1982–1988*, PEACE RSCH. INST. OSLO BLOGS (May 16, 2023), <https://blogs.prio.org/2023/05/the-other-peace-process-on-afghanistan-geneva-talks-1982-1988/> [https://perma.cc/SB6K-U6RL].

### III. FRAMEWORK FOR PRACTICALLY ATTAINABLE CONSTITUTIONAL REFORM

As examined in previous chapters, the absence of rule of law under the Taliban poses immense problems for Afghanistan. This chapter presents a potential framework that could establish governance adhering to legal order. The goal is to outline a constitution upholding both international standards and Islamic/national values of Afghans.

The first Section will discuss principles and fundamentals to enshrine in a constitution without contravening Islamic values. These include rights protections, separation of powers, free elections, and other key tenets.

The second Section will evaluate the feasibility of implementing this proposed framework given dominant values in Afghan society. It will aim to outline a reform pathway that is both rights-respecting and pragmatically attainable within the Taliban's Islamic Emirate system.

Together, these Sections provide a vision for constitutional order that could address the challenges of lawlessness while aligning with Afghan culture.

#### *A. Guiding Principles*

This Section outlines key principles to guide drafting a constitution that protects the basic rights of Afghan citizens, promotes stability, decentralizes power, and improves the current situation.

These principles represent vital aspirations and values that can inform constitutional reforms. While the principles alone do not constitute a full framework, they can steer the development of specific structures and provisions needed to realize the intended aims. This Section articulates the desired goals that constitutional processes and content should serve.

#### 1. Protect Citizen Rights and Freedoms

Protecting citizens' rights and freedoms in the constitution is an important principle that is considered in all countries, whether Islamic or non-Islamic.<sup>279</sup> It seems that the right to education, work, freedom of expression, equality before the law, personal immunity, and other matters are usually protected in the constitution with respect to the culture and religion of the countries.

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<sup>279</sup> TAD STAHNKE & ROBERT C. BLITT, THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF RELIGION OR BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES 13–15 (U.S. Comm'n Int'l Religious Freedom 2005), <https://www.uscirf.gov/sites/default/files/Study0305.pdf> [<https://perma.cc/S6JA-3GHR>]; see also DAVID SMOCK, ISLAM AND DEMOCRACY 1, 3–7 (U.S. Inst. of Peace, Spec. Rep. No. 98, Sept. 2002), <https://www.usip.org/sites/default/files/resources/sr93.pdf> [<https://perma.cc/BJ5M-WY25>].

Additionally, the recognition of fundamental rights has precedent in foundational Islamic sources. The Medina Charter, drafted by Prophet Mohammad in 622 CE, is considered one of the earliest documents upholding “universal human rights” and pluralism.<sup>280</sup> It established a cooperative political order in Medina<sup>281</sup> by bringing together its warring tribes under common values and rights.<sup>282</sup> The Charter set forth rights, responsibilities, and relations between the Muslim, Jewish, Christian, and pagan communities of Medina.<sup>283</sup> It guaranteed freedom of religious beliefs and practices for all citizens regardless of faith.<sup>284</sup> Groundbreaking principles in the Charter included justice, rule of law, equality, mutual defense, pluralism, and basic human rights like freedom of religion and speech.<sup>285</sup>

Similarly, these rights are guaranteed in the constitutions of modern Islamic countries. For example, Articles 19 to 42 of the Constitution of Iran address citizens’ rights and freedoms.<sup>286</sup> Furthermore, Part Three of the Constitution of Qatar deals with protecting citizens’ rights and the state’s obligations towards them.<sup>287</sup> Previous constitutions of Afghanistan, especially the 2004 Constitution, also discussed fundamental rights and duties in Chapter Two.<sup>288</sup> All these precedents uphold equality; non-discrimination; the rights to education, expression, and assembly; and other basic human rights. Therefore, supporting fundamental rights and citizens’ freedoms is by no means contradictory to Islamic law and principles. On the contrary, Islamic ethics endorse social justice, tolerance, and human dignity.

Therefore, protecting citizens’ rights and freedoms is an important and integral part of any constitution. Since Chapter Two of the 2004 Afghanistan Constitution aligns with Islamic law, this Article suggests incorporating its provisions on fundamental

<sup>280</sup> Zia H. Shah, *The Constitution of Medina: A Symbol of Pluralism in Islam*, MUSLIM TIMES (Nov. 9, 2012), <https://themuslimtimes.info/2012/11/09/the-constitution-of-medina-a-symbol-of-pluralism-in-islam/> [https://perma.cc/MB6R-R7CM].

<sup>281</sup> Madina, also spelled Medina, is a city in western Saudi Arabia located about 190 miles (306 kilometers) north of Mecca. *Id.* It is the second holiest city in Islam after Mecca and played an important role in the early history of the faith. *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Mohamed Bin Ali, *Religious Pluralism and Peace: Lessons from the Medina Charter*, RSIS COMMENT. (Feb. 16, 2016), <https://dr.ntu.edu.sg/bitstream/10356/82743/1/CO16035.pdf> [https://perma.cc/YWB3-CSG7].

<sup>284</sup> *Id.*

<sup>285</sup> Abdullah Moeed Al shehri, *Universal Human Rights: A Comparative Study of the Charter of Medina and the Universal Declaration of Human Rights* (Aug. 2022) (Ph.D. dissertation, Western Sydney University), <https://researchdirect.westernsydney.edu.au/islandora/object/uws%3A71490/datastream/PDF/download/citation.pdf> [https://perma.cc/TT7U-YWYK].

<sup>286</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), arts. 19–42 [hereinafter THE IRAN CONSTITUTION].

<sup>287</sup> CONSTITUTION OF THE STATE OF QATAR (Qatar Ministry of Foreign Affs., Government Commc’ns Office 2016), <http://www.gco.gov.qa/wp-content/uploads/2016/09/GCO-Constitution-English.pdf> [https://perma.cc/L4NT-2SXT].

<sup>288</sup> THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, arts. 22–59.

rights into the future Afghan constitution. This would uphold Islamic values of fairness and morality while also protecting citizens' liberties essential for a stable country.

## 2. Establish a Well-Structured Government with Checks and Balances

Establishing an effective governance structure with separation of powers and checks and balances is crucial to ensure stability and accountability.<sup>289</sup> While the constitution of Iran provides a useful model, it should be adapted to suit Afghanistan's present context.

The constitution should create the position of Amir al-Mu'minin elected by the Leadership Council (The Rahbari Shura) with expertise in political and social affairs, like the Iran approach.<sup>290</sup> The Amir's powers would include commanding the military, appointing a prime minister and judges, approving minister appointments, resolving conflicts between government branches, and heading the Leadership Council. To prevent abuse of power, the Amir could be impeached by a two-thirds majority vote of the Leadership Council for crimes or constitutional violations in some way similar to Iran's approach.<sup>291</sup> In addition, the Amir's decisions could be subject to judicial review through the courts.

The Leadership Council, headed by the Amir, should be composed of prominent scholars, policy experts, and influential figures from diverse backgrounds across Afghanistan, like the Iranian approach.<sup>292</sup> At least thirty people would be nominated by the current Amir and only fourteen people may be selected by the traditional Loya Jirga in a binding vote. The Loya Jirga may consist of Parliament, the Supervisory Council of Legislation, and the Head of Provincial Council and Head of Shura-e Ulama (Islamic Scholar Council) of all over Afghanistan. The Leadership Council would have the authority to elect and dismiss the Amir by a two-thirds majority vote. It would also advise and make decisions on important national issues.

To select a new Amir, the Leadership Council shall vet candidates based on qualifications and hold an election. If needed, a run-off will take place between the top candidates. The vetting and voting procedures shall be made public, if possible.

The constitution should establish executive, legislative, and judiciary branches, similar to the 2004 Afghanistan Constitution.<sup>293</sup> The executive would consist of a Prime Minister and Cabinet Ministers. The Prime Minister is nominated by the Amir through the Leadership Council and confirmed by the legislature. The ministers are nominated by the Prime Minister, approved by the Leadership Council, and confirmed by the legislature. The legislature would be an elected parliament responsible

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<sup>289</sup> Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1163–64 (1997).

<sup>290</sup> THE IRAN CONSTITUTION, *supra* note 286, art. 107.

<sup>291</sup> *Id.* art. 111.

<sup>292</sup> *Id.* art. 107.

<sup>293</sup> See THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, arts. 60, 81, 116.

for enacting laws, approving treaties, and overseeing the executive. The judiciary would be made up of independent judges appointed on the recommendation of the Amir and Leadership Council, with legislature approval. They would adjudicate legal disputes and review laws for constitutionality.

A Supervisory Council on Legislation, similar to Iran's Guardian Council,<sup>294</sup> reviews laws for compliance with the constitution and creates fundamental Islamic principles. It may consist of Islamic jurists and lawyers, with one-third appointed by the Amir, one-third by the provincial council of scholars (Shura-e Ulama), and one-third by the provincial council. The Supervisory Council can return laws to the legislature for reconsideration but cannot veto. Its scope is clearly limited to unambiguous violations, and it must issue detailed written opinions on all reviews, similar to the Iran approach.<sup>295</sup> The legislature can override the Supervisory Council with a two-thirds majority vote. This Council may have one hundred and two members in total.

At the regional and municipal levels, governance will be at the local level; each village's people will directly elect a council of community representatives who choose a village headman. These village councils select representatives to form district councils. Each district also has a council whose members come from the village council, and this council appoints a district governor. There should also be a provincial council which is formed through the selection of representatives from each district council. The provincial council suggests a list of ten people to the prime minister to appoint as provincial governors until provincial governor elections can be held. This council also elects one of its members for the Supervisory Council of Legislation. Each province may have a Council of Scholars (Shura-e Ulama) which the Supreme Leader selects by taking advice from local people and Local Ulama. This Shura may appoint one of its members, who has a legal education, in the Supervisory Council. Shura-e Ulama may have advisory authority.

### 3. Promote Equality and Prohibit Discrimination

Another very important principle that should be included in the new Afghan constitution is the principle of equality and prohibition of discrimination and prejudice, so that all people feel they are equal partners in governance.

The constitution, as the fundamental law, must create equal opportunities for all citizens regardless of ethnicity, religion, language, gender, geography, or other affiliation. It should enable their equal service within government institutions and access to state resources and benefits.

There should be equal access to education, employment, political participation, and cultural expression for all. Laws and policies that currently facilitate discrimination and inequality, especially against women, minorities, rural populations, and

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<sup>294</sup> THE IRAN CONSTITUTION, *supra* note 286, art. 91.

<sup>295</sup> *Id.* arts. 94–98.

other marginalized groups, must be reformed. The constitution should protect minority languages and cultures without imposing the values of one group upon others. Awareness campaigns, educational reforms, and transitional justice processes should acknowledge historical injustices and harms of discrimination. Hate speech and incitement of prejudice should be prohibited.

#### 4. Uphold Rule of Law and an Independent Judiciary

Establishing rule of law and an independent judiciary are crucial principles to include in the new Afghan constitution. There is an argument that independent judiciaries can place checks on executive power and help prevent slides toward authoritarianism.<sup>296</sup> It is obvious that the lack of rule of law and judicial independence severely damaged the government's legitimacy and performance. Therefore, the new constitution must establish rule of law and an independent judiciary. These two principles support each other in promoting stability and justice: an independent judiciary impartially handles legal matters and keeps the executive branch in check; thus, these complementary pillars are foundational to constitutional democracy.

However, effective implementation requires more than constitutional recognition. Major reforms to enforcement, police training, and judicial capacities are essential to bridge the gap between theory and practice. But Afghanistan's long-term stability depends on enshrining explicit constitutional safeguards for rule of law and an independent judiciary, alongside meaningful institutional reforms. With careful planning, the dawn of a new constitutional era offers hopes of rectifying past failures by laying solid foundations for the future.

#### 5. Decentralize Some Powers to Provincial Governments

Expanding the authority of local and provincial governments should be considered as a principle in the new constitution, contrary to the previous centralized system.<sup>297</sup> Even though Afghanistan is a diverse country with multiple ethnicities, tribes, languages, and religions, the 2004 constitution established a centralized government and did not expand the power of local officials.<sup>298</sup> This was likely done in an attempt to unite the country under a strong central government after years of instability. However, it ended up having detrimental effects by concentrating too

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<sup>296</sup> See generally Douglas M. Gibler & Kirk A. Randazzo, *Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding*, 55 AM. J. POL. SCI. 696, 696 (2011).

<sup>297</sup> THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, art. 1.

<sup>298</sup> Ayoub Arwin, *Shura hai Mahali Afghanistan Chura Qudrat Nadarand? [Why Are Afghanistan's Local Councils Powerless?]*, BBC NEWS PERSIAN (Feb. 12, 2015), [https://www.bbc.com/persian/afghanistan/2015/02/150210\\_k02\\_afghan\\_local\\_councils\\_power](https://www.bbc.com/persian/afghanistan/2015/02/150210_k02_afghan_local_councils_power) [<https://perma.cc/57QS-VM9L>].

much power in the national level and limiting local autonomy.<sup>299</sup> This centralization most of the time led the country to disorder by causing tensions between the national and local levels.<sup>300</sup>

Specifically, the lack of executive and decision-making power given to local authorities, with power concentrated at the national level, caused problems. Local officials often feel powerless to solve their small, local issues without central intervention, leading to unrest and ineffective governance in regional areas.<sup>301</sup> For example, when security issues emerged in districts, officials needed central approval to react, lacking independent authority over local policing matters.<sup>302</sup>

Therefore, the new constitution should take a different approach by empowering local governments. Giving local authorities defined executive powers can enable them to respond swiftly to community needs. Rapid action is needed to address modern challenges, which is not possible with a highly centralized system where even basic functions like appointing low-level officials and budgeting required central sign-off. While some centralization can curb corruption, in practice it often led to delayed responses, non-local appointments, and reduced accountability among local leaders.

By distributing specific powers, from the village up to the provincial level, the new constitution can fix the over-centralization problem. This will not only improve local administration effectiveness and provide better public services, but also strengthen support for the central government, as empowered citizens feel more involved in local decision-making and governance.

## 6. Incorporate Islamic Principles Compatible with Human Rights and Pluralism

Afghanistan is an Islamic country, so it is fitting that the constitution integrates Islamic values and principles. However, these should be adapted thoughtfully to align as much as realistically possible with fundamental human rights and principles of good governance.<sup>303</sup> I acknowledge that the Taliban are unlikely to accept

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<sup>299</sup> Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* 232 (2016) (LL.M. thesis, University of Washington School of Law), [https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/36735/Pasarlay\\_washington\\_0250E\\_16099.pdf](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/36735/Pasarlay_washington_0250E_16099.pdf) [https://perma.cc/RRS5-KULY].

<sup>300</sup> See Mohammad Qadam Shah, *Centralization Is at the Core of Afghanistan's Problems: Can the Taliban Learn from History?*, DIPLOMAT (Aug. 24, 2021), <https://thediplomat.com/2021/08/centralization-is-at-the-core-of-afghanistans-problems/> [https://perma.cc/AQ4C-2GUN].

<sup>301</sup> See *id.*

<sup>302</sup> SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, POLICE IN CONFLICT: LESSONS FROM THE U.S. EXPERIENCE IN AFGHANISTAN 4 (2022).

<sup>303</sup> See TURAN KAYAOGU, THE ORGANIZATION OF ISLAMIC COOPERATION'S DECLARATION ON HUMAN RIGHTS: PROMISES AND PITFALLS, at i, 8 (Brookings Inst. 2020), <https://>

provisions that overtly contradict their preferred interpretations. Therefore, the constitution should focus on emphasizing universal Islamic ethics and values that most Muslims agree on—such as justice, dignity, mercy, and equality—while allowing space for gradual legal reforms.<sup>304</sup> Rather than directly countering the Taliban's positions, the constitution can stress higher aims like human rights, creating openings for moderate reform. Additionally, power-sharing arrangements could incentivize the Taliban to respect the constitution if it is in their political interest to compromise. An overtly secular or liberal constitution, however, risks provoking backlash and instability at this fragile time. The goal should be laying groundwork for gradual reform through inclusion and consensus-building wherever possible, not confrontation.

#### 7. Adoption Should Be Approved by a Traditional Afghan Assembly (Loya Jirga)

Afghanistan's traditional assembly, the Loya Jirga, should ratify the new constitution to democratize the drafting process. The Loya Jirga should have diverse representation of delegates from all Afghan ethnicities and social classes—including politicians, scholars, civil society members, women, and minorities. It should be comprised of both appointed and elected delegates, with two-thirds being elected. The election shall be at the district-level and conducted by the Independent Election Commission. This helps ensure diverse geographic representation. Additionally, one-third of the delegates will be appointed based on quotas to ensure participation of women, ethnic and religious minorities, and other marginalized groups.

Enacting a constitution is a vital process requiring experts in religion and law; therefore, a drafting committee of legal scholars and Islamic jurists should be formed to draft the text. The legal experts on the initial drafting committee shall be appointed in equal numbers by the Amir, the ulema council, and the civil society. This balances representation from political, religious, and civil society perspectives. The committee will incorporate public feedback through a national surveying process before the review stage. After the initial drafting and receiving public input, the text should go to a review committee for finalization. The constitution review committee shall be comprised of delegations from the formal government, judiciary, religious institutions, security forces, and civil society councils. Review procedures shall include open public hearings allowing oral and written testimonies for transparency.

Subsequently, to ensure the constitution is enacted without foreign interference, through a genuinely Afghan process, and that people feel included in its drafting, it must be approved by the traditional Loya Jirga. Finally, such an inclusive, traditional

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[www.brookings.edu/articles/the-organization-of-islamic-cooperations-declaration-on-human-rights-promises-and-pitfalls/](http://www.brookings.edu/articles/the-organization-of-islamic-cooperations-declaration-on-human-rights-promises-and-pitfalls/) [<https://perma.cc/77R7-G2ES>].

<sup>304</sup> See Mohammad Hossein Mozaffari, *Human Dignity: An Islamic Perspective*, RESEARCH-GATE (Dec. 2011), [https://www.researchgate.net/publication/327237458\\_Human\\_Dignity\\_An\\_Islamic\\_Perspective](https://www.researchgate.net/publication/327237458_Human_Dignity_An_Islamic_Perspective) [<https://perma.cc/PH8X-V22K>].

Loya Jirga with members representing all Afghans should pass the constitution. After endorsement by the Amir, it should be enacted as supreme law of the country.

### *B. Ensuring Acceptability and Feasibility*

Implementing any new framework in Afghanistan requires careful consideration of cultural values and pragmatism. This Section will analyze the proposed constitutional framework for acceptability and feasibility. First and foremost, strategic framing is crucial for acceptability. The constitution should be presented as regulating rather than abolishing Taliban power by emphasizing checks and balances. Explicitly aligning the constitution with Islamic principles will underscore consistency with religious values. Honoring Afghanistan's Islamic heritage and identity will also position the constitution as upholding cultural pride rather than undermining it.

In addition to deliberate framing, targeted messaging should focus on tangible collective benefits like stability, accountability, economic growth, and national sovereignty. Communicating protections for and the participation of the Taliban is also important for their buy-in. However, messaging solely to the Taliban risks alienating other groups, which necessitates mitigation through inclusive outreach.

Beyond messaging, directly engaging Taliban leadership and influential religious clerics and scholars will boost feasibility and ownership. Leveraging allies among respected Islamic scholars and clergy can also help ensure that the constitution's principles align with and uphold Islamic values. However, their religious influence will need balancing with perspectives from ethnic minorities, women's advocates, and other civil society stakeholders to avoid over-conservatism.

On a pragmatic level, approaches like incorporating traditional Afghan governance mechanisms, building consensus with mainstream religious leaders, and framing reforms as incremental are wise strategies. However, deference to tradition cannot overrule fundamental human rights protections that Afghanistan is obligated to provide under international laws and norms. With these considerations of strategic framing, benefits messaging, stakeholder engagement, and pragmatic adaptation, the constitution can become an acceptable, feasible foundation for Afghanistan's future. The subsequent Sections will detail related strategies.

#### 1. Framing the Constitution

Framing the proposed constitution strategically will be key for promoting acceptability among Afghans. The narrative and positioning should tap into cultural values and perspectives. For example, the constitution can be framed as building upon Afghanistan's Islamic heritage and principles. Language should emphasize continuity with values Afghans hold dear rather than presenting wholly foreign concepts. Consultations with local religious scholars and texts can be highlighted. The constitution can also be framed as honoring the long struggle and sacrifices of

the Afghan people. It represents the next chapter in a national journey toward stability and prosperity. The diverse identities and experiences of all Afghans (men and women) should be acknowledged in the framing process.

Rather than positioning the constitution as fully complete or permanent, it should be framed as welcoming participation and feedback. There is no perfect document the first time—it can evolve with the nation. Framing the constitution as a living work-in-progress makes change less threatening. Enough time should be provided for gradual adoption, with the messaging that immediate imposition without acceptance risks instability. The framing must set realistic expectations to ease anxieties. With deliberate narrative framing on continuity, participation, gradual adaptation, and acknowledging Afghan perspectives, the constitution can be positioned as a homegrown document meeting local needs on an ongoing basis. This empowers rather than alienates, increasing receptivity.

*a. Regulates Power Rather Than Removing*

Adopting a constitution in Afghanistan can provide a framework for progress that regulates the Taliban power through separation of powers while allowing their participation in governance. As demonstrated by the examples of Indonesia and Malaysia, constitutions can facilitate accountable governance and economic development even when dominant factions hold influence.<sup>305</sup>

As is obvious, a major benefit of constitutional systems is establishing accountability through checks and balances between branches of government. The separation of powers allows the Taliban and other groups to play a role in governance while controlling each other to prevent abuse of authority. The constitution defines the duties and powers of each branch, making the rulers' authority lawful. Importantly, the constitution does not necessarily eliminate Taliban control. They can maintain influence by partaking in constitutional drafting and preserving desired structures. Extensive changes to their current power may not be needed if core Taliban interests are maintained in the constitution. This may actually increase its legitimacy.

Indonesia's gradual transition to democracy highlights how progress can occur under a constitution despite dominant factions holding sway.<sup>306</sup> After Suharto's autocratic rule ended, Indonesia retained military and ruling party influence but enacted political and economic reforms, showing a potential path for Afghanistan.<sup>307</sup>

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<sup>305</sup> See Muhammad Guntur, *Implementation of Good Governance Principles Based on Transparency, Accountability and Public Participation in Indonesia*, ADRI INT'L CONF. SERIES 554, 555, <http://eprints.unm.ac.id/5808/78/73-Guntur.pdf> [<https://perma.cc/BA7K-FBDG>] (last visited Sept. 25, 2024).

<sup>306</sup> See Muhammad Bahrul Ulum, *Indonesian Democracy and Political Parties After Twenty Years of Reformation: A Contextual Analysis*, 3 INDON. L. REV. 29, 32 (2019).

<sup>307</sup> See Hasti HassanZada, *Chura Indonesia Peshraft Kard? [Why Did Indonesia Progress?]*, PJ MAG. (Feb. 19, 2020), <https://payju.ir/content/%DA%86%D8%B1%D8%A7-%D8%A7%D9%86%D8%AF%D9%88%D9%86%D8%B2%DB%8C-%D9%BE%DB%>

Additionally, Malaysia's former Prime Minister Mahathir Mohammad emphasized modernization alongside religious principles, investing in people's skills, and negotiation over violence as keys to Malaysia's success.<sup>308</sup> This provides guidance for Afghanistan to enact reforms while preserving Taliban participation.

Therefore, adopting a constitutional framework can regulate Taliban power lawfully, institute accountable governance with checks and balances, and enable gradual progress—with the Taliban playing a central role. The focus is controlled participation, not total removal of their influence.

*b. Incorporates Islamic Principles and Values*

The adoption of a constitution presents an opportunity for Afghanistan to promote modernization and development while upholding Islamic principles. With proper foundations, Afghanistan can pursue reform through constitutional means coherent with its spiritual identity and traditions.

Afghanistan needs a constitution that incorporates modern values in harmony with the principles and values of Islam. As the cases of Indonesia and Malaysia demonstrate, Muslim-majority nations can achieve progress by grounding constitutions in both Islamic ethics and contemporary norms.

Indonesia provides a model of democratic progress under an inclusive constitutional framework. After transitioning to democracy in 1998, Indonesian leaders brought diverse voices into a consultative drafting process.<sup>309</sup> This established protection for religious freedom and minority groups while mandating democratic reforms, giving the constitution legitimacy.<sup>310</sup> Since then, Indonesia has made strides in democracy and the economy under constitutional guarantees of healthcare and education aligned with Islamic values.<sup>311</sup>

Similarly, Malaysia overcame divisions to develop under a framework balancing faith-value with governance, rights protections, and economic advancement.<sup>312</sup> Malaysia's constitution promotes Malay culture alongside modern pluralism.<sup>313</sup> Its inclusive political framework has led to economic growth and electoral democracy.<sup>314</sup>

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8C%D8%B4%D8%B1%D9%81%D8%AA-%DA%A9%D8%B1%D8%AF%D8%9F [https://perma.cc/FY8W-4UMH].

<sup>308</sup> Mahdi Ghani, *Chera Malezi Pishrafat Kard? Negaahi beh Rahe Tay Shodeh dar Malezi* [Why Did Malaysia Progress? A Look at the Path Taken in Malaysia], PARSINE (Nov. 23, 2018), <https://www.parsine.com/%D8%A8%D8%AE%D8%B4-%D8%B3%DB%8C%D8%A7%D8%B3%D8%AA-106/12574-%DA%86%D8%B1%D8%A7-%D9%85%D8%A7%D9%84%D8%B2%DB%8C-%D9%BE%DB%8C%D8%B4%D8%B1%D9%81%D8%AA-%DA%A9%D8%B1%D8%AF-%D9%86%DA%AF%D8%A7%D9%87%DB%8C-%D8%A8%D9%87> [https://perma.cc/XDA4-7CLS].

<sup>309</sup> HassanZada, *supra* note 307.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> See Ghani, *supra* note 308.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

The experiences of Indonesia and Malaysia highlight pathways for constitutional development in Afghanistan. When crafted inclusively, constitutions can confer legitimacy and progress while upholding religious principles.

By learning from regional models, Afghanistan has an opportunity to enact a constitution reflecting its traditions, therefore paving the way for the way for a more just, prosperous, and democratic future.

*c. Honors Islamic Heritage and Afghan Identity*

With over 99% of Afghans identifying as Muslim, Islam has profoundly shaped the nation's culture and values over centuries.<sup>315</sup> At the same time, Afghanistan is home to a variety of ethnic groups, languages, and beliefs.<sup>316</sup> The constitution must recognize this complex national identity. By enshrining Islamic principles while promoting inclusivity and progress, the constitution can unite Afghans in building a more just and stable shared future.

First and foremost, the constitution must reflect that Afghanistan is an Islamic country where most people are Muslims with strong Islamic beliefs. Islam should play a fundamental role in the constitution, with its foundations based on Islamic law. Many social norms and rules of conduct in Afghanistan originate from religious principles rather than legal dictates.<sup>317</sup> For instance, Islamic teachings against stealing and lying govern social relations. The constitution should build upon these ingrained values to be effectively implemented.

Furthermore, the constitution must make room for the diversity of perspectives within Islam itself in Afghanistan. Different Islamic sects like Shia and Sunni play major roles, while religious minorities including Hindus and Sikhs are also present.<sup>318</sup> Their views on religious issues need recognition in the constitution. More broadly, respect for all languages and cultures in the nation should be promoted.

Looking ahead, the constitution must prevent division and promote unity and equal opportunities for citizens. Core freedoms must be upheld within an Islamic framework. It needs to adeptly address critical matters like the flag, anthem, and

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<sup>315</sup> *Afghanistan Population 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/afghanistan-population> [<https://perma.cc/KUK6-7P4M>] (last visited Sept. 25, 2024).

<sup>316</sup> OFF. OF INT'L RELIGIOUS FREEDOM, 2020 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: AFGHANISTAN 4, 16 (U.S. Dep't of State 2021), <https://www.state.gov/reports/2020-report-on-international-religious-freedom/afghanistan/> [<https://perma.cc/2DUD-CB42>].

<sup>317</sup> Charles H. Norchi, *The Path of the Law in Afghanistan: From Custom to Code*, UNIV. ME. SCH. L. (May 9, 2019), <https://mainelaw.maine.edu/faculty/the-path-of-the-law-in-afghanistan/> [<https://perma.cc/6T45-CPBF>].

<sup>318</sup> NIALA MOHAMMAD & ZACK UDIN, RELIGIOUS MINORITIES IN AFGHANISTAN 1–2 (U.S. Comm'n Int'l Religious Freedom 2021), <http://www.uscirf.gov/sites/default/files/2021-10/2021%20Factsheet%20-%20Religious%20Minorities%20in%20Afghanistan.pdf> [<https://perma.cc/87XC-5D6G>].

official religion and languages. The failures and successes of the previous constitution and the Malaysian approach should inform this process.

Therefore, Afghanistan's new constitution will carry the profound duty of honoring the nation's Islamic heritage while fostering inclusivity of all Afghans.

## 2. Messaging Benefits

Messaging will be key to generating widespread public support for Afghanistan's new constitution. Strategic communications emphasizing the benefits of the constitution can help secure buy-in across all segments of society, including the Taliban. Effective messaging should highlight both collective and individual advantages.

On a national level, the constitution can be framed as bringing stability and unity. It provides a common foundation for Afghanistan's future development and prosperity. Moreover, the constitution can enshrine Islam as the national religion and protect Afghan cultural identity, countering fears of erosion through external influence.

Additionally, for individual citizens, the constitution should guarantee fundamental rights like free speech, education, and equal protection under the law. It should allow people from all backgrounds to participate in civil society and have a political voice through voting and representation. Furthermore, the constitution will empower citizens and constrain government abuses of power.

Consequently, by communicating these national and individual benefits, the public can be mobilized behind the constitution as a unifying force. This messaging should emphasize how the constitution will uphold Islamic principles while embedding reforms to benefit all Afghans. Building this national consensus is essential for enduring stability and democratic progress. With strategic messaging, the Taliban and other groups can potentially be persuaded that the constitution protects what they value, prevents domination by others, and provides a path for reconciliation.

However, similar messaging in the past has failed to convince the Taliban to accept constraints on power. As extremists unwilling to compromise control, benefits-focused communication alone is inadequate without accountability.

Therefore, messaging should couple with diplomatic mechanisms like aid conditionality, economic sanctions, and transitional power-sharing structures to directly incentivize and pressurize Taliban cooperation on reforms. Both "carrots and sticks" are necessary, as relying purely on verbal persuasion rarely sways uncompromising authoritarian regimes. The following Sections will detail related messaging:

### *a. Brings Stability and Accountability*

A core message should emphasize how the new constitution will provide much-needed stability for Afghanistan after decades of conflict. In particular, the constitution can promise to uphold law and order through formal state institutions and

checks on government powers. With an established legal process, arbitrary rules and corruption can be prevented.

Additionally, setting clear procedures for future elections will allow regular, peaceful transfers of power. Furthermore, explicitly detailing qualifications and processes for appointing and dismissing government officials adds accountability. For example, outlining merit-based criteria for ministerial and judiciary appointments based on technical expertise limits patronage. Without defined appointment procedures, officials right now can install cronies and loyalists in key positions on personal whims, like recently replacing a mayor with a police chief.<sup>319</sup>

Similarly, spelling out impeachment processes based on performance metrics or legal violations provides accountability if officials overstep boundaries. Such transparent, strictly delineated appointment and dismissal procedures constrain the ability of leaders to act on personal whims or self-interests.

By outlining the roles and limits of institutions like the courts, police, and legislature, the constitution brings predictability and consistency to governance which is sorely lacking under the current Taliban regime.

#### *b. Brings Economic Growth and Sovereignty*

The constitution can also be promoted as laying the groundwork for Afghanistan's future prosperity and self-sufficiency. Specifically, with stability and formal institutions, the country becomes more attractive for national and international investment and development aid.<sup>320</sup> The economy can begin to grow sustainably. In addition, the constitution can mandate oversight of natural resources to ensure profits benefit the public good rather than narrow elite interests.<sup>321</sup> However, those currently in power may resist ceding control of lucrative sectors. Therefore, independent regulatory bodies should have gradual power transitions, allowing incumbent leaders economic autonomy in domains like security while instituting transparency and accountability reforms in areas like infrastructure, services, and provincial governance. If resistance persists, access to aid and sanctions relief can further incentivize acceptance of diluted authority.

Moreover, establishing secure property rights encourages local entrepreneurship and educated Afghans from the diaspora may return to participate in a thriving economy. Trade relationships can also be developed from a position of sovereignty

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<sup>319</sup> *Islamic Emirate Brings New Appointments*, TOLONews (Jan. 5, 2024), <https://tolonews.com/index.php/afghanistan-186823> [<https://perma.cc/3NRU-8BX6>].

<sup>320</sup> Press Release, Security Council, Afghanistan's Future Depends on Taliban's Engagement with World, But Restrictions on Women Signal Lack of International Commitments, Briefer Warns Security Council, U.N. Press Release SC/15038 (Sept. 27, 2022).

<sup>321</sup> See generally Lynne O'Donnell, *'The Taliban Have Picked Up the Resource Curse,'* FOREIGN POL'Y (July 11, 2022, 2:19 PM), <https://foreignpolicy.com/2022/07/11/afghanistan-taliban-mining-resources-rich-minerals/> [<https://perma.cc/D79G-KDQC>].

rather than dependency. With political stability and growing leverage, the terms of partnerships will improve.

*c. Provides Protections in Taliban Interest*

To gain acceptance from the Taliban on constitutional reforms, messaging should emphasize protections for their core interests and values.

In particular, the constitution can enshrine Islam as the state religion and permit no law contrary to the Sharia. This helps mitigate Taliban anxieties about erosion of Islamic principles under a modern governance framework. Further accommodations like establishing a council of religious scholars to advise on legislative compliance with Islamic law can provide additional reassuring checks.

Additionally, while the Taliban announced amnesty and offered reconciliation to opponents, their own leaders and members still face international sanctions, travel bans, and potential war crimes charges.<sup>322</sup> Enshrining formal amnesty clauses in the constitution could provide a path for lifting these restrictions, contingent on meeting conditions for reforms and moderation. Communicating this incentive appeals to the Taliban interests in legitimizing and empowering their rule and protecting members.

Moreover, security of persons and property rights can be guaranteed for all law-abiding citizens regardless of political affiliation. There are more durable protections under formal legal state authority than reliance solely on force. Constitutional order can legitimize and consolidate the Taliban's power and security through official recognition and jurisdictional control versus needing to enforce authority solely through violence without checks.

Offering these explained assurances and participation incentives can ease the Taliban anxieties about loss of control while noting benefits. However, securing these protections requires embracing restraints on absolute power through checks and balances.

Finding equilibrium between Taliban interests and constraints is key to persuading their engagement on constitutional reforms.

### 3. Taliban Involvement

Involving the Taliban in the constitution-drafting process is critical for its legitimacy and successful implementation. Their involvement in the drafting process will build a sense of ownership and make the Taliban feel invested in the development of the foundational document.

More specifically, with direct participation, free from external interference, the Taliban will view the constitution as reflecting their interests and Afghan societal

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<sup>322</sup> Ayaz Gul, *Taliban Say Travel Ban Hurts Diplomacy and Dialogue With World*, VOICE OF AM. NEWS (Aug. 25, 2022, 8:01 AM), <https://www.voanews.com/a/taliban-say-foreign-travel-ban-hurdle-to-settling-issues-through-peaceful-means-/6716112.html> [<https://perma.cc/V86G-MGAV>].

values, not imported Western notions.<sup>323</sup> This participation should incorporate the Taliban perspectives on preserving Islamic principles, rights, legal systems, and other priorities.

Admittedly, compromises will be required even from the Taliban's standpoint, but a collaborative drafting process including legal experts, civil society, and the Taliban will produce a broadly agreeable supreme law.

Ultimately, Taliban participation reduces the risk of future resistance or rejection of the constitutional order.<sup>324</sup> This paves the way for gradual acceptance through consensus building. Taliban input makes them stakeholders in the new system. Specific methods for productive Taliban involvement include:

*a. Influence over Process and Contents*

Direct participation in drafting the constitution enables the Taliban to significantly shape its formation and contents as per their vision. With substantial representation and leverage, the Taliban can weigh in on defining the future system of governance, power division, rights protections, and other critical frameworks to align with Islamic principles.

At the same time, other influential groups and experts will also provide input during the consultative process. Compromise and reconciliation of disparate perspectives will be required, with debate resolved through applying Sharia law and contemporary governing norms.

As evidenced during initial 2001 Bonn Agreement negotiations, Taliban non-participation in framing Afghanistan's governance foundations sowed seeds for later insurgency and turmoil after feeling excluded.<sup>325</sup>

Now is the time for an inclusive process where the Taliban, as the dominant power, have a responsibility to incorporate perspectives from across Afghan society—including ethnic minorities, women, and civil society.

Total control, either by the Taliban or by other parties, risks provoking violent opposition and charges of illegitimacy regardless of the constitution's contents, as shown in the insurgency post-2001.<sup>326</sup>

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<sup>323</sup> Aaron Y. Zelin, *New Release From the Islamic Emirate of Afghanistan: "Full Text of Statement Delivered By the Delegation of the Political Office In the International Pugwash Research Conference,"* JIHADOLOGY (May 5, 2015), <https://www.jihadology.net/2015/05/05/new-release-from-the-islamic-emirate-of-afghanistan-full-text-of-statement-delivered-by-the-delegation-of-the-political-office-in-the-international-pugwash-research-conference/> [<https://perma.cc/HZG5-EQ8Q>].

<sup>324</sup> *See id.*

<sup>325</sup> MARK FIELDS & RAMSHA AHMED, A REVIEW OF THE 2001 BONN CONFERENCE AND APPLICATION TO THE ROAD AHEAD IN AFGHANISTAN 19 (Inst. Nat'l Strategic Stud. 2011), <https://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-8.pdf> [<https://perma.cc/RW4S-6LCB>].

<sup>326</sup> *See id.* at 2, 19, 22.

While compromise may seem impossible on core issues, even small Taliban gestures towards inclusion and willingness to understand opposing views can build vital trust needed to contain conflict. The theory of “constitutional deferral” can be a good strategy to use with respect to some issues.<sup>327</sup> The goal should be laying groundwork for peaceful evolution through patience and sustained political engagement with all Afghans over the long-term. This inclusive approach provides the only viable path to broad-based stability.

Therefore, the end result, though not an unfettered Taliban constitution, can incorporate many of their priorities and desires within an adapted structure. A constitution drafted in this way, accounting for realities on the ground and modern governance needs, has immense potential to bring greater stability to Afghanistan.

Ultimately, the key to securing Taliban buy-in is their leadership feeling that the supreme law reflects their consultation and influence. Their active involvement in deliberations and drafting is more likely to garner their acceptance and ownership than if dictated externally.

*b. Leverage Allies in Religious Circles*

The Taliban can leverage allies and religious institutions to facilitate acceptance of the constitution and marginalize extremist voices. Specifically, by participating in the constitution drafting process, the Taliban can leverage respected religious scholars they trust. On contentious issues and matters related to international principles, they can benefit from clerics’ advice, which can enrich the law and facilitate its implementation. Specifically, the Taliban can involve prominent religious scholars with expertise on legal and global political affairs in formulating the constitution within a set mechanism, as the Islamic Republic of Iran did during the adoption of its constitution in 1979.<sup>328</sup>

Additionally, to ascertain whether the constitution contradicts Islamic law, initial drafts may be submitted to esteemed institutions in the Islamic community for endorsement or validation.

Similarly, soliciting opinions from the public, scholars, and communities through religious-academic centers and universities can be very effective. In this manner, the Taliban can build a societal-religious consensus to authorize the constitution and keep hardliners out of the drafting process.

Therefore, substantial Taliban involvement in drafting Afghanistan’s new constitution provides immense potential benefits. Their representation in shaping the

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<sup>327</sup> Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 637–38 (2011).

<sup>328</sup> *Panj Gam Dar Tadween Qunun Asasi Jomhori Islami [Five Steps in the Drafting of the Constitution of the Islamic Republic]*, IRAN HUM. RTS. (Apr. 23, 2021), <https://iranhr.net/fa/articles/4711/> [<https://perma.cc/F2KV-9WX6>].

constitution can lend greater legitimacy among their followers for gradual implementation. Taliban perspectives will directly inform solutions reflecting Afghanistan's realities. Leveraging religious allies and institutions can further build support and marginalize obstructionists.

#### 4. Utilizing Local Customs

Afghans have strong traditions and value long-held social norms, so grounding the constitution in these local values will make it more acceptable to the populace. For example, practices like Jirgas and Shuras<sup>329</sup> are influential in many Afghan communities.<sup>330</sup> Provisions allowing some matters to be settled at the local level through these traditional structures, as appropriate, could be incorporated into the judicial system outlined in the constitution. However, certain discriminatory customs regarding women's rights or minority groups will likely need to evolve.<sup>331</sup>

More broadly, the constitution will need to reflect Islamic principles and accommodate Afghan cultural values like hospitality, respect for elders, and community solidarity.<sup>332</sup> Including respected Islamic scholars and local leaders directly in the drafting process can help ensure it resonates with the people. At the same time, careful consideration must be given to balancing local pragmatism with establishing core human rights, freedoms, and institutions that align with international norms.

The constitution drafting process should be led by Afghans who understand the native context and culture.<sup>333</sup> However, discreet consultation with international experts could provide helpful perspective on global standards and precedents while avoiding imposition of external solutions. Overall, a constitution grounded in Afghan Islamic values and local customs but also laying the framework for an inclusive, just society has the best chance of gaining legitimacy and stability.

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<sup>329</sup> Sulaiman Sheu Adua & Moshood Olayinka Salahu, *The Islamic Shura System and the Western Democratic Process: A Debate*, 7 POL. SCI. REV. 97, 110 (2016).

<sup>330</sup> See Jawed Nader & Fleur Roberts, *Inclusive Local Peacebuilding in Afghanistan: Lessons From Practice*, 27 ACCORD 1, 80–81, 92 (2018).

<sup>331</sup> *Huquoq Asasi Sharwandan Dar Quanoun Asasi (Qesmate Panjum)* [Fundamental Rights of Citizens in the Constitution (Part Five)], HASHT-E-SUB DAILY (Dec. 29, 2008), <https://8am.media/fa/%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D8%B3%D8%A7%D8%B3%DB%8C-%D8%B4%D9%87%D8%B1%D9%88%D9%86%D8%AF%D8%A7%D9%86-%D8%AF%D8%B1-%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D8%B3%D8%A7%D8%B3%DB%8C-%D9%82%D8%B3%D9%85-3/> [https://perma.cc/LUR2-6HW3].

<sup>332</sup> See HAMID M. KHAN, ISLAMIC LAW, CUSTOMARY LAW, AND AFGHAN INFORMAL JUSTICE 2–3, 2 n.9 (U.S. Inst. of Peace, Spec. Rep. No. 363, Mar. 2015), <https://www.usip.org/sites/default/files/SR363-Islamic-Law-CustomaryLaw-and-Afghan-Informal-Justice.pdf> [https://perma.cc/2665-QSUY].

<sup>333</sup> See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, WHAT WE NEED TO LEARN: LESSONS FROM TWENTY YEARS OF AFGHANISTAN RECONSTRUCTION 70–81 (2021), <https://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf> [https://perma.cc/RS68-9S9W] (explaining how U.S. ignorance of the Afghan culture and context led to its failure at Afghan reconstruction).

*a. Leverage Traditional Afghan Governance Mechanisms*

Afghanistan has long-standing traditional governance structures that carry weight and legitimacy at the local level. While a modern state requires proper government institutions, the new constitution could acknowledge and incorporate these traditional mechanisms to some degree.

For example, Jirgas and Shuras allow village elders and religious scholars to resolve disputes through consensus.<sup>334</sup> Permitting local matters and minor civil disputes to be settled through Jirgas and Shuras formally recognized under law could ease the burden on the court system.<sup>335</sup> This traditional conflict resolution aligns with the Afghan cultural preference for communal solutions. The constitution could also mandate that the central government must consult Loya Jirgas (grand assemblies) on matters of national importance.<sup>336</sup> Historically, the Loya Jirga has represented the voice of the people on critical issues when convened.<sup>337</sup> Requiring their input on declarations of war, amendments to the constitution, or major policy changes affirms traditional consultative processes.<sup>338</sup>

However, care must be taken to codify guidelines on the limits of traditional mechanisms, protecting human rights and aligning with the formal justice system. Overall, leveraging institutions like Jirgas, Shuras, and Loya Jirgas shows respect for Afghan heritage while utilizing communal governance familiar to local communities. This nod to tradition can aid decentralization and nationwide acceptance of the constitution.

*b. Build Consensus with Religious Leaders*

As an Islamic society, it will be crucial to consult and gain the support of religious scholars and leaders in drafting the new constitution. Doing so will lend the constitution greater legitimacy in the eyes of the heavily religious population.<sup>339</sup> Councils of ulema should be organized to debate and provide guidance on ensuring the constitution complies with Islamic principles. Representatives from all Islamic sects and schools of thought should have seats at the table to build broad consensus.

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<sup>334</sup> See NOAH COBURN & JOHN DEMPSEY, INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN 2–3, 9–10 (U.S. Inst. of Peace, Spec. Rep. No. 247, Aug. 2010), [https://www.usip.org/sites/default/files/resources/sr247\\_0.pdf](https://www.usip.org/sites/default/files/resources/sr247_0.pdf) [<https://perma.cc/LCS5-ME3C>].

<sup>335</sup> See *id.* at 2–3.

<sup>336</sup> Babar Shah, *Loya Jirga and the Present Day Afghanistan*, 20 STRATEGIC STUD. 146, 148–49 (2000).

<sup>337</sup> SCOTT S. SMITH, LOYA JIRGAS AND POLITICAL CRISIS MANAGEMENT IN AFGHANISTAN: DRAWING ON THE BANK OF TRADITION 4–5 (U.S. Inst. of Peace, Spec. Rep. No. 457, Sept. 2019), <https://www.usip.org/publications/2019/09/loya-jirgas-and-political-crisis-management-afghanistan-drawing-bank-tradition> [<https://perma.cc/A9P8-MQ9M>].

<sup>338</sup> THE 2004 AFGHANISTAN CONSTITUTION, *supra* note 41, arts. 64, 110–13.

<sup>339</sup> See 2021 AFGHANISTAN REPORT, *supra* note 14, at 5–6.

Their input will help address thorny questions on the role of religion in governance. Gaining the approval and the issuance of Fatwas<sup>340</sup> from respected religious authorities in support of the constitution can persuade the faithful to accept its tenets. Their critiques should also be sought out and addressed transparently through additional debate and revisions.

However, religious leaders alone cannot dictate the constitutional framework. Lawmakers' expert views must also be heard. With good faith discussions and willingness to find common ground, an equilibrium can be forged between Islamic values, local traditions, and modern governance.

Consulting widely with ulema while keeping the talks inclusive will incorporate religious perspectives without allowing undue influence. This balance and pluralistic process can produce a constitution that is both workable for the state and acceptable to the people of all backgrounds.

*c. Avoid the Impression of Imposing Foreign Values/Institutions*

There is a strong distrust among Afghans of foreign interference and influence imposing external governance models or social values upon the country. The constitution-drafting process must be seen as homegrown and free of any domination if it is to gain legitimacy. The Taliban Foreign Minister asked foreign countries to not "give prescriptions for the formation of a government in Afghanistan."<sup>341</sup> To achieve this, Afghan experts should lead in writing the text and shaping the form of government. International advisors may provide technical guidance, but foreign officials should not directly determine provisions. The U.N. and other global bodies can play a facilitative role, but the substance must remain in Afghan hands.

Terminology and governmental structures outlined should connect to local values and history where possible, rather than duplicating Western-style democracy verbatim.<sup>342</sup> Adaptations may be required to ensure cultural resonance. Afghanistan

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<sup>340</sup> "Sharia is also the basis of legal opinions called fatwas, which are issued by Muslim scholars in response to requests from individual Muslims or from governments seeking guidance on a specific issue." Kali Robinson, *Understanding Sharia: The Intersection of Islam and the Law*, COUNCIL ON FOREIGN REL. (Dec. 17, 2021, 2:00 PM), <https://www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law> [<https://perma.cc/7MY9-4T5G>].

<sup>341</sup> Associated Press, *Russia Hosts Taliban for Talks on Regional Threats and Says It Will Keep Funding Afghanistan*, NBC NEWS (Sept. 30, 2023, 4:06 AM), <https://www.nbcnews.com/news/world/russia-taliban-afghanistan-talks-funding-aid-sharia-law-rcna118195> [<https://perma.cc/8F98-ALEQ>]; Ariana News, *Amir Khan Muttaqi Speaking at the Moscow Format Meeting*, YOUTUBE (Sept. 29, 2023), <https://www.youtube.com/watch?v=Blz5MDsS99M> [<https://perma.cc/CV5T-4JRR>].

<sup>342</sup> See Hanna Ingber, *Afghans Share Their Views on the West's Influence*, N.Y. TIMES (Aug. 23, 2013), <https://www.nytimes.com/2013/08/23/world/asia/afghans-share-their-views-on-the-west-s-influence.html> [<https://perma.cc/734Q-WQ23>], for a discussion of Afghans' views on the West's influence on Afghanistan.

undoubtedly needs assistance going forward. However, the constitution itself must be written by and for Afghans if it is to be embraced.

*d. Something Is Better Than Nothing*

After decades of instability and conflict, Afghanistan has an opportunity to make real progress through this constitutional process. However, expectations must be realistic. Revolutionary change overnight is unlikely. Rather than seeking an idealized document, the constitution should focus on making concrete incremental improvements that can be built upon gradually.

The constitution does not need to solve everything immediately. It can protect basic rights and core freedoms first while leaving more contentious issues for future evolution through amendments. A flexible, living document is preferable to rigid permanence.

Similarly, the structures of governance do not need to be perfect from the outset. As long as foundations are established for representation, rule of law, and civil society participation, the system can mature over time. Some continuity and compromise with existing institutions may be necessary for short-term stability. The constitution can preserve what works while instituting needed reforms.

With wisdom and patience, a constitution that makes measured progress will allow Afghanistan to heal, adapt, and navigate the challenges ahead. Something is certainly better than nothing, and, indeed, the long path to prosperity begins with a first step.

*e. Position Limited Reforms as Preferable to Isolation*

Without signaling a willingness for even limited reforms aligning with international rights norms, Afghanistan faces deepening global isolation under Taliban rule. Restrictions directly violating universal values cements pariah status.

Constitutionally embedding at least incremental improvements however can retain connections vital for aid and legitimacy. For example, making modest education access improvements while retaining segregation practices demonstrate balancing continuity with gradual evolution.

Messaging these small reform efforts as good faith, if imperfect, steps show awareness of international obligations. Constraining the most extreme elements can reduce external sanctions over time, even if more progress remains needed.

Therefore, the supreme law of Afghanistan should outline measurable human rights upgrades compatible with Afghan values, even through phased stages. This representation of directional change risks less isolation than constitutional stagnation without concession. Some change matures responsibility, total refusal receives condemnation.

## IV. ANTICIPATING POTENTIAL OBJECTIONS

The proposed constitutional framework for Afghanistan is likely to face a range of criticisms from various sides. Conservative Islamist groups might object that the framework contradicts their strict religious principles and desire for unconstrained theocratic rule. They want absolute supremacy of their rigid interpretation of Sharia law without concessions to modern norms or women's rights. On the other side, reformists and democratic groups may contend the framework enables Taliban oppression while lacking adequate protections for citizens' rights and freedoms, especially for women and girls. They may advocate substantive reforms and inclusion of democratic processes like legitimate elections. They also may express concerns about the influential role given to conservative religious clergy who could impose harsh policies on women, minorities, and others. While arising from divergent perspectives, the shared concerns revolve around rights, freedoms, legitimacy, and religion's role. Building consensus amid such polarized views remains challenging but vital for moving forward.

*A. Religious Conservatives/Taliban*

The Taliban, as devoted defenders of strict Sunni religious principles, will likely raise numerous objections to provisions they view as contravening Islamic law or granting excessive freedoms.

Given the Taliban's current power and rigid doctrinal perspectives, they may strongly oppose any perceived dilution of "pure Islamic governance." Their preference for unconstrained religious authority clashes with concessions to modern norms.

In particular, the Taliban's objections may center on matters of religious law, social policies, women's rights, political participation, and minority protections. They are skeptical of claims that compromises can be made without undermining core Islamic values.<sup>343</sup> As sincere believers, they see unrestrained enforcement of Sharia and the Taliban control as religious imperatives, not negotiable policy questions.

The following objections acknowledge the Taliban's devout motivations, even if their desired governance may seem excessive or intolerant to outsiders. The aim is direct engagement, not dismissal of their sincerely held views.

Responses will substantively address concerns and risks raised regarding contravention of religious dictates. They will convey how the framework attempts to strike a pragmatic balance between religious foundations and functional governance given current realities.

While the Taliban may oppose any dilution of their interpretation of Islam, the goal is finding potential common ground that moves toward stability and citizen

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<sup>343</sup> LOMBARDI & MARCH, *supra* note 122, at 2.

well-being within unavoidable constraints. But their principles and objections cannot be ignored if progress is to be made.

### 1. Limiting the Power of the Amir

The first objection that the Taliban and their like-minded supporters may raise is that enacting a constitution with the participation of other groups and institutions could in some way undermine the power and authority of the Amir. They may argue from a religious standpoint that the Amir, as the overall leader of the Muslims, should have ultimate power in all affairs of state in order to properly implement Islamic principles and Sharia.<sup>344</sup>

However, this view is not aligned with the example set by the Prophet Mohammad in the Medina Charter, where he granted rights and collective defense to non-Muslim groups, unifying a diverse community under Islam.<sup>345</sup> This shows that even Islam's founder compromised and took other groups into account when doing so served the stability of the community.

So, while the Taliban may oppose sharing power, the precedents set in Islamic history illustrate that limitations and consensus may be necessary for stable governance. Setting defined constraints on the Amir's powers would not diminish their authority but rather promote legitimacy.

To clarify, introducing judicious checks and balances on the Amir would restrict total unilateral control in some respects. However, this reduction of absolute power can strengthen legitimacy, stability, and good governance—which bolsters sustainable authority through public support versus relying purely on force or supremacy claims.

Therefore, while direct power is partially limited through accountability measures, the Amir's influential capability and mandate strengthens through consent of the governed.

### 2. Undermining Core Islamic Values

The Taliban frequently argue that the Quran and Hadith provide guidance for all aspects of social life.<sup>346</sup> Therefore, the constitutional framework's limitations on

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<sup>344</sup> Hailan Salamun & Asyraf Ab Rahman, *Leadership Values and Understandings from an Islamic Perspective*, in 1 LEADERSHIP IN A CHANGING WORLD—A MULTIDIMENSIONAL PERSPECTIVE 63, 63–64 (Muhammad Mohiuddin et al. eds., 2022).

<sup>345</sup> See Sean William White, *Medina Charter of Prophet Muhammad and Pluralism*, ISLAMICITY (Sept. 27, 2022), <https://www.islamicity.org/5685/medina-charter-of-prophet-muhammad-and-pluralism/> [<https://perma.cc/XT8K-GZSJ>]; see also Yetkin Yildirim, *The Medina Charter: A Historical Case of Conflict Resolution*, 20 ISLAM & CHRISTIAN-MUSLIM RELS. 439, 439 (2009).

<sup>346</sup> Eric Patterson, *The Taliban and "Sovereignty": Popular vs. Divine*, RELIGIOUS FREEDOM

governmental power could potentially impact Islamic values. Among the issues that the Taliban may regard as contrary Islamic values are the granting of particular individual freedoms, checks and balances, and elections. Under such a constitution, the populace may elect representatives who fail to meet the Islamic qualifications for leadership, thus undermining Islamic guidance and values.

Similarly, granting women specific freedoms and permitting their participation in societal affairs or election to leadership positions would likely be deemed contrary to Islamic Sharia law.<sup>347</sup>

However, the proposed framework has been carefully constructed to interpret Sharia in a suitably open manner, without necessarily imposing all Western norms. Standards may be incorporated that complement international norms while avoiding overt conflict with Sharia tenets. With wisdom, the constitution need not come at the expense of Sharia properly understood. For instance, similar to Iran's approach,<sup>348</sup> qualified individuals approved by a competent and impartial commission<sup>349</sup> could be nominated for election to key positions thereby addressing possible concerns regarding the election of inadequately qualified leaders. With respect to the issue of women in leadership roles, there are differing perspectives in Islamic Sharia and some erudite scholars contend that women can be appointed to any leadership position.<sup>350</sup> As an initial measure, women could be placed in roles where there is no explicit Sharia prohibition.<sup>351</sup> For example, religious conservatives frequently argue that women's putative propensity for excessive compassion could impair their ability to render dispassionate judgement.<sup>352</sup> While there is no credible scientific evidence for this claim,<sup>353</sup> a compromising constitution might prohibit the appointment of women as criminal court judges, while permitting their appointment as civil, commercial, or other non-criminal judges, bolstering female participation in leadership roles while minimizing conflict with traditionalist Islamic principles.

More generally, there is considerable support in Islamic history for flexibility and innovation in governance. As contemporary scholars have discussed, there is significant dispute regarding what practices actually derive from fundamental Islamic

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INST. (Sept. 9, 2021), <https://religiousfreedominstitute.org/the-taliban-and-sovereignty-popular-vs-divine/> [https://perma.cc/YL6X-GQJZ].

<sup>347</sup> John R. Allen & Vanda Felbab-Brown, *The Fate of Women's Rights in Afghanistan*, BROOKINGS (Sept. 2020), <https://www.brookings.edu/articles/the-fate-of-womens-rights-in-afghanistan/> [https://perma.cc/Q8YS-BBFQ].

<sup>348</sup> THE IRAN CONSTITUTION, *supra* note 286, art. 110(9).

<sup>349</sup> *Id.*

<sup>350</sup> Maliha Marri, *Muslim Female Leadership 20–23* (May 2011) (Ph.D. dissertation, Pepperdine University), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1129&context=etd> [https://perma.cc/2XLR-6N8U].

<sup>351</sup> *See id.* at xi, 52.

<sup>352</sup> *See generally id.* at 30.

<sup>353</sup> *See id.* at 30, 95.

foundations versus merely from local cultural norms and traditions.<sup>354</sup> For instance, while the Taliban banned television in the 1990s as supposedly prohibited under Islam, they now oversee media outlets as part of governance,<sup>355</sup> suggesting such prohibitions reflect cultural influences more than immutable Sharia principles.

Therefore, a thoughtful examination of the plurality of Islamic jurisprudential perspectives, historical practices, and scholarly interpretations is prudent, rather than a restrictive approach failing to differentiate temporal traditions and timeless Islamic canon.

### 3. Excessive Compromise in Applying Sharia Law

The Taliban may argue this framework pushes excessive flexibility on issues like human rights, therefore undermining Sharia rules. They may contend unhindered Sharia application in all governance aspects is non-negotiable. For example, the Taliban are likely to protest that accepting the constitution means refusing to enforce the Sharia punishments, like Hudood, that Islam requires.<sup>356</sup>

However, differences in interpreting Sharia have always existed among jurists.<sup>357</sup> Consultation and reasoned pluralism in applying Sharia is accepted in Islamic jurisprudence.<sup>358</sup> As jurist Imam Shafi'i demonstrated in revising some opinions across regions,<sup>359</sup> positions on derivative Sharia matters can adapt to evolving contexts.<sup>360</sup> Similarly, scholar Ibn Qayyim affirmed respecting differences between eminent jurists.<sup>361</sup> This shows flexibility is reasonable.

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<sup>354</sup> Robinson, *supra* note 340.

<sup>355</sup> Weeda Mehran, *The Evolution in the Taliban's Media Strategy*, GEO. WASH. UNIV. PROGRAM EXTREMISM (Aug. 18, 2022), <https://extremism.gwu.edu/evolution-in-taliban-media-strategy> [https://perma.cc/77P6-SJVE].

<sup>356</sup> A.A. Mansour, *Hudud Crimes (From Islamic Criminal Justice System)*, NCJRS VIRTUAL LIBRARY, U.S. DEP'T OF JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/hudud-crimes-islamic-criminal-justice-system-p-195-201-1982-m> [https://perma.cc/8DUD-ZXH5] (last visited Sept. 25, 2024).

<sup>357</sup> Jan Michiel Otto, *Introduction: Investigating the Role of Sharia in National Law*, in *SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* 17, 23–24 (2010).

<sup>358</sup> *Id.* See generally Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT'L L. REV. 733, 734, 736 (2013); Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 INT'L J. CONST. L. 615, 615 (2013).

<sup>359</sup> Ahmed El Shamsy, *Rethinking "Taqīd" in the Early Shāfi'ī School*, 128 J. AM. ORIENTAL SOC'Y 1, 8 (2008).

<sup>360</sup> *Shafi'i Madhab: History, Principles, and Contemporary Influence in Islamic Jurisprudence*, AL-DIRASSA, <https://al-dirassa.com/en/shafii-madhab-history-principles-of-the-islamic-jurisprudence/> [https://perma.cc/X5NY-J3HH] (last visited Sept. 25, 2024).

<sup>361</sup> *Juristic Differences in Sharia*, EGYPT'S DAR AL-IFTA, <https://www.dar-alifta.org/en>

Regarding criminal penalties, this framework does not preclude Hudood punishments if strict conditions are diligently applied per Sharia rules and Prophetic guidance.<sup>362</sup> Issues of Qisas and Deyat can be addressed through Sharia.<sup>363</sup> Clear, specific, and humane Ta'zeer rules can be codified, similar to the previous Afghan criminal code.<sup>364</sup> Hence, fundamental Sharia tenets remain intact.

#### 4. Appeasing Western Influence over Islamic Principles

The Taliban may object to constitutional provisions like protections for women and minorities, elected representative bodies, dividing power (giving a role to political parties or minority groups), and checks on executive power as appeasing Western influence.

However, throughout history, Muslim leaders have selectively integrated useful governance principles from other cultures to benefit their societies while retaining Islamic foundations. For instance, during the Ottoman reforms of the 1800s, the empire adopted European-inspired changes like codifying laws, establishing provincial legislative councils, reforming education and taxation, and instituting public health policies.<sup>365</sup> This selective adaptation strengthened Ottoman governance and society while retaining the Islamic foundations of the state.<sup>366</sup>

Furthermore, Indonesia's constitution integrates "Pancasila principles"<sup>367</sup> of pluralism and democracy from diverse philosophies with Islamic precepts.<sup>368</sup> Articles upholding democratic elections, social justice, religious freedom, and human rights reflect beneficial aspects of various sources and adapt them into an Islamic framework.<sup>369</sup> These principles align with Islamic traditions of justice, accountability, and diversity.

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/article/details/76/juristic-differences-in-sharia [https://perma.cc/Z6KF-9D4T] (last visited Sept. 25, 2024).

<sup>362</sup> إدروا الحدود بالشبهات [No penalty [is given] on suspicious proof].

<sup>363</sup> See Nikhat Sattar, *Qisas & Diyat Laws*, DAWN (May 5, 2023), <https://www.dawn.com/news/1750977> [https://perma.cc/ZZ6X-JNB2].

<sup>364</sup> Code Jaza-e Afghanistan [Afghanistan Criminal Code] art. 1. (Oct. 7, 1976).

<sup>365</sup> STANFORD J. SHAW & EZEL KURAL SHAW, 2 HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY 68, 79, 99, 119 (1977).

<sup>366</sup> See generally FINDLEY CARTER VAUGHN, TURKEY, ISLAM, NATIONALISM, AND MODERNITY: A HISTORY, 1789–2007, at i, 8–9, 18 (2010); Miyase Yavuz Altıntaş, *Evolutionary Secularisation of the Ottoman Law in the Nineteenth Century: Roots and Implications*, 44 ESKİYENİ 385, 385, 389 (2021).

<sup>367</sup> PATRICK GREENWALT, INDONESIA'S PANCASILA 1 (U.S. Comm'n Int'l Religious Freedom 2021).

<sup>368</sup> Dewi Fortuna Anwar, *Indonesia's Democratization Underpinned by Major Islamic Groups and Consensus on National Ideology*, MIDDLE E. INST. (Feb. 26, 2019), <https://www.mei.edu/publications/indonesias-democratization-underpinned> [https://perma.cc/3PK9-ZFCL].

<sup>369</sup> See generally Undang-Undang Dasar Negara Republik Indonesia [Constitution of the Republic of Indonesia] arts. 6A, 28(A)–(J), Aug. 18, 1945.

Rather than appeasement, thoughtful integration of beneficial principles demonstrates wisdom and pragmatism. In contemporary times, inter-civilizational dialogue is encouraged by prominent statesmen, scholars, and international organizations over isolation and hostility. For example, former Iranian President Mohammad Khatami has written extensively on the importance of dialogue among civilizations.<sup>370</sup> The Taliban have an opportunity to pioneer a distinct constitutional model grounded in Sharia while embracing diversity and governance norms that strengthen Muslim society. Openness to different civilizations does not necessitate compromising Islamic identity but rather affirms historically Islamic principles of dialogue, wisdom, and unity.

### *B. Reformists*

The other group that will certainly raise numerous objections is the reformists and democratic activists. This diverse, educated group includes high-profile figures who have been advocates for modernization and democratization in Afghanistan over the past two decades.<sup>371</sup> While varying in specific viewpoints, most share goals of establishing inclusive governance, safeguarding human rights, promoting pluralism, empowering women, and reducing the influence of hardline Islamist factions.<sup>372</sup> They wield moral authority and have mobilized large segments of the population behind calls for accountability and participation.

This Section will outline some of their key legal, political, social, and cultural objections to the proposed framework. It also addresses each concern, conceding valid risks before explaining how the framework attempts to mitigate harms and make gradual progress within imposed constraints. The aim is to show good faith, engagement and find areas of common ground from which to build.

The responses do not dismiss all objections or claim the framework is a finished solution. Rather, they demonstrate how the proposal represents an incremental step forward from the current unstable status quo, establishing a base that can be improved through ongoing negotiation.

By delineating objections and limitations, the following discussion aims to illustrate that this modest framework is not a finished product, but one necessary

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<sup>370</sup> See Seyed Mohammad Khatami, *Dialogue Among Civilizations: Contexts and Perspectives*, 49 U.N. CHRON. (2012), <https://unchronicle.un.org/article/dialogue-among-civilizations-contexts-and-perspectives> [<https://perma.cc/DH79-7PVD>]; see also Solon Simmons, *The Aging of Empire and Future of the Inter-Civilization Dialogue*, AL JAZEERA (Sept. 29, 2019), <https://studies.aljazeera.net/en/reports/2019/09/aging-empire-future-inter-civilization-dialogue-190929093813064.html> [<https://perma.cc/2C77-6GXX>].

<sup>371</sup> See Cora Sol Goldstein, *The Afghanistan Experience: Democratization by Force*, 42 U.S. ARMY WAR COLL. Q.: PARAMETERS 18, 19 (2012).

<sup>372</sup> Timothy Nunan, *The End of Nation-Building*, NOEMA (Aug. 24, 2021), <https://www.noemamag.com/the-end-of-nation-building/> [<https://perma.cc/423Y-69XU>].

stage in a larger process of expanding rights and accountability over time. Its aim is imperfect progress rather than perfect solutions.

### 1. Empowering a Totalitarian Taliban Government

Some reformists and democratic activists will contend that this framework does not simply fail to guarantee rights and freedoms; rather, it actively reinforces the Taliban's dictatorial rule and extremist ideology. It destroys twenty years of struggle and progress in Afghanistan, converting a terrorist group into a legitimate government authority and rewarding their bloody and oppressive tactics. Compromising with the Taliban will further embolden their harsh policies and treatment of citizens.

This Article acknowledges the validity of concerns over empowering the Taliban and the group's abhorrent track record regarding human rights. However, the unfortunate reality is that the Taliban currently control Afghanistan, and this is unlikely to change in the near future absent a significant international intervention.

Given this reality, the choice becomes finding some way to improve citizens' lives under the Taliban rule versus sticking to principles and allowing total instability and injustice to continue unchecked. An imperfect legal framework represents a starting point that would bring some much-needed rights and basic stability to a truly terrible situation. Without such a framework, government plunder, violence, and unchecked Taliban abuses will continue to run rampant.

This initial framework does not justify the Taliban ideologically, legitimize their past actions, or proclaim their rule as ideal. However, it aims to make the best of difficult circumstances to achieve gradual improvements in citizens' rights and well-being. Some compromised progress is preferable to none, and the framework can be amended over time to incrementally raise standards.

### 2. Imposing Religious Law Risks Regressive Policies

Reformers and democratic activists might also argue that the proposed constitutional framework represents a surrender to theocratic government. Implementing the Taliban's harsh interpretation of religious law risks enacting regressive, antiquated policies that endanger the lives and livelihood for the Afghan people, especially women and minorities. It could send society backwards to seventh century thinking and standard of living, unable to address modern needs.

This Article understands the significant risks of allowing the Taliban to impose their rigid version of religious law without restraint. However, that is exactly what is happening now. The proposed framework does not advocate unchecked religious rule. Rather, it seeks to apply religious principles in a way that makes compromise and reconciliation possible while upholding basic international norms. The goal is to chart a middle path where religious rules are moderately applied but do not violate international standards. This allows for a nuanced integration of religious law

with modern principles, avoiding the extremes of either full religious control or complete secularism. The framework aims to balance religious and contemporary values for the benefit of all.

### 3. Excessive Influence of Conservative Clerics

Reformists may object to the influential role of conservative religious scholars in governance as proposed by this framework. They may argue these clerics could impose regressive policies, especially against women.

However, excluding any influential societal group, as Taliban clerics were in 2004,<sup>373</sup> can have disastrous consequences. The framework acknowledges their traditional role in Afghanistan while balancing it through checks on power to safeguard citizens' rights.

Specifically, constitutional limitations, institutional constraints, and mechanisms to ensure diversity and competence within decision-making bodies aim to include conservative perspectives in a way that prevents imposition of harsh policies. Rather than absolute exclusion or domination, the goal is balanced inclusion with protections.

### 4. Inadequate Protections for Rights and Freedoms

Reformists may critique inadequate protections for rights and freedoms compared to the past constitution. However, this framework does not claim to perfectly nor comprehensively safeguard rights given realistic constraints. Rather, it secures some initial privileges to break the current deadlock while leaving open potential for future improvements.

In essence, the framework represents a pragmatic starting point of imperfect but possible protections that can put Afghanistan on a path from standstill toward greater rights and accountability over time. It is an incremental step forward, not an outright solution. But it aims to make gradual progress by securing basic guarantees now and amending deficiencies through ongoing, inclusive negotiations as conditions allow.

## CONCLUSION

Afghanistan stands at a defining moment in its history. After decades of instability and conflict, the Taliban have returned to power. However, their current rule lacks constitutional foundations, judicial independence, and protections for citizens' rights. This volatile vacuum poses grave risks of oppression, factionalism, brain drain, and economic collapse.

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<sup>373</sup> JOHNNY WALSH, CONSTITUTIONAL REVIEW UNDER A PEACE AGREEMENT 1 (U.S. Inst. of Peace 2020), [https://www.usip.org/sites/default/files/Afghanistan-Peace-Process\\_Constitutional-Review-Under-a-Peace-Agreement.pdf](https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Constitutional-Review-Under-a-Peace-Agreement.pdf) [<https://perma.cc/LXU2-CWTF>].

Therefore, this Article argues that pragmatic constitutional reforms offer hopes of steering Afghanistan onto a more stable path. The lessons of Afghan history underscore that constitutions imposed by narrow interests and foreign governments quickly unravel. By contrast, broad participation in developing a moderate governance framework can foster greater inclusion and social cohesion.

The Article demonstrates that rule of law is not inherently incompatible with Islamic principles. Precedents from the Prophet's era through modern Muslim nations highlight pathways to integrate religious values with accountable institutions, rights protections, and democratic processes. With wisdom and patience, constitutional accommodation is possible.

By outlining a framework affirming Afghanistan's Islamic identity while incorporating participatory mechanisms and constraints on power, gradual positive change becomes attainable. This modest vision does not solve all challenges immediately. However, it offers a starting point to escape the cycle of dictatorship and instability. The perfect should not be the enemy of the good. This modest framework seeks benefit for all Afghans. Its principles of inclusion, accountability, and justice can breathe new life into a weary nation. Afghanistan stands at the dawn of a new constitutional era—if it has the wisdom to take this first step.