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State-building, lawmaking, and criminal justice in Afghanistan: a case study of the prison system's legal mandate, and the rehabilitation programmes in Pul-e-charkhi prison

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2 State-building, lawmaking, and criminal justice before and after the 2001 international intervention

2.1 Introduction

While the main focus of this work is on post-2001 developments, it is self-evident that none of the three storylines I want to explore began in 2001. Therefore, this chapter provides a historical context for *how and to what extent Afghanistan's political ruptures and subsequent regimes, including post-2001, have influenced state-building, lawmaking, criminal justice, and especially prison institutions*. As the chapter looks into the main features of the three storylines within the historical context, it also tries to shed light on key actors and factors, both domestic and international, which are involved in the processes concerned.

2.2 A periodisation of the pre-2001 era, political rupture, and subsequent regimes

It is important to emphasise that conflicts and fragmentation have characterised state-building, law, and order throughout Afghanistan's checkered history. People in Afghanistan are accustomed to a deeply ingrained sense of insecurity and fear. Institutions of all kinds, including the criminal justice and prison institutions, lack a cohesive development pattern. Countless historical instances have occurred in which one institution has grown at the expense of others during one phase, only to suffer dramatic setbacks or undergo significant transformation in subsequent phases.[1]

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1 A review of the history suggests that state institutions tend to undergo extremely quick and fundamental changes, under the influence of social and political factors. For example, the development of a coherent system and consistency of operation in prison institutions did not follow a cohesive pattern; it kept changing with the political environment. In the sytem's early stages, prisons were used by autocratic rulers to maintain their coercive power over the people. Later, a westernised modality was adopted, followed by a Russian modality, and then a mix of European and American-oriented systems. It is important to note that each shift has been associated with broad changes across other criminal justice institutions, including the judiciary. Unlike the natural evolution of institutions, changes in this case were often sustained by substantial effort and resources, since institutions tended to revert to their initial state shortly after changes had been implemented. (Please refer to the epilogue, below, for a description of drastic changes in the prison system during the post-2020 period).

Various other factors also contribute to the fragility of state-building, law and order in Afghanistan, including its high levels of poverty and illiteracy, its complex and isolated geographical location, and its intricate conception of national values (resulting from its checkered history). There have always been strong regional and international dynamics in Afghanistan, which create conflicts of interest within the Afghan society, also resulting in political rupture, turmoil, and civil war. These factors affect different areas of life, in different ways, and at a different pace. It is difficult to comprehend the situation from a broader historical standpoint, because, in the words of established Afghan historian, Hassan Kakar (1995), Afghanistan's history has been "long and eventful", which has a dynamic socio-political momentum.[2]

For this reason, I propose a periodisation of the historical context, based on specific moments of change, which will not only help to focus attention on the most relevant facts but will also facilitate a reasonably accurate description and understanding of the context. I will split the history into two general phases: ancient history, covering the era before the war of independence in 1919; and contemporary history, covering 1919-2021. The division is for convenience only and does not claim to create new historical classifications.

The year 1919 represents a historic moment of change in many ways (including independence), which cannot be ignored when considering developments throughout Afghanistan's history. After this point there are over 100 years of state-building dynamics, including the rule of law, modernisation of state institutions, and general efforts towards development. The era also includes periods of instability, political rupture, and civil war. Therefore, I will divide the latter part of the country's history further, into six distinct phases. Considering the pre-1919 era to be one major period, there are in fact seven historical periods to explore in this chapter.

The first phase is from 1919 until 1932, and is a period of independence and fighting for modernisation. The second phase is from 1933 to 1973, the last decade of which is considered to be the golden age of state-building and development. The third phase, from 1974 until 1977, sees a coup d'état, leading to the emergence of the first republic and a period of political upheaval. The fourth phase, from 1978 until 1991, marks the start of political rupture, a revolution, and a bloody coup d'état, as well as an era of socialist legality.

2 The ebbs and flows of Afghan history are captured in several scholarly works, including (Ghobar, 1978; Kakar, 1995; Barfield, 2010; Ansary, 2012; Dalrymple, 2013; Lee, 2019). However, I have based my work on three of them. Amongst literature written in English, my most cited sources are Barfield (2010) and Ansary (2012); I sometimes refer to other sources as well. When it comes to local literature, I mostly cite Mir Gholam Mohammad Ghobar (1978). His book is called *Afghanistan in the Course of History, Volumes I & II*. (Both volumes are originally written in the Dari language. Volume II of the book, however, has also been translated into English by Hashmat K. Gobar, and was published under ISBN-13: 978-0970796400 in 2011).

The fifth phase, from 1992 to 2001, features further rupture which ushers in an era of Islamic revolution and civil war; an era of fundamentalism and terror follows, along with continuation of the civil war under the first Emirate of the Taliban. The fifth phase also embraces some major shifts in the international sphere, including the collapse of communism and end of the cold war. The final (sixth) phase, from 2001 to 2021, represents an era of international intervention and reform, as well as setbacks which ended with yet another catastrophic political rupture in 2020, leading to the Taliban taking over the country.

2.3 Fights for identity, self-defence, and statehood (the revolving door of history)

Contrary to common perceptions about Afghanistan, it is a mineral rich country, sitting at the meeting point between East and West: the crossroads of Central Asia and South Asia. The country has been an integral part of the ancient trade route known as the Silk Road, which ran from the Middle East to Asia and vice-versa, as well as being a passageway from Asia to the Indian subcontinent.[3] This combination of hidden wealth and strategic location tended to make Afghanistan an attractive destination for warriors and conquerors from across the world.

To that end, numerous military campaigns have been fought in Afghanistan, from the Persians to the Macedonians and Greeks who came with Alexander, the Muslim Arabs who brought Islam, the Mongols who came with Genghis Khan on their way to Europe, to the British and Russians in the 18th and 19th centuries, and finally, a broader international coalition over the last two decades (i.e. 2001- 2021). Some of the above conquered and ruled the country for a period, but ultimately all faced defeat except for those who brought Islam that not only introduced religious conversion, but also established its own lasting institutions. These institutions provided a framework for spreading the Islamic faith and for providing justice to the newly converted population. Hence, it has been a significant turning point in the country's history bringing with it a new religion, culture, and political order shaping the country's future.

Today, Islam remains the dominant religion in Afghanistan, with the majority of its population following the Sunni school of thoughts. The advent of Islam, however, has been a complex and multi-layered process that took place over several centuries. The early history of Islam in Afghanistan is closely tied, to the Arab conquests of the 7th century when the Arab

3 Afghanistan has always been part of a transport route, due to its geographic location; it shares borders with Turkmenistan, Uzbekistan and Tajikistan, to the north; China, to the northeast; Pakistan, to the east and south; and Iran, to the west. For more information about the Silk Road and how it connected east and west, please see (Omrani, 2010; Hiebert, 2016).

armies conquered, in 652 CE, Persia and the eastern province of Khorasan that included parts of today's Afghanistan. The Umayyad and Abbasid, two Islamic dynasties, which ruled over much of the region during 9th and 10th centuries, aided introduction of Islam in the region and played a key role in spreading the religion in Afghanistan.

Initially, the conquerors encountered resistance from the local population, who were predominantly Zoroastrian and Buddhist. However, over time, it began to spread and by the 11th century, Islam had become firmly established in the country and some of its provinces such as Balkh and Ghazni had become centers of Islamic scholarship and culture. The city of Ghazni, in particular, emerged as a major center of Islamic learning, and its ruler Mahmud of Ghazni is remembered for his patronage of the arts and sciences.

Coming back to the numerous military campaigns that have been fought in Afghanistan, in terms of state-building and development processes, they have left a legacy of destruction and disruption. War and self-defense was the country's modus operandi for a long period, including a big part of the 19th century. Ancient rulers could not devote sufficient time to building state institutions, putting laws together, and thinking about economic growth, whilst feeling the enemy at their back. Nevertheless, whilst setting up modern state institutions was not a priority for most rulers, some sources argue that (even in that peculiar context) a state structure and judicial system 'under traditional norms and Sharia rules' existed from as early as the post-Islamic conquest.[4]

Those glint of hope was never able to flourish, because the sequence of events kept attracting more and more invaders, some of which deliberately aimed to destroy states as part of their battlefield strategy. A famous example of the latter is the Mongolian ruler, Genghis, who invaded Afghanistan from 1219 to 1222. During this invasion, the Mongolian army massacred people, destroyed institutions, burnt infrastructure, and fiercely suppressed any attempts to restore government for years after the invasion was over. This led to a situation of statelessness and fragility for a long time, until Ahmad Sha Durrani established an independent kingdom in 1747 (Ghobar, 1978, p. 121; Dupree, 1980; Runion, 2007, pp. 44-49).

As a key figure in the Durrani dynasty, Ahmad Sha showed leadership by trying to establish elements of a viable state. He set up a relatively strong state, and soon started to expand his empire to other parts of Asia. He invaded India around eight times and made substantial territorial gains, which shows us the extent of his empire's might and demonstrates the fact that he did not rule by law. Yet, Ghobar (1978) contends that during the Durrani dynasty an early version of the judiciary evolved within the

4 The first signs of a legal system based on Sharia rules are recorded after the Islamic conquest, beginning with the rule of the Saffarid dynasty (861-1003). Later, the Ghaznavid dynasty (977-1163 CE) established a more formalised judicial hierarchy, in which Sharia, traditional norms, and royal decrees governed (Bosworth, 2010).

state structure (1978, pp. 355-359&594-595). In this period, a harsh form of criminal justice was re-established that was based on the Ghaznavid dynasty and its system of punishment (977-1163 CE), especially with regard to the prison system.[5] There were some famously notorious prisons at the time, in Gardaiz, Mandaish, Jawzjan, Kashmir, Multan, and Ghazni. Wells, dungeons, and other means of isolation were also built on remote mountaintops (Ghobar, 1978, p. 121). According to the literature, the sole purpose of re-establishing a harsh criminal justice system during Ahmad Sha's reign was to control the people and suppress important anti-government figures, either by locking them up or executing them, as directed by the ruler (Kohzad, 2018).

Despite the strength of his empire, the king had to remain mindful of domestic actors, including tribal elders, clergymen, and other activists. In a way, the king owed his crown to the tribal elders, because he had been appointed by a gathering of influential elders; once the gathering had decided, Saber Sha (a respected Sufi) crowned him as king.[6] This indicates how tribal elders, community leaders, and other religious figures were powerful and closely involved in the state affairs and politics of the era.

On the other hand, regional and international scenes were fraught with political and security-based tensions for most of the 19th century, and up until the turn of the 20th century, which directly threatened state-building, law, and order in Afghanistan. For instance, a political confrontation between the British and Russian empires over territories in Central and South Asia, known as 'the Great Game', coincided with this turbulent part of Afghanistan's state-building history. During most of this period, the British feared the expansion of Russian interests in the region, particularly in India and throughout Central Asia. Equally, the Russians feared the expansion of British interests in the region, leading to a profound sense of suspicion between the two superpowers.

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5 Although (as I have argued elsewhere) prison institutions pre-date the Ghaznavid dynasty, they seem to have been the first to set up multiple prisons and use them in a relatively systematic way (Amin, 2017, pp. 243–282). For example, *The King's Epic* (*Shahnama*, in Dari language) is an ancient book, written by the famous poet Ferdowsi between 977 and 1010 CE, and it describes a terrible custodial settlement in the ancient Balkh region in northern Afghanistan. Furthermore, Gobar (1978), Abultaqi (2013), and Beek (2004) cite the Zoroastrian sacred book *Avesta*, which refers to Zahak Jail, an unpleasant prison in the aforementioned geographical area, which was controlled by a cruel king called Zahak (1978, p. 37; 2004, p. 31; 2013, p. 116).

6 In 1747 a Loya Jirga was invited to discuss forming a state out of the ashes of Genghis Khan's long-running era of destruction. The Jirga was held in Sher-e-Shorkh (an area in Kandahar province), so it became known as the Sher-e-Shorkh Jirga. After nine days of discussion and debate between the elders, the Jirga decided that Ahmad Sha Durrani would be the new ruler. Saber Sha, a respected Sufi, crowned Durrani by placing a cluster of wheat on his turban. The new king left the Jirga wearing a gold-colored crown made out of a wheat cluster. To that end, clusters of wheat have long been a symbol of national government, in many forms, throughout Afghan history (Ghobar, 1978).

During the course of this period of suspicion, particularly when tensions were running high, the British Empire invaded Afghanistan three times, resulting in three 'Anglo-Afghan' wars. As each of these wars had a significant effect on Afghanistan's internal affairs, a brief description of the wars and their consequences follows. The descriptions highlight the importance of external actors and their impact on the country's international and regional relations, as well as its internal affairs, such as state-building, laws, and criminal justice.

The first Anglo-Afghan war occurred from 1838 to 1842, when the British army invaded Afghanistan. The British conquered the country in 1839, installing Sha Shuja, a pro-British king who ruled for a while. The invasion, which met with resistance from the outset and culminated in a serious uprising against their rule in 1841, led to the complete destruction of the British forces in 1842.[7] The second Anglo-Afghan war occurred from 1878 to 1880, when the British invaded Afghanistan again, with the hope of excluding Russian influence. This war led to the Treaty of Gandamak (1879), by means of which Britain acquired part of the Afghan territory, including all the frontier border areas between Afghanistan and British India, as well as control over Afghanistan's foreign affairs.

In return, the British offered an annual subsidy, as well as vague assurances of assistance in case of foreign aggression. For this purpose, the British maintained a resident governor in Kabul, Louis Cavagnari, and the army left in May 1879. Only three months later, in September 1879, the Afghan resistance forces executed the British governor and massacred his companions in Kabul. In response, the British returned with more forces, and further campaigns were waged. The British re-captured Kabul, installing Abdulrahman as king, reaffirming the Treaty of Gandamak, and establishing Afghanistan as a buffer zone between the British and Russian empires, then left again.[8]

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7 At the height of hostilities, the British decided to leave Afghanistan. They came under attack from Afghan tribesmen on their way out, leading to a bloody war and costly consequences for both sides. On the British side, an army of over 16,000 military personnel and their companions, were killed in action or died of exposure to the harsh weather. The army was led by Major-General Elphinstone, hence history refers to this war as the 'massacre of Elphinstone's army'. According to reports, William Brydon (a surgeon with the British army) was the only survivor left alive to relay information about the incident to British authorities. The cost was even greater on the Afghan side, despite its apparent military victory. The British army was outraged by the massacre, so Afghanistan later paid a high price in blood and tears, putting both its statehood and geographical boundaries in jeopardy.

8 There have been profound and lasting effects on the country, and it has since repeatedly been used as a theatre for proxy wars, including during the Cold War era and thereafter. Despite its recent progress, the country has not been able to escape these effects to this day, and current circumstances suggest that this pattern may continue for many decades to come.

The third Anglo-Afghan war was fought in 1919, after about 40 years of attachment to British subsidies resulting from the second Anglo-Afghan War and the Treaty of Gandamak. The war began with Amir Amanullah's attack on the frontier area that the British had separated from Afghanistan. As a result, Afghanistan entered into the treaty of Rawalpindi with British India and secured its independence. The British ceased to pay the Afghan subsidies and ended their claim to direct Afghan foreign policy. In addition, since the British had traditionally viewed Afghanistan as a buffer state, they imposed the Durand line as a dividing line between Afghanistan and British India, so that the country would remain a buffer state.

It is important to note that between the third and second Anglo-Afghan wars important developments occurred. In the aftermath of the second Anglo-Afghan war, in 1880, Amir Abdurrahman ascended the throne and began to move towards setting up a new state structure, including the legal system, new laws, and a judiciary. The Amir was famous for his pragmatic approach and intense efforts to centralise power, and he gradually asserted authority throughout the country (Pashtoon, 2017, p. 134). Any actions of the Amir in asserting control obviously came at the cost of limiting the reach of local power brokers. Although they were rudimentary and divided, the state structure and reforms implemented at the time continue to influence Afghanistan's state structure and judicial system today, hence it was a very important era for state-building, lawmaking, and criminal justice (Choudhury, 2014, p. 252; Kristina *et al.*, 2017, p. 25).

The sovereignty of the state was believed to be based on divine authority, and the Amir was believed to be its representative on Earth; hence, rebelling against him was a rejection of the divine. On the basis of this philosophy, the Amir consolidated state control over its territory and integrated a robust set of state institutions. The first official police force belonged to this period; reportedly a predatory force, it was used for activities such as tax collection, amongst other things (Pashtoon, 2017, p. 134). Likewise, other state institutions, such as the first robust court system and the first finance and taxation arrangement, also belong to this period. The Amir believed that he laid "the foundation stone of a constitutional government… though the machinery of a representative government had not taken any practical shape yet" (Kakar, 1979; Kristina *et al.*, 2017, p. 73).

On the lawmaking front, Abdulrahman was the first to institutionalise written laws. In his opinion, lawmaking was clearly connected with state-building. He asserted that, the state "exists to bear witness to God amid the darkness of this world, and the function of the government is to act as the executive of the law" (Kristina *et al.*, 2017, p. 75). Examples of lawmaking in this era include the introduction of Sharia and the Hanafi School of Islamic jurisprudence, as well as the creation of the first ever judges' manual (*Asas ul Quzat*), which was the first procedural law to standardise the court procedures of the time.

In the area of criminal justice, the Amir imposed an unprecedentedly harsh system of justice, including prisons, but made two innovations that were fundamentally important, including: the creation of a dual court system and the installation of boxes of justice. The system was composed of Sharia and state courts working in parallel, but with different jurisdictions. The Sharia court was responsible for adjudicating issues related to criminal law, family law, and personal law. The state court adjudicated disputes regarding trade, taxation, and crimes related to government employees. Courts were run by judges (*Qazi*), who also received advice from religious scholars (*Mufti)*. The Hanafi School of Islamic jurisprudence and the judges' manual were the governing laws.

The 'justice box' (*Sandooq-e-Adalat*) was another initiative aimed not only at extending access to justice to remote areas, but also at ensuring the state monopoly of power, and at strengthening relations between the centre and periphery of the country. The initiative involved installing large mailboxes in public areas, so that citizens could enclose sealed letters informing the Amir directly of their disputes, and asking for his assistance in resolving them. The mailboxes were taken to Kabul, so that the king could personally open them and read the petitions. The petitioner would then receive a reply through the mail, or in certain cases the petitioner was invited to come to Kabul so that justice could be served in front of the Amir. As a result of this practice, the king was reinforced as the ultimate decision maker of all state affairs, including the judiciary (Martin, 1907).

Prison institutions were particularly harsh during this period. Several notorious prisons, such as the Arg prison, the Sheerpor prison, the Bala Hisar dungeon, and the Kotwali prison came into being under Abdulrahman. According to Martin (1907), in Abdulrahman's era the entire country was a large prison. He maintains that "prisons in Kabul are not buildings erected for the purpose, but any house belonging to the government, which is suitably situated, becomes a prison. The space at disposal in such houses is inadequate to the number of prisoners. …the prisoners are herded together in a house that has perhaps been used for twenty or thirty years and never cleaned … typhus and other diseases are common among prisoners. Typhus alone will very often sweep off seventy to eighty per cent of the men confined, and the wonder is that all do not die" (1907, p. 146).

After the death of Abdulrahman, in 1901, his son Habibullah inherited the throne and tried to reform the state, including elements of the harsh criminal justice system introduced by his father. However, he also decided to improve prison conditions and soften the severity of the criminal justice system. For example, after taking power in 1901, he ordered a review of all prisons and prisoners, and only about 120 prisoners were allowed to remain in prisons throughout the country; there was no legal basis for keeping

anyone else, so the king released them.[9] In addition, the king took drastic measures to amend the dreadful practices of the past, close down some prisons, and discipline officials who had mishandled their responsibilities.

Habibullah was an open minded person, although not necessarily a liberal, he was in favour of reform and liberalisation. An important characteristic of Habibullah's time is that it provided a conducive environment for the formation and strengthening of the constitutionalist movement (*Junbish-e-mashrotyat*), influenced by similar movements in Iran, Turkey, and Egypt. As a matter of fact, during British rule (particularly between 1878 and 1880), there had been exiling and assassinations of noble and knowledgeable Afghans. Those who managed to escape, or were exiled as a result of the British takeover, continued to develop an ideological bond with political movements and influencers in Iran, Turkey, and Egypt. These bonds were the seeds of the constitutionalist movement which formed and grew under Habibullah.

However, the movement was fundamentally unhappy with certain elements within Habibullah's cabinet, as well as with his relationship with Britain; every now and then, the movement raised concerns. Although initially a civil movement, it was decided at some point that pistols were needed for its protection, and this was reported to the king as if some members of the movement intended to assassinate him. As a result, the king tracked down records of their meetings, determined who had weapons, then arrested and executed eight of the movement's members without trial, sending 35 others to prison (Ghobar, 1978, p. 717).

Due to incidents such as those described above, the emergence of a deep political split within the kingdom, and fear of powerful opposition, some notorious prisons were reopened. According to Ghobar (1978), this included Sara-e-Mutee prison in Shorbazar (near downtown Kabul), which was devoted to housing members of the constitutional monarchy movement. The authorities exploited this prison, and others, by using them to gradually eliminate their internal enemies. As a result, the old prison system of management and punishment reappeared.

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9 King Habibullah went to the Central Kotwali (the office of the Central City Magistrate) personally and wrote an order in the official prison register in his own handwriting, so that officials could follow it exactly as he intended. This is a translation of the order from the original Dari text: "…effective from today, [November 9, 1912] the 29th of Zealqahda 1330, it is prohibited to take out prisoners' eyes. In lieu of the criminal being blinded he shall serve 12 years in prison. The criminal's ears may not be cut off; instead, six years of imprisonment will be imposed. It is now prohibited to cut off one (or both) hand(s) of a criminal. Ten years of imprisonment shall be imposed in place of cutting off hands. This shall apply only in instances that do not fall under Sharia. Where Sharia provisions apply, the regulation of age-by-age wounds by Qisas [i.e. equivalent to *lex talionis*] may proceed. I have written this order, and with Allah's help I will execute it as well" (Ghobar, 1978, p. 701; Abultaqi, 2013, p. 119).

This was the moment when the constitutionalist movement gained traction, growing into a specific force which pushed hard for modernisation, a consitutional monarchy, individuals' rights, womens' rights, and reform. To put this into perspective, giving examples of the personalities active in this movement is helpful, and Mahmood Tarzi is one good example. Tarzi was an Afghan who grew up under the Ottoman empire, where he experienced the effects of reform and returned to Afghanistan in 1911. His daughter, Malika Suraya, married King Amanullah, forming a young couple who questioned a number of the old traditions, including hijaab and the education of girls.

In summary, it is important to note that the Islamic conquest played a significant role not just in shaping the country's religious and cultural landscape but also in shaping its laws and the overall system of governance. Yet its practical application has been influenced by a variety of factors, including the country's rugged geography, ethnic diversity, political upheavals, and the influence of neighboring countries. To that end, as in many Islamic countries including Egypt, Indonesia, and Iran, Afghanistan's legal system is characterised by a highly complex blend of legal pluralism, which is composed of three predominantly competing sources, including Sharia, statutory law, and customary law.[10] However, in the area of prison law and criminal procedure law, which is central to this thesis, statutory law prevails. Therefore, this study bears no signs of the abovementioned legal pluralism.

However, a stable state structure did not exist in most parts of the era before 1919. In the rare cases when states did exist, they were rudimentary and divided. Thus, struggles for independence and statehood, as well as a strong state reliance on a mixture of traditional and Sharia law, were hallmarks of the time. In the latter stages, a centralised state structure evolved that ended the revolving door of history, and the influence of regional and international players. Nevertheless, two opposing ideologies and mindsets – of traditional power brokers and modernist reformers – emerged within the country, and began to push against each other. The two opposing ideologies targeted the modernisation of state institutions, laws, and the justice system as priority areas for change.

10 Each of the sources has a different degree of hierarchical power and binding nature across time and geography. For example, statutory laws come first in the court system, followed by the Islamic jurisprudence both of which are inspired by the broader notions of Sharia and sometimes by the customary norms. However, in reality, the customary norms seem to have a higher degree of applicability in rural areas, where a majority of the population lives (MoJ, 2005, p. 12; Center for Policy and Human Development, 2007; Akseer *et al.*, 2018, p. 121).

2.4 Fights between traditionalism and modernity

In August 1919, King Amanullah championed the war of independence, after which he initiated an ambitious policy of reform and further centralisation of the state authority.[11] The king embarked on modernisation of state institutions and significant social change, by introducing new laws, including the first constitution of Afghanistan, which was endorsed by the Loya Jirga of Jalalabad and promulgated in 1923. The 1923 constitution included a number of important features related to state-building, lawmaking, and criminal justice (Ghobar, 1978; Prashad, 2021).

Adoption of the first constitution not only marked the first systematic effort towards state-building, but also established a tradition of constitutional rules and informally obliged subsequent regimes legitimising their power through written constitutions. In fact, after Amanullah, no monarchy dared to rule without a constitution legitimising its authority. The constitution, however, did not provide for a legislature, instead vested all legislative authority in the king; the king was still free to pass laws, issue decrees, and enforce rules as he wished, which meant that power was still centralised to him. This was not appealing to tribal elders and notables, in particular, who had been used to having a great deal of discretion within society.

The spirit of modernisation also brought changes to other areas directly affecting religious leaders. For example, the 1923 constitution added a reference to the "general civil and criminal laws", together with a reference to the "principles of Sharia", and it provided that all criminal cases must be adjudicated according to the state and Sharia. Furthermore, the constitution initially restricted *tazeer* punishments to those "stipulated in criminal law". Thus, in the area of criminal justice, the principle of *nullem crimen sine lege* emerged for the first time in the history of Afghanistan, taking away the discretionary power of the *Qazi*s and *muftis*, who used to assign *tazeer* punishments.[12]

It is believed that this was a major reason for the resistance of traditional power brokers to the constitution and the king's modernisation efforts. These dynamics were even involved in the development of the constitution

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11 As discussed in (2.3.1, above), Afghanistan's war of independence is rather complex, because at the time of the war the country was technically independent, except for in its foreign policy. Therefore, it is important to consider independence within the broader context of 'the Great Game'. In the aftermath of the second Anglo-Afghan war, and as a result of the treaty of Gandumak, Afghanistan and Britain were able to maintain good relations for almost four decades. However, when Amanullah came to power he felt oppressed by internal strife and a limited scope for foreign policy. Accordingly, he decided to take over the country's affairs entirely and go against the Gandumak treaty. This led to the third Anglo-Afghan war, also known as 'the war of independence', as it led to end the of Britain's role in managing Afghanistan's foreign policy.

12 *Nullum crimen sine lege* signifies that there is no crime without law, and that conduct cannot be considered criminal unless it is specifically described in the behavior-circumstance element of criminal statute.

as, according to some sources, "in 1924 a Jirga of *ulama* strenuously objected to this codification of law because in their view it denied them the ability to consider the individual circumstances of the case, as is required by the Sharia. For his part, [Amanullah] argued that the fixed penalties achieved greater deterrence because the criminal knew what the punishment would be ahead of time. Due to general disagreement with the codification of [tazeer] crimes, the constitution was amended shortly after adoption, to allow the *qazi* more flexibility in assigning punishments for a given crime." (Una *et al.*, 2009, p. 16)

The first Prisons and Detention Centres Law (1923) is amongst the legislature produced during this era.[13] The proximity between the prison law and Amanullah's modernisation efforts, as well as the law's enforcement alongside the constitution of 1923, emphasises the importance of prison institutions to the process of state-building at the time. The law is one of the first in a series laws known as *Nezam namas*; it is compact and written in classic Dari (one of the two official languages of Afghanistan), but it contains all the basic requirements of a standard prison management system.

One important function of the law was to decrease the number of prisons and detention centres and prohibit an unlimited number of prisons overall. It allows only one prison per province to be used for confinement purposes, and it provides state courts with sole authority to send convicts to prison.[14] In order to control any possible illegal use of prison institutions, prison staff are required to ensure that inmates have a written order from a judge or the *Kotwali* (local police). Failure to apply these provisions would lead to legal proceedings against the prison staff.[15]

The legislation not only prohibits the widespread arbitrary use of prisons, it also introduces measures to separate prisons and prisoners, based on the length of sentence a prisoner should be serving.[16] The law also contains provisions about prison-based work and services, such as health and catering.[17] However, these are not connected with concepts such as prisoners'

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13 The first Prisons and Detention Centres Law was called, *Nizam nama-e-tawqif khana ha wa mahboos khana ha*, 10th Mizan, 1302 [3rd October 1923].

14 See rule number 10 of the 1923 law.

15 The following is a direct translation into English of rule numbers one and ten of the law:
Rule one: "At the centre of each province [*Nayabulhokomagi*], zone [*Hokomat-e-Ahla*] and district [*Hokomat-e-Sayera*] there will be one detention centre. At the centre of each province, zone, and super-eminent municipality there will be one prison. In addition to this, one central prison will be established in the capital city, Kabul."
Rule ten: "All prisoners and detainees entering a detention centre or prison (including the prison warden) will observe a written document issued by the city magistrate [*kotwal*] or judge, and register themselves in the registration book. Prison and detention centre staff cannot accept prisoners who have not first been officially convicted by the city magistrate or judge's verdict, and if such a prisoner is admitted to the prison the staff will be punished in accordance with the provisions of the penal code."

16 See rule numbers 3-6 of the 1923 law.

17 See rule number 18 of the 1923 law, about food and medical services, and rule number 22, about compulsory work during incarceration.

education and rehabilitation, neither of which are mentioned in the law. It is therefore clear that the only official objective of imprisonment is incapacitation, and hence the same is true of the system's fundamental legal mandate at the time.

However, it is important to note that the procedural sophistication provided by the law did not bring about changes in the actual physical condition of the prisons. Some authors maintain that the physical conditions of prison institutions did not show any progress at the time, that the system was predatory, and that prisoners continued to suffer abuse through being beaten and chained to wooden pillars in their prison cells. In sum, there was no sign of any prison-based programmes resembling rehabilitation (Ahrar, 2010).

With regard to the overall criminal justice system, the dual court system of Abdulrahman was maintained and the high court added to it as a final layer of adjudication. The high court was not permanent, and it was focused primarily on cases in which the other courts either had been unable to make a decision or had disputed jurisdiction; yet, it did place a greater emphasis on state courts. In this case, the prominence of state courts came from the fact that many of the crimes codified via decree and state laws were also considered crimes under Sharia. For example, stealing government funds was criminalised by decree, but theft was also a general crime under Sharia. Nearly all cases of this type involved disagreements over the jurisdiction of the two courts and were ultimately brought before the high court. As high court decisions set judicial precedent, subsequent judgements of a similar nature followed the precedent, resulting in a significant decline in the authority of religious courts.

In this way, tribal elders and religious leaders were not only alienated, but the age-old authority and influence they held over their societies and their connection with people's affairs were both fundamentally challenged. The conservative aristocrats, landlords, tribal elders, and clergyman were obviously not happy with all of these reforms because they found themselves in a disadvantageous situation due to the reform. As a natural consequence of losing power, they started to cause trouble in arenas such as social reform and modernization. These were the government's main areas of susceptibility simply because the society has been deeply rooted in traditional beliefs and hence it was particularly easier for tribal elders and the clergyman to provoke people when there were changes in those areas of life. As a result, the king was portrayed as a non-believer, and his reform initiatives were represented as being markedly disrespectful to Islamic and traditional values (Ghobar, 1978; Barfield, 2008, p. 349; Adamec, 2011; Ansary, 2012).

Although King Amanullah tried to convince the disenchanted religious leaders and elders by amending the constitution in 1925, which led to a partial restoration of their powers as well as recognition of the Hanafi School, it was probably already too late. There was opposition at a high level and on several fronts, leading to rebellions against Amanullah and his social

and legal reforms. The mainstream movement (with Islamic inclinations), led by Habibullah Kalakani, gained significant momentum and succeeded in overthrowing King Amanullah in January 1929. Habibullah Kalakani possessed no education, Islamic or otherwise, neither did he have solid social or religious qualifications for leadership of the country; and yet, he ascended the throne and became Amir. He then started to replace the values of the monarchy with his own version of an Islamic Emirate.

Habibullah remained in power for a very short time, and he reversed almost all the modernisation efforts initiated before his reign. For example, he abolished the 1923 constitution (along with its 1925 amendment), eliminated all state taxes, and closed down the education system for girls, because he considered it harmful to society and not Islamic, much as the Taliban did in 1995 and later in 2021 (see 2.8 below). In terms of the history of events, this period represents an interesting moment of change, demonstrating the adverse effects of tension between the elite's desire for modernity and society's preference for traditionalism.

In late 1929, Mohammad Nader deposed Habibullah Kalakani and embarked on a new set of reforms, taking into consideration the lessons learned from King Amanullah's time. As a first step, Mohammad Nader proposed a new constitution in 1932 that introduced Islam and the Hanafi School as the country's official religion. Since the new constitution was modelled on the French, Iranian, and Turkish constitutions, it provided a parliament with two chambers, and carefully restored the power of religious leaders. It was also the first parliament in the history of Afghanistan, hence another big step in the direction of a more inclusive and representative state and a clear example of copying totally new institutions through legal transplantation, see Watson (1993) discussed in (1.1.2 above).

The advent of a parliament meant that the tribal leaders and religious figures regained their share of power, and found themselves in possession of the kind of authority and influence that would otherwise need to be earned via election (Ghobar, 1978).[18] Furthermore, because Sharia returned as a major feature of the 1931 constitution, legislative processes and the legislature itself both had to follow Islamic law and the Hanafi School of Islamic Jurisprudence. Therefore, any state laws passed by parliament were inferior to Sharia law; in a way, this also strengthened the status of the clergy.

The new constitution did not require that criminal offences and penalties must be specified in statute before being imposed. Instead, it allowed Sharia to decide the vast majority of criminal punishments. As a result, adherence to the principle of '*nullem crimen sine lege*' was neglected and courts were allowed to decide criminal cases in accordance with either Sharia or state law, as deemed necessary by the judge. Perhaps, via these changes, Mohammad Nader wished to illustrate his determination to

18 The parliament consisted of two houses, the Upper House (*Majlis-e-Ayan*) and the Lower House (*Shura-e-Milli*). Lower House members were elected for three years, but the king had discretion to appoint members of the Upper House.

remain in touch with the sentiment of the people, and that he intended to take balanced steps towards completing the modernisation process (including economic development).

In this way, the king was able to undo some of the regression that happened just before his rule, although he was not immune to criticism from divergent factions under his rule (Ghobar, 1978). A series of criticisms and hostilities culminated in the king's assassination (by a student from the Hazara ethnic minority) during a graduation ceremony in 1933. As a result of the assassination, Mohammad Nader's 19-year-old son, Mohammad Zaher, ascended the throne.

2.5 The golden era

Muhammad Zaher ruled from 1933 to 1973, and remained a political figurehead throughout his time in office, assisted by a succession of prime ministers. His role was limited during the first ten years of his reign, when his paternal uncles Mohammad Hashim and Sha Mahmoud served as prime ministers and effectively ruled from 1933 to 1946 and from 1946 to 1953, respectively. Thereafter, the king gradually took over the management of his kingdom, but he was still being assisted by Mohammad Daoud and Mohammad Yusuf, who served as prime ministers from 1953 to 1963 and from 1963 to 1965, as well as Mohammad Nur Ahmad Etemadi (from 1966 to 1971) and Mohmmad Musa Shafiq (from 1971 to 1973).

The first part of this period essentially continued the policies and initiatives implemented by Mohammad Nader, and contributed greatly to the success of state-building, the rule of law, and (to a certain extent) criminal justice. At the beginning of this period, Mohammad Hashim insisted on building institutions such as schools and hospitals. Nevertheless, motivated by his dictatorial nature, he soon decided to focus on strengthening the armed forces and improving infrastructure, including roads and telecommunications. In his efforts to construct new roads and introduce new technologies, he was able to initiate a few projects, securing the cooperation of Germany, Japan, and Italy, instead of the Soviet Union and the United Kingdom, which had been the usual reference points before 1919 (Ghobar, 1978).

In 1946 Sha Mahmood replaced Mohammad Hashim, which marked the beginning of an era of significant developments for state institutions, including the legislature and judiciary. During this period the first representative parliament was established, with a majority of reform-minded members. For the first time, laws were being passed by a legislature whose members had been elected by the public. Since the newly elected lawmakers were interested in reforming the government, they quickly embarked on major codification projects, including redrafting the 1932 constitution, the first civil code, the first freedom of speech law, and the second Prisons and Detention Centres Law; all of which led to significant developments in the legislative sphere.

The second Prisons and Detention Centres Law was adopted in 1950 and is an almost exact copy of the 1923 law.[19] There are only slight differences in the two laws. Due to a general trend in the legal profession, the official term *Nezam nama* was changed to *Usool nama*, and the official title of the 1923 law was also changed accordingly.[20] In addition, minor formatting modifications were made, in order to present the law in both Dari and Pashtu (the two official languages of Afghanistan). However, despite the changes in the prison law, the actual conditions of prisons remained the same as before, and there was no evidence to demonstrate any tangible improvement in prison conditions.

Throughout the first part of Mohammad Zaher's rule, the court system continued to work with the dual state and Sharia court. The period when Mohammad Hashim was prime minister is known to have been tyrannical and suppressive, whereas Sha Mahmood's term was relatively progressive, and Mohammad Daoud continued to pay special attention to the existing constitutional structure, as well as law-making and development projects. However, in all three periods no comprehensive criminal code existed; instead, royal decrees defined crimes and their penalties. Some authors maintain that "despite considerable economic developments, law reform not only slowed down but also regressed to the same normative bifurcation of 30 years earlier. The court system was allowed to apply Sharia in many areas, particularly in civil disputes, which caused so [much] confusions in the relationship between state laws and the Sharia norms as compared to earlier period" (Kamali, 1985, p. 36).

In 1964, Mohammad Zaher assumed control (more independently), and his first order of business was to amend the constitution. The king announced the formation of an advisory commission assisted by "Louis Fauger, a French constitutional expert who wrote the Moroccan constitution" (Kristina *et al.*, 2017, p. 86). Consequently, the country's most progressive and democratic constitution was adopted in 1964, offering a monarchy with a modern legislature, consisting of two chambers, an independent judiciary, and an independent executive, all working under a separation of powers arrangement.

As a result of the new constitution, the sovereignty of the people, and new democratic institutions, a strong central state emerged, which united the country. Every aspect of governance and development, including the economy, flourished and people's freedoms – including civil rights and women's rights – were guaranteed by law. To this end, the period from 1963 to 1973 was a time when the judiciary, legislature and government, as three independent branches of the state, worked together and at their best.

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19 The second Prisons and Detention Centres Law was called, *Usool nama-e-tawqif khana ha wa mahboos khana ha*, 16th of Jadi, 1329 [6th January 1951].

20 Both *Nizam nama* and *Usool nama* mean "law", however, the former originates from Turkish and the latter from Egyptian legal terminology.

Laws were drafted by professional drafters at the MoJ and passed by a representative parliament. Whilst Islam continued to be the official religion, for the first time in history it was accepted (through democratic process) that statutory laws were more binding than Sharia. Also for the first time, courts were empowered to perform independent judicial reviews, and to decide the faith of laws and regulations if they did not conform to the constitution.

In terms of the justice system, although historical records present a mixed picture of the situation, there is some evidence testifying to a strong desire for a free and fair justice system. It starts with the unification of the dual courts that continued to dominate the criminal justice system for around half a century. The introduction of a Supreme Court and lower courts operating independently, based on statutory laws, was another hallmark of this period, which in turn is testimony to the fact that the state tried to put together a different (perhaps better) justice system.

A strong representation of the principle of legality in the 1964 constitution and comprehensive criminal law that was inspired by that constitution are other important aspects to consider. However, in practice, these had little effect on the adjudication of criminal cases, because state law still proclaimed that the laws of the *hudud* and *qisas* be prosecuted based on Sharia, and criminal law only had adjudication over *tazeer* crimes. In the specific area of the prison system, there was a secondary regulation (enacted in 1968) for Prison Awards. Its preamble indirectly declares that "… in addition to restoring justice, the main objective of government in punishing criminals and deviants is to reform and prepare them for future resocialisation…"

Another secondary regulation was enacted in 1971, which resulted in the establishment of the first Central Board of Prisons.[21] The regulation proposed specific prison-based programmes, such as health, education, work, and vocational trainings, mandated jointly to prison administration and other state institutions. By delegating specialised prison services to the relevant state institutions, the regulation not only reduced the burden on the prison system, but also allowed for more fundamental steps to be taken towards upgrading the system's infrastructure. Furthermore, the board mechanism provided a workable coordination platform for prison management and services, which allowed prison system issues to move from a place of isolation to the state-level agenda.

Despite the many positive developments, some authors asserted that, during Amanullah, Mohammad Nader, and Mohammad Zaher (1919-1974), the government paid little or no attention to the physical conditions of prisons. Prison cells were dark, small, and filthy, with no natural light or ventilation. Hygiene conditions were poor, and prisoners were denied their constitutional rights. The most advanced prison of the time was Dehmazang

21 The name and publication date of the bylaw is: *Muqarara-e-tanzim wazaif bord markazi mahbis Afghanistan*, 31st of Hamal, 1350 [30th April 1971].

Central Prison, but people feared it to death because it had poor hygiene, there was no food, and prisoners suffered from insect infestation. According to the literature, almost all the prisoners made large sleeping bags, to protect themselves from insects during the summer months. The bags had zippers on one side, or at the top, and prisoners would get into them and zip them up (Ahrar, 2010, pp. 14-15).

I believe that poor prison conditions were more likely a result of human resources and economic circumstances than the political will of the then government. Historically, most prisons were managed by Kotwals and wardens who brought with them a history of abuse and misconduct, which appears to have been passed down from one generation to the next, eventually becoming institutionalised. However, some individuals believe that prison brutality was an effective strategy for controlling people through intimidation and fear.[22]

Nevertheless, during the period 1964-1973 Afghanistan's legal history produced so much progress that many people referred to it as 'the golden era', and since governance, democratic institutions, and civil liberties were guaranteed by the state and the constitution, many more referred to it as 'the decade of democracy'. However, in continuation of the tragic events of the past, the regime experienced persistent social unrest and revolt, inspired by clashes between traditional and modern mindsets. Although most of the tensions were managed through a somewhat workable state institution and centre-periphery relationship, the first political rupture (in the form of a planned military coup d'état) marked the end of this era.

2.6 The one-party republic

Mohammad Daoud, the retired prime minister of Afghanistan, was an autocratic character and cousin of the king. He felt that the king lacked leadership, and that his system of government prevented real progressivism, so in 1973 he planned a military coup d'état with the help of his socialist allies. Consequently, the king was removed from power whilst he was away on an official trip. Due to this coup d'état, the monarchy was abolished and replaced by a republican government. Mohammad Daoud proclaimed himself President of the Republic, abrogated the 1964 constitution, and appointed a committee to draft another constitution to articulate the republic's requirements.

22 Abultaqi (2013) argues that as part of the government's intimidation policy certain notorious Kotwals were usually responsible for the management of prisons. A few of the most famous include Tura' baz, Kotwal of Kabul; Abdul Wazir Abadi, a member of Kabul Kotwali; Sarajuldin Gardizi, the warden of Arg Prison; Abdul Qadir Logari, Kotwal of Kandahar Province; Mohammad Yosuf Herati, Kotwal of Farah Province; Nisar Logari, warden of Sarai Moti Prison; and Abul Ghani Gardizi, warden of Qal-e-Bigi Prison (2013, p. 123).

During this period, the change in political regime and overall system philosophy was significant. A new constitution was introduced in 1977, and a number of other laws were passed to accommodate the regime change. The constitution introduced a democratic republic, announced equal rights for men and women, and (for the first time in history) provided all citizens with the right to elect the president. The state formation was intended to be a single party modality, which raised a lot of concern amongst technocrats, notables, and the socialist party, who feared complete monopoly of power at the hands of the president. According to many authors, this was one of the key factors contributing to the eventual removal of Mohammad Daoud from power (see below for further discussion of this event).

Major codification projects of this period included the Criminal Procedure Code 1965 (amended in 1974), the Criminal Code 1976 (amended in 2017), and the Civil Code 1976. All these laws, especially the Criminal Code of 1976, are famous for their quality and comprehensiveness. To this end, one could claim that efforts made during Daoud's presidency were basically efforts towards standardising and completing the criminal justice system introduced in 1964. In this period especial attention was also paid to improving prison conditions, as a result of which Pul-e-charkhi, the largest and most modern prison of the country, was built. Due to the president's precision and thirst for development, other major themes flourishing at the time included the installation of a land reform and redistribution system, nationalization of natural resources, and economic and infrastructure development.

In 1978 the People's Democratic Party (PDP) conducted a military coup d'état, assassinated Mohammad Daoud, and massacred his entire family. It is believed that both internal and external factors contributed to the coup. Mohammad Daoud's autocratic character caused him to tyrannise both his socialist opponents and pro-Russian actors. He reportedly filled the prisons with pro-Russian political opponents. Nevertheless, Daoud's foreign policy played an even greater role, as he actively pressed the issue of the Durand Line with Pakistan and encouraged Pashtuns on the other side to unite against the unjust separation imposed by the British. At the same time, Doaud pursued a non-alignment policy with the superpowers of the Cold War era, by suppressing the socialists in his government and extending Afghanistan's relationships with NATO members, working against the welfare and interests of the Soviet Union.

In summary, this period, although short-lived, contributed greatly to the development of state institutions, laws, justice, infrastructure, and economic development. Focussing particularly on issues such as land reform, the nationalisation of natural resources, women's rights, and the one-party political system, it was ultimately a turning point towards a socialist-oriented state modality. Moreover, this period marks the inception of several political ruptures, upheavals, and subsequent regime changes, which led to a downward trend for state-building, and to long-term misery.

The remainder of this chapter is devoted to the series of events following the fall of the 'First Republic'. It is necessary to remember that the history, developmental paths, belief systems, party politics, and power dynamics in each of the above periods encompass many details beyond the scope of this chapter. Therefore, I will briefly summarise the most pertinent developments below, and refer the reader to other sources for further details (Ghobar, 1978; Amin, 1984; Kakar, 1995; Rashid, 2001, 2010; Goodson, 2001; Kaplan, 2001; Edwards, 2002; Their *et al.*, 2003; Dorronsoro, 2005; Peters, 2009; Barfield, 2010; Sinno, 2011; Ansary, 2012; Ruttig, 2013; Kohzad, 2018; Lee, 2019; Kallie, 2019; Maley, 2020).[23]

2.7 Socialist legality and the onset of civil war

To recap the above discussion, this period begins with the PDP's coup d'état, followed by the former Soviet Union's invasion of Afghanistan. The PDP was founded by Noor Mohammad Taraki and Babrak Karmal in 1965 and had a leftist orientation. The party's ideology had been somewhat closer to the mainstream reform agenda of Mohammed Daoud, and they helped him to overthrow Muhammad Zaher in 1973. However, following Mohammad Daoud's suppressive policy towards members of the socialist party – to the extent of removing its key members from positions of authority, imprisoning its sympathisers, and allegedly abducting its leaders, in pursuit of the one-party system – and his unfavorable foreign policy towards the Soviets, the PDP summoned its will and overthrew him in 1978.

Following the coup d'état, Noor Mohammad Taraki was President of Afghanistan from 1978 to 1979. During this time, he maintained cordial relations with the Soviets. However, due to his social reform policy and some internal rifts, the government encountered difficulties, and armed resistance was accentuated all over the country. Taking advantage of this opportunity, Hafizullah Amin, a hardliner and prime minister of the government, who was at odds with the Soviets, overthrew Taraki and took office in September 1979.

This was a blow for Afghan-Soviet relations, at the height of the Cold War. The Soviets attempted to stabilise the situation and remove Amin remotely, but they were unsuccessful. The Soviets did not find the state of uncertainty in their relationship with Afghanistan appealing, so they invaded Afghanistan in 1979 and remained there until 1989 (Ansary, 2012). The immediate outcome of the invasion was that the Soviets replaced Amin with Babrak

23 Sources which discuss the Mujaheedin's history include: Olivier Roy, *Islam and Resistance in Afghanistan*, London and New York, 1986; Henry S. Bradsher, *Afghan Communism and Soviet Intervention*, Oxford and New York, 2000; Gilles Dorronsoro, *Revolution Unending: Afghanistan: 1979 to the Present*, London 2005; Kit Spence, *Political Party Assessment Afghanistan*, National Democratic Institute for International Affairs, [Kabul], Spring 2006.

Karmal, who remained in power until 1986.[24] However, after about seven years Karmal was regarded as another failure and Mohammad Najibullah replaced him, first as General Secretary of the party, then as its leader, and finally as the President. Najibullah was in power from 1987 to 1991.

The PDP regime and the Soviet invasion introduced revolutionary changes to the entire system of government, including to the state institutions, laws, and criminal justice system. The regime abrogated Mohammad Daoud's constitution and replaced the legislature with a 'Revolutionary Council'. Until the council came into full effect, the government was ruled primarily by decrees issued by the communist politburo, instigating a set of infamous social reforms. Amongst these was decree number seven, in which the marriageable age was lowered to 16 (from 18), women were granted equal rights to men (including in civil and family affairs), and a maximum of 300 Afghanis was set as a cap on the amount payable as compensation for the dissolution of a marriage. Likewise, decree number eight (to do with land reform) required that approximately half of the rural land available was redistributed to landless farmers. Finally, the decree concerning literacy, which required illiterate adults to learn to read within one year. All these policies, but particularly the latter, were commonly unpopular in rural areas.

Later, the council rewrote laws and adopted the Foundational Principles of the Democratic Republic of Afghanistan as its de facto constitution, which did not recognise Islam as the state religion.[25] In addition, an important step in defining the prison system's legal mandate was taken in 1983, with the adoption of the third Prisons and Detention Centres Law.[26] Besides being termed *Qanoon*, as opposed to *Nizam nama*, the law encompasses both incapacitation and rehabilitation as legal mandates of the prison system, but the official title of the law reads as 'The Law of Application of Punishment in Prisons and Detention Centres', which emphasises punishment rather than rehabilitation.

The law has 72 articles, which makes it not only a detailed law compared to its predecessors (that had only 27 articles each), but also a law with stronger technical aspects. Whilst the law states rehabilitation as its main objective, it focusses on a few important themes that are deeply relevant to the context in which it was born. The law is mainly geared towards shifting responsibility for prison management from the intelligence service

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24 The invasion started with a direct military intervention called 'Operation Storm-333', in December 1979. Historical records suggest that in the first hour of this invasion Hafizullah Amin was assassinated in Tajbeg Palace, Kabul (Dupree, 1979; Galeotti, Stacey and Shumate, 1979).

25 The Foundational Principles of the Democratic Republic of Afghanistan was converted into a constitution in 1987 (i.e. at the end of the PDP regime). The two main changes the 1987 constitution brought about were recognition of Islam as the official religion of the state, and permission for new political parties to register and operate.

26 The third Prisons and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 15th of Jadi, 1361 [6th January 1983].

(known as *Khad*) to the Ministry of the Interior and police. Other major areas of concern include the separation of anti-government criminals from other criminals, the general living conditions of prisons, prison security, the introduction of prison-based (reforming or work) programmes, the proper use of prison equipment, and finally, reward and punishment.

When it comes to the practice of criminal justice, however, the PDP misrepresented its support of justice. Its intelligence service was actually predatory, so the criminal justice system was suffering from a critical disorder. In general, the criminal justice process consisted of three steps, beginning with arrests that were based on the kind of reports that were often fabricated by the PDP intelligence. The individual arrested was then subjected to an interrogation, in order to obtain a confession, and all interrogations typically involved some form of torture. The final stage of most cases was either indefinite imprisonment or execution.

A court system known as the 'Revolutionary Court' was introduced during the later stages of the PDP, but it was seen as nothing more than a layer of bureaucracy in addition to the three steps described above. According to several authors, the court did not disregard a single claim orchestrated by the intelligence agency (Ghobar, 1978; Rostar, 1990; Patman, 1991; Abdulrahimzai, 2009; Ghaznawi, 2010). As for the prison system, the newly constructed prison, Pul-e-charkhi operated in an extra-judicial manner, as a facility for intimidation, obstruction, and torture. Its typical customers were those opposed to communist ideology, irrespective of gender, age, social status, or tribal affiliation (see 6.2.2 below). The prison was particularly brutal in 1978-1979, creating an atrocious image in the public mind (Ghobar, 1978; Kakar, 1995; Ghaznawi, 2010).

In summary, due to the Soviet invasion an oppressive and authoritarian state emerged that lacked popular support. Its laws and justice system were inspired by a socialist legality that further alienated people, and its criminal justice system was brutal, carrying extra judicial prosecution and resulting in an environment of total fear and distrust. Consequently, strong social and military resistance took shape, which ultimately led to the collapse of the government at the hands of the Mujahidin in 1992.

2.8 The era of civil wars

Before entering into further details about the specific features of this period, in relation to state-building, lawmaking, and criminal justice, a brief introduction to the term 'Mujahidin' is necessary. Mujahidin is a collective noun, derived from the Arabic word *jihad*, meaning a holy struggle or effort, to exert strength, or to use every means to accomplish a task (with or without fighting). In this way, 'a mujahid' is a person who engages in such a holy effort or struggle. The original concept of jihad can be traced back to the early Islamic period, in 600 CE, when holy fighters tried to disseminate Islam (Meri, 2005; Morgan, 2010, p. 87).

In the context of Afghanistan, the term Mujahidin comes from the same root, but has a slightly different purpose. In this context, Mujahidin refers to Afghan fighters who opposed the expansion of British India during the 19th century (see 2.3 and 2.4 above). They were reshaped in the 1970s and became famous after organising themselves into seven parties, in or around 1979, to form a resistance to the former Soviet Union's invasion of Afghanistan (Barfield, 2010; Ruttig, 2013; Kallie, 2019).[27] In the immediate aftermath of the PDP, the Mujahidin factions gathered in Pakistan and reached a power-sharing agreement that led to the formation of an interim Mujahidin government.

In 1992, as the Mujahidin moved to Kabul, a council of religious scholars mostly comprised of pro-jihadi figures elected Burhanuddin Rabbani as president, and endorsed the establishment of the Islamic State by recognising the power-sharing agreement reached in Pakistan.[28] However, the Islamic State was a state in name only, and it could barely exercise control over the city of Kabul. Yet, due to their attachment to Islamic ideology and the spirit of victory inspired by the end of their Jehad against the Soviets, the Islamic State decided to erase the entire body of laws that had preceded it, particularly the constitution and other laws enacted by the Soviet-backed PDP regime.

In order to address the legal vacuum, in 1992 the Mujahidin government proposed a draft constitution. The draft suggested a system of government that consisted of three separate institutions: the Presidency, the Leadership Council, and the Jihadi Council. As per the proposed draft, the sovereignty of the state belonged to God, and the Islamic State was formed on the bases of Quranic provisions – in other words, the Quran was the constitution. To that end, the proposed system of government (including the adjudication of disputes) was based on Sharia, with no reference to statutory laws. However, the Mujahidin's proposed constitution never came into force, because the Mujahidin lacked a viable central government.

Instead, state affairs including the military, the courts, and general administration, were left to operate in accordance with the Mujahidin's interpretations of Sharia and their personal preferences. In addition, due to lack of capacity and the inclination towards corruption, self-interest, and

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27 The Mujahidin groups were divided into seven parties, which can be grouped into two categories. The first category were political Islamists, including: Hezbi Islami, of the Khalis faction; Hezbi Islami, of the Hekmatyar faction; Professor Burhanuddin Rabbani's Jamiat-e-Islami; and Professor Abdulrab Rasoul Sayyaf's Islamic Union for the Liberation of Afghanistan. The second category were traditionalist factions, including: Peer Said Ahmad Gailani's National Islamic Front for Afghanistan; Professor Sebghtullah Mojaddedi's Afghanistan National Liberation Front; and Mohammad Nabi Mohammadi's Revolutionary Islamic Movement (Kaplan, 2001; Ruttig, 2013; Kallie, 2019).

28 The religious scholars council was called *Shura e ahl e hal wa haqd*; for more details about the council see (Kakar, 1997). The term 'Islamic State' is used solely to replace its predecessor, 'The People's Democratic Republic'. It had nothing in common with Da'esh and its Islamic State.

power politics amongst Mujahidin leaders and foot soldiers, a deep sense of public distrust, insecurity, and a wide range of social and ethical divisions emerged within Mujahidin groups, as well as amongst the general population (Barfield, 2010).

The criminal justice system was in particular disarray, because the Mujahidin had denounced the entire body of laws (including criminal justice legislation), but failed to replace them with new laws. In addition, Mujahidin factions used to operate autonomously, with an utterly independent jurisdiction and in complete absence of the rule of law. Nearly all Mujahidin commanders and other warlords were allowed to maintain private prisons throughout the country. The groups' influence determined the capacity of these prisons; for example, the higher the rank of the Mujahidin leader or commander, the larger his prison.

According to a key figure, and respondent in this study, "those facilities were private and operated independently of state laws or anyone's control. The rest, you can guess!" The Mujahidin were unable to establish a single, nationwide justice system. In addition, as soon as they were at odds with the ruling faction (the Jamiat-e-Islami) which controlled parts of Kabul, the Mujahidin fractions fought for control of various regions and areas. It is believed that all of these factors contributed to a situation in which widespread warlordism, abuses of human rights, and criminal activities dominated, intensifying the civil war.

The inability of the Islamic State to find common ground gave rise to the Taliban movement, which took over from the Mujahidin in 1996 and ruled until 2001 (Rashid, 2001). As the Taliban took over the capital, Kabul, the Mujahidin government – led by Burhanuddin Rabbani, the then president – took refuge north of Afghanistan, where they formed a parallel government and resistance front. The resistance front reportedly maintained an anarchic government, running under its own laws and justice system, and with "excessively harsh prisons and detention centres" (Amnesty International, 2003b, p. 5).[29]

The Taliban had vowed to end the civil war and restore a pure society, in accordance with Islamic principles. Indeed, to some extent that objective was achieved, as the war between the Mujahidin factions ceased, but in exchange, people were deprived of their basic rights. The Taliban established an Islamic Emirate, based on a radical interpretation of Islam. The state operated through a Supreme Shura (working from Kandahar) and a Jahadi Shura (based in Kabul). As a result of the two Shuras, the relevance of official state institutions such as ministries and public services, including the courts and justice system, began to decline.

The Taliban abolished the preceding constitution and the entire body of laws, and hence the entire legal system of Afghanistan. There were no

29 The resistance front not only fought the Taliban, but also allied forces to help the international military overthrow the Taliban in 2001. For this reason, and due to their location north of Afghanistan, they are also known as 'the northern alliance'.

impartial judges and no state laws, and there was no separation of powers. A committee was established within the MoJ, which would either formulate new laws or align the old laws with Quranic provisions; in practice, the committee simply added the term 'Islamic' and the official name of the state (i.e. the Islamic Emirate) to the laws. The committee also made special efforts to combine pieces of related legislation, so that it would be easier to locate them when needed, and this proved to be a useful contribution to the practice of lawmaking.

In terms of content, however, the committee hardly changed anything. For example, the Prisons and Detentions Centres Law was amongst the legislation reviewed and revised by the said committee in 2000, qualifying as the fourth prisons law in the history of Afghanistan.[30] A simple comparison of the two texts reveals that the committee only replaced 'Democratic Republic of Afghanistan' with 'Islamic Emirate of Afghanistan', and included 'Islamic' or 'strict application and observation of Islamic standards' in all the laws. The remaining contents stayed the same as in the version enforced by the PDP. For example, Article 2 of the law reads: "…the purpose of applying imprisonment is to reform prisoners so that they can follow Sharia orders properly."

Taliban law was generally interpreted and applied according to an especially strict and fanatical interpretation of Sharia and Hanafi jurisprudence. The Taliban's primary objective was to intimidate and control the population, so they employed all means towards that objective, including the criminal justice system. Therefore, public executions, stoning, and amputations were common punishments. Under the guise of Sharia, they not only applied intimidation and exemplary punishments, but also summary justice and on-the-spot harsh punishments. In many cases, the Taliban's militiamen and religious police were the ones who decided right from wrong and imposed punishments on the spot after perpetrators were arrested.

As a result, the era resonates very closely with what was going on during Abdulrahman in 1880, with a slight difference, in that the Taliban did not rely heavily on prisons. If used at all, prisons were generally for housing hostages, those awaiting punishment, and those convicted of minor crimes.[31]

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30 The fourth Prison and Detention Centres Law was called, *Qanoon tatbiq majazat habs dar mahabees* 20th of Jamadi alawal, 1421 [20th August 2000].

31 Under the Taliban certain normal conduct would count as a crime, although an explicit punishment for it might not exist. For example, it was compulsory for all men to grow a beard, wear a hat or turban, and pray in joint sessions. The prayer should always be made immediately after the call for prayer. Thus, not wearing a hat, cutting or shaving the beard, or not attending prayer on time were all crimes. Likewise, women were not allowed to go out unless fully covered and accompanied by a *Mahram* – a close male family member. The Taliban's religious police later banned music, dance, films, flying kites, football, volleyball, boxing, playing chess and card games, and other forms of entertainment. The religious police were part of a powerful establishment called the Ministry of Vice and Virtue, which policed people's behaviours, including (for example) forcing men to attend collective prayers and women to cover themselves from head to toe.

For example, citizens who were not familiar with the correct way to conduct prayers or oblations, were detained for seven days and housed in a small prison-like facility. The facilities were used to teach the prisoner how to conduct prayers, oblations, and the like. At the end of these trainings, the prisoners were required to take a test; if successful, they were permitted to go free, otherwise they were sent to prison for up to four weeks. This process was primarily managed by the Taliban's religious police.

Despite the Taliban's oppressive and tyrannical characteristics, some Afghans supported their system of government. Perhaps this was primarily because many Mujahidin and other groups involved in the suffocating conflict since the early 1990s had been disarmed by the Taliban, ending warlordism and anarchic situations across the country. Physical security improved and the state had control over a substantial portion of its territory as a result. Many people viewed this as a positive development, restored for perhaps the first time in 30 years since the fall of Mohammed Zaher.

However, the overall situation remained unsettled, because the northern alliance still resisted (and carried out armed attacks on) Kabul and other cities; hence, the civil war continued. The Taliban remained in power until October 2001, when an international military operation overthrew them. Afterwards the Taliban retreated to safe sanctuaries, mainly in and beyond the eastern and southern parts of the country, preparing to fight back until returning to power in August 2021 (see the epilogue, below).

2.9 Post-2001 international intervention

In response to the terrorist attack carried-out by Al-Qaeda on the United States of America in September 2001, an international military campaign led by the United States raided the Afghan territory in October 2001 and toppled the Taliban government in November 2001.[32] An immediate result of this intervention was a power vacuum, which led prominent Afghans and the international community to gather together in Bonn, Germany, in search of a solution. All the major Afghan actors (excluding the Taliban), including politicians, local elders, and warlords, were invited to participate in the meeting, where they agreed on a road map known as 'the Bonn Agreement'.[33]

32 In resolution number 1368, adopted on 12 September 2001, the United Nations Security Council approved the US military intervention in Afghanistan. The resolution strongly condemned the September 11 attacks in the United States, regarding them as threats to international peace and security. In response to the attack, the Council called on all countries to cooperate in bringing the perpetrators, organisers and sponsors to justice.

33 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, or the Bonn Agreement 5 December 2001. The UN Security Council also endorsed the agreement S/2001/1154: https://www.un.org/press/en/2001/sc7234.doc.htm. (Last accessed in July 2021).

All the parties to the agreement pledged to help rebuild the state, establish law and order, and work towards economic development, stability, and democracy. In this moment of euphoria, Afghan diaspora returned to the country to take part in the rebuilding process. The Bonn Agreement served as both a political roadmap and a work plan for the initial five years of state-building and development efforts.[34] Every step of the process demonstrated progress in a variety of relevant areas, including state-building, law reform, and the development of state institutions, such as prisons and the criminal justice system in general.

About five years after the Bonn Agreement state institutions gained momentum, leading to a somewhat well-functioning state at the conclusion of the process. However, further development work was needed and interventions were therefore justified. The state showed tendencies towards two types of design and implementation method, one that would be independently run by the new government, and one that would be run in conjunction with the state's international partners. As such, when considering the post-2001 development of state-building, lawmaking, and criminal justice in Afghanistan, in the historical period 2001-2020, it is best to divide the era into two phases, which I would like to refer to as the 'Bonn Process' and the 'Post-Bonn Process', respectively.

Other authors have used 'donor-led process' and 'Afghan-led process' or have even divided these into smaller parts, such as 'the self-reliance phase', the 'mutual accountability phase', and the 'transformation decade'. I would like to stick to the earlier classification, because it allows me to include actors and institutions involved in the broader process of reform. It also helps maintain connections to the original sources of reform ideas in their respective phases, without going back and forth between parts of the same process within a smaller time scale.

Ad 1.

The Bonn Process essentially outlined a three-pronged approach for the establishment of a new government in post-Taliban Afghanistan. This included the formation of an Interim Authority, followed by a Transitional Authority, and finally an elected government, all of which was planned to

34 Several studies (academic and otherwise) have discussed different aspects of the Bonn Agreement, including its strengths and weaknesses (Suhrke, Harpviken and Strand, 2004; Jalali, 2006; Sky, 2006; Rubin and Hamidzada, 2007; Fields and Ahmed, 2011; Ponzio, 2011; Afsah and Hilal Guhr, 2019), which I will not discuss in in this work. A study by Afsah & Hilal Guhr (2019) examines how the agreement would have yielded better results by bringing together a number of factors and working with realities on the ground, whereas Suhrke et al. (2004) provide a concise summary of the Bonn Agreement and its success during its early stages of implementation. Nevertheless, many analyses overlooked important aspects of the agreement in relation to the three storylines discussed in this work, which is yet another reason for the importance of this section.

happen within the first two years of the Bonn Agreement being declared.[35] According to Section I, Article 2 of the Bonn Agreement, the Interim Authority consisted of the following three institutions:

A) The Interim Administration: As the highest authority in the country's bureaucracy, this was the first and the most important institution in the aftermath of the Taliban. The administration had a chairperson and five deputies, as well as 24 members who headed different departments; they were all selected and agreed upon during the Bonn conference. As soon as it was appointed the administration assumed all government responsibilities, not just inside the country, but also with regard to its international relations – as the repository of Afghan sovereignty. It also occupied Afghanistan's seat at the United Nations.
B) The Supreme Court: This was the second institution of the interim authority. Although the proposed Supreme Court clearly intended to help with and oversee the justice system, (unlike the interim administration) its leadership and other members were not defined in the agreement. On the other hand, the agreement's reference to the 1964 constitution as the temporary legal framework implied that the supreme court of that time would also be reactivated. Nevertheless, in reality it was not possible to activate (or reactivate) the court system within a short period of time, so the interim administration's chairman controlled everything, including the judiciary.
C) The Special Commission for the convention of the Emergency Loya Jirga (ELJ): Another vital institution intended to facilitate the formation of the 'Transitional Authority' through a broad consultation, using the traditional 'Jirga' mechanism. Just as with the Supreme Court, the leadership and members of the commission were to be selected later, via a series of consultations between Afghans under the supervision of the UN.

The commission managed to convene a Jirga that included about 2,000 delegates (it was planned for 1,450 delegates) from June 11th to June 19th 2002 (Singh, 2002). In spite of some deadlocks at the start of the Loya Jirga, the planned election took place and Hamid Karzai was elected president with an overwhelming majority. The new president was also required to introduce his cabinet and receive a vote of confidence from the Loya Jirga. Accordingly, Karzai announced the names of 14 ministers and vice presidents, for whom the Loya Jirga voted, and the cabinet was also approved.

Eventually, as the second step in the Bonn Process, the Interim Authority installed its own replacement (i.e. the Transitional Authority). As initially outlined in the Bonn Agreement, it took the Transitional Administration two

35 The Interim Authority was a temporary government, assigned to help with the transfer of power to a transitional government (from the Mujahidin, who temporarily took over in the immediate aftermath of 2001) and fill the power vacuum created by the overthrow of the Taliban.

years to prepare for the third and last phase of the Bonn Process and introduce an elected government. Nonetheless, the Transitional Authority had several important tasks before that, including drafting a constitution and overseeing other reform processes, including reform of the justice sector. Altogether, these constituted a blueprint for the construction of an overall state structure, with presidential and National Assembly elections forming the final step in the Bonn Process.

Although each of these activities involved some roadblocks, interruptions, and arrests, they were ultimately successful, in a broad sense. At a more technical level, however, all the processes and interventions featured deviation, setbacks, and (in general) a great deal of the information I will cover in subsequent chapters. For example, following an admittedly arduous and troubled process a constitution was adopted in 2004, which ended up being a moderate success in the broader sense, because it allowed the overall process of state-building to move forwards in a relatively positive direction, after all the years of instability and civil war.

A significant overhaul of the legal sector was also a hallmark of this era, including the establishment of a Judicial Reform Commission (JRC) (see 3.2.5 below), and the enactment of laws such as the 2004 Interim Criminal Procedure Code (see 4.3.2 below) and the 2005 Prisons and Detention Centres Law (see 4.3.5 below). Thus, before drawing conclusions on the basis of this section alone, it is best to refer to the relevant sections below.

The last step in the Bonn Process included the 2004 presidential election and the 2005 national assembly election, resulting in two groundbreaking outcomes: with it the first ever president elected with popular support, and a representative legislature being installed after a very long period of arrest. This is not to say that the election outcomes were perfect; on the contrary, the outcomes were very troubled processes (Morgan, 2007; Smith, 2011). Nevertheless, looking at the elections in a broader sense, they did contribute to the success of state-building, law and order in a country that had just emerged from decades of civil war. I am inclined to call this success moderate as well, because it instigated a timeframe which entailed that the process of state-building was lengthy and challenging.

The Bonn Process was officially ended by the Afghan President's statement at the inauguration of the new national assembly in December 2005. The statement concluded that 'Afghanistan, with military and financial aid from the international community, successfully met all benchmarks of the Bonn Agreement. Thus, the process officially ends but Afghanistan has a long way to go before it becomes a self-governing state with functioning institutions.'[36]

36 From President Hamid Karzai's speech on the historic occasion of inauguration of the first elected legislature since 1969.

Ad 2.
The Post-Bonn Process was essentially a continuation of the preceding stage, although the role of international actors gradually declined, in favour of putting domestic actors in the so-called 'driving seat'; the Bonn Process was both the cause and effect of this. It was the cause, since over the course of the process many of the state institutions grew into fully functional entities that could plan and implement their development agenda independently, or with minimal assistance. It was an effect, since in many cases reform failures were attributed to their donor-driven nature. Although, the need to change previous approaches to development eventually became apparent, leading to the development of more domestically-led substitutes, such as the partnership approach.

The partnership approach (2006-2007) reduced the international community's role in setting priorities for Afghanistan. With this in mind, the 2006 London Conference endorsed a new roadmap, known as 'the Afghanistan Compact', which proposed a reform agenda that would strengthen Afghan leadership with the support of the international community (see 3.3.1 below). The compact aimed to guide efforts towards state-building in a coordinated manner, in partnership with the Afghan government (UN Security Council, 2006).[37] Whilst this stage brought some changes to the donor-driven approach, it also had many shortcomings for a comprehensive reform programme, given Afghanistan's conflict-affected situation (Naylor, 2011).

Consequently, the Afghan ownership phase (2007-2012) replaced the partnership phase. The ownership mechanism recommended that the Afghan government set priorities and establish partnerships with the international community. This led to formulation of the Afghanistan National Development Strategy (ANDS), after which the National Priority Plans (NPP) were developed, both of which served as new reform frameworks. However, it should be noted that previous mistakes had already sparked a blame game between the Afghan government and the international community, and the newly formed partnership was not immune from these effects. As Thiessen (2013) argued, "for each argument related to Afghan ownership there exists a valid counter-argument that is another piece to the overall puzzle." (2013, p. 70).

In the blame game that ensued, questions were raised as to who was ultimately responsible for delivering agreed-upon commitments, and this led to the development of the mutual accountability frameworks (2012-2014) as the next strategy for overcoming reform effort failure. The Tokyo Mutual Accountability Framework (TMAF), named after a 2012 meeting held in Tokyo, was the first in a series of similar frameworks. Consequently, the Afghan government and its international partners heralded 'the Transformation Decade' (2015-2024), which was focussed on securing aid flow in the context of promising a radical shift from aid dependence to a self-sustaining situation (see 3.3 below).

37 Also see (UN Security Council, 2006).

Indeed, the Transformation Decade was meant to be part of an exit strategy for the international military.[38] However, in 2019 some of the US policy makers simultaneously launched the *Doha Process* and set in motion negotiations for peace and power-sharing with the Taliban, after nearly twenty years of staunchly fighting them. The Afghan government was not involved in the negotiations, but a special US envoy kept them informed via briefings of the process. The process quickly gained momentum, resulting in a peace agreement between the international community and the Taliban representatives, entitled *The Agreement for Bringing Peace to Afghanistan*, which was signed in Doha, Qatar, in February 2020.[39]

As part of the agreement, which was designed to end the war in Afghanistan, the international military forces were to withdraw from Afghanistan in exchange for the Taliban's commitment that terrorist groups would not be allowed to operate on the Afghan soil. As an additional confidence-building measure, and condition for resuming intra-Afghan negotiations, the international community committed to releasing the military and political prisoners, who were formerly part of the Taliban, from Afghan prisons; although unilaterally, and without coordination with the government of Afghanistan. In its resolution S/RES/2513 of March 2020, the United Nations Security Council endorsed *The Agreement for Bringing Peace to Afghanistan*, calling for its full and expedited implementation, in order to end the long-lasting state of war in the country (Farr, 2020, p. 1).

However, as the Afghan government was neither party to the negotiation, nor a signatory of the agreement, it became increasingly resentful of how the peace process was progressing. The government felt excluded from discussions and necessary arrangements regarding the future of its own country, resulting in intense conflicts between Kabul and its international partners, particularly Washington. Consequently, the government's control was impaired, due to the internal split within the administration (including the ANSF) resulting from confusion and (possibly) hidden agendas. In the end, the government collapsed in mid-August 2021, and the Taliban regained control of the country (see the epilogue, below).

According to my assessment of events, the Doha Process disrupted a smooth transition of the Transformation Decade and returned the country to its pre-2001 state of affairs. It would therefore be imprudent to categorise the drawdown in state-building as either a miscalculation or an unintended consequence of reform interventions. It is also imperative to note that marking it as a deliberate set of actions geared towards deterioration of the situation would also be unreasonable. In order to understand what went wrong, it is essential to examine specific areas of intervention in full, through the lens of 'insider information', and by using a comprehensive and multi-dimensional research methodology.

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38 For more information about the exit strategy see (Fearon and Laitin, 2004).

39 For a public copy of the agreement see: *Agreement for Bringing Peace to Afghanistan* (Last accessed in June 2021).

2.10 Conclusion

In spite of Afghanistan's long history, the first thread of viable state-building effort dates back to the middle of the eighteenth century, under Ahmad Shah Durrani, the founder of an expansionist dynasty that lasted from 1747 to 1772. Later, Afghanistan became a scapegoat for the Great Game, three Anglo-Afghan wars were fought in the process and ultimately Afghanistan became a buffer state between the British and Russian empires. After the war of independence in 1919, the country gradually stepped towards modernisation of its state and institutions, as well as of its culture and society.

The country experienced serious turbulence under the influence of a number of domestic and foreign factors, including conflicts between modern and traditional mindsets, and a prevailing regional power dynamic. However, it enjoyed its longest period of relative peace and stability from the 1940s until 1970, with the latter decade being a golden time in numerous arenas, including in state-building, the rule of law, and justice. After 1970, there were dynamic changes in the process of state-building, law, and order, which are best defined by terms such as 'checkered history', 'ruptures', and 'subsequent regimes'.

From this point onwards, the flow of developments slowed down, halted, and even changed direction towards deterioration, culminating in a regime change in 1973. In 1979 Soviet occupation led to decades of instability and a downward path in state-building, the rule of law, and order. This was followed by political ruptures, further regime changes, and rapid transition from a republic to a socialist one-party system, then to an Islamic state, followed by an extremist Islamic Emirate, a western type democracy, and finally back to an Islamic Emirate in 2021 (for the latter event, see the epilogue, below).

Except for Afghanistan's short golden era, the common characteristics of the latter part of its history are successive state failures, the deterioration of law and order, civil war, and instability. These factors have allowed very little time for most ruling governments to plan for development and think about good governance. As is commonly understood amongst most Afghans, the country has experienced the impact of external interventions and changes to its state structure, including its political system and state institutions, at a frequency which matches how often other nations would normally hold their national elections.

As a matter of fact, there is a side to Afghanistan's history, involving conservative aristocrats, landlords, tribal elders, and clergyman, which is often overlooked by analyses. These groups typically respond harshly to development, and create blocks ahead of any attempts to change direction, because changes in any direction would eventually threaten their power bases. The brief account presented above is testimony to the fact that Afghanistan has been caught up between such opposing historical blocks. For example, all reform attempts – no matter how large or small, modern or traditional, national or foreign they were – have met with opposition that was initially weak but which gradually grew into a block.

Amanullah's modernisation was prevented, because some people thought it was against tradition and Islam. In the latter part of the twentieth century, the communist-oriented PDP completely undid all the achievements of the golden era, because the era was too royalist and religious for them; yet, their government collapsed as the Russians left Afghanistan. In the mid-1990s the Taliban reinstated a pre-1919 Islamic arrangement that was fundamentalist and traditional. The arrangement was erased by post-2001 state-building and democratisation efforts, which ruptured back to a fundamentalist Islamic arrangement only weeks after the international presence had left Afghanistan.

This account of Afghanistan's history teaches us two lessons.

First, one must always pay attention to the deep social dynamics that exist as two broad historical blocks defining the social structure. One of the historic blocks saw the future as change, modernisation, and liberalisation, wanting to advance towards better social conditions. However, the other historical block saw the future in the past, thinking it would be better to return to the past and live there forever. Both of the blocks contained a variety of characters, including progressive reformers and fanatical hardliners of different ideologies.

Internal dynamics and their effect on state institutions reveal that the ethnolinguistic nature of society calls for a broad-based consensus between all Afghans, which has never been achieved due to the historical blocks. The resistance to Amanullah's modernisation efforts and the Taliban's Islamisation initiatives are excellent examples, showing that people will resist when forced to follow practices or beliefs, whether modern or Islamised, that are different from their own traditional views. None of the governments compelled society to follow purely traditional practices, either by way of regulations or by other official means. However, if this were ever to occur, I believe the people would resist, because not all Afghans believe in a single tradition that is acceptable for everyone.

Second, other factors that played a significant role in Afghanistan's checkered development included: troubling geographical boundaries, imposed by colonial powers; poor state institutions; a lack of resources, including professional human resources and leadership; and, a lack of synergy in almost all state-building and development interventions across history. With every new intervention came new sets of rules and regulations, as well as short-lived and concurrent governments, which attempted to impose new regulations on inconsistent and fragmented structures. This seemed to have the most significant impact on state-building, in terms of making it fail. Throughout history, international intervention in Afghanistan has not only proved ineffective in terms of improving these conditions, it has also discouraged the growth of national institutions.

For example, over time, the financing schemes for the 'Great Game', the 'Cold War', and the recent 'Global War on Terror' have not only intensified hostilities between the domestic historical blocks, they have also prevented growth in domestic taxation, trade, and other financial structures. In the

absence of these financial aspects, statesmen have nevertheless needed to pay a lot of attention to them. Additionally, the moment the schemes ceased to exist, the country experienced a crisis that was worse than before, as evidenced by the severe humanitarian crisis the country has been experiencing since August 2021, due to a sharp reduction in international aid and the Taliban takeover (for an exploration of the latter event, please see the epilogue, below).