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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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10.1 INTRODUCTION

In this epilogue I will discuss two major changes, which occurred after I ended my field work in 2019.¹ During the first period, in the spring of 2020, the legal mandate was affected by an institutional overhaul and the shift of prisons' responsibility to a civilian institution. In the second period, in the summer of 2021, the legal mandate for prisons changed, along with the overall structure of the government and political regime, as the Taliban rose to power for the second time. Both periods had significant impacts on the prison system and its legal mandate, will be summarised below.

10.2 THE OFFICE OF PRISON ADMINISTRATION AND ITS CHALLENGES

Amidst a volatile political and security situation within the country, in November 2019 the Islamic Republic of Afghanistan's cabinet announced the need for a prison system that is "coordinated, rehabilitation-focussed, and managed by civilians". Following this announcement, the Prisons and Detention Centres Law was revised in a rush, and a presidential decree, issued in January 2020, confirmed the establishment of the Office of Prison Administration to replace the GDPDC.² In its founding decree, the office was tasked with taking any initiatives necessary for a thorough reform of the prison system, including revising lower legislation and proposing a five-year reform plan.

1 Although the majority of my fieldwork was conducted from 2017 to 2019, some changes were introduced to the prison system's overall structure in 2020, so I conducted additional interviews and observations of the prison-based programmes in 2020 as well.

2 Establishment of the Office of Prison Administration was proposed by the Cabinet's Legal Sub-committee through decision number 11, dated 17/10/1389 (7 January 2020) and was endorsed by Presidential Decree number 106, dated 25/10/1398 (15 January 2020).

Admittedly, the prison system had long sought reforms of this type, and they were actively advocated by the MoJ in 2012 (see 7.2.3 above). However, at that time a 'military first' approach was favoured, and the government did not pay attention to those proposals. In 2020, when the prison system was exposed to the influence of political factors around peace negotiations, and was arguably more robust, the 'military first' approach was no longer necessary, and the government opted to shift the prison system to a civilian administration.

In accordance with the new prison law, however, the Office of Prison Administration has been tasked with a broad mandate, including: provision of services such as catering, health, and education for all prisoners; development of new prisons and reform of existing ones; expansion of work opportunities within prisons; identification of beneficiaries for presidential pardon; implementation of pardon decrees; and taking care of any other business related to prisons and detention centres.³

In terms of its institutional structure, the Office of Prison Administration is composed of both military and civil service positions, and its workload is divided between civilian and military personnel. The office is headed by a Director General – a civilian position, directly appointed by the president. The Director General is supported by two deputies, one for general management, including policy formulation (a civilian position), and one for security management (a military position).

The civil service section of the prison administration consists of two first-grade and 46 second-grade senior management positions, assisted by over 2,000 support staff who are also civil service personnel.⁴ All the civil service employees must be hired through a meritocratic and open competition, based on the Civil Service Law (2018) and other relevant guidelines. In contrast, the military section has more than 7,000 guards and employees, approximately three times more than the civilian structure, and unlike their civilian counterparts they are not hired via a competitive process.⁵

From a technical and administrative perspective, the reformed structure of the Office of Prison Administration presents several institutional challenges, albeit after the culmination of years of reform and restructuring effort. For example, although the relevant cabinet decision calls for the establishment of a civilian prison administration, the reform simply followed the civilian leadership approach used by the ANP in early post-2001,

3 Article 11 of the Prisons and Detention Centres Law, Official Gazette number 1375, dated 28 Hamal 1399 (April 2020).

4 In accordance with the Civil Service Law there are basically six civil service grades. Grades 1 and 2 are management ranks, with 1 being the most senior.

5 In accordance with the Prisons and Detention Centres Law 2020, all military positions have to be filled by recruits from the Afghan Public Protection Force (APPF), which is essentially a state-owned security company. Prior to the establishment of the new Office of Prison Administration, all military recruits were drawn from the Police Academy of Afghanistan, or from other branches of the National Police. According to the Afghan Public Protection Force Advisory Group and the APPF official website: “the APPF is a pay-for-service Afghan government security service provider underneath the MoI that protects people, infrastructure, facilities, construction projects and convoys. It is organized as a State Owned Enterprise (SOE) in order to be able to contract with domestic and international customers for security services. The APPF guards are not members of the ANA or Police and they have no mandate to investigate crimes or arrest suspects. The APPF was established in 2009 in order to allow Afghan Uniformed Police (AUP) to focus more on traditional law enforcement tasks. The APPF today has about 10,000 guards who provide security for international, government and non-governmental entities, sites and facilities.” (APPF, 2018)

and installed a mixed military and civil administration. The civilian leadership approach was a problematic solution then, and it was not adjusted, adequately defined, or regulated to match prison system requirements now.

One major negative consequence of this approach was the occurrence of several institutional level clashes between the two streams of managers. Whilst civilians were nominally in the lead, the military structure of the prison system was entrusted with more operational power, enhancing its responsibilities, strengths, and other features. As a result, an age-old and predominantly military environment was maintained across the prison system, resulting in furious administrative competition at all levels, but more visibly within the second and third tiers of bureaucracy, including in individual prisons such as Pul-e-charkhi, where military features and routines took over the institution, but fresh and less experienced civilians still claimed to be in charge.

In order to strengthen the position of civilian management, the Office of Prison Administration introduced a new stream of civilian managers across the prison system. These managers were authorised to exercise significant leadership roles in almost every aspect of prison management, including its internal and external relations. In addition, they had significant influence over the development of a five-year reform plan (with an estimated budget of 80 million dollars) and set of proposals for outsourcing certain prison services, including security management, education, and industrial programmes – a task assigned to the Office of Prison Administration in its founding decree.

These changes in the prison system's structure and personnel apparently did more harm than good, because most of the ideas and plans pushed by civilian management were highly ambitious and unrealistic. In some cases, exerting too much pressure and influence in order to centralise prison-related matters at the Office of Prison Administration resulted in animosity and resentment between the new administration and other institutions within government bureaucracy. As discussed in bureau-political theory (Tanner, 1995, 1999), this process would come naturally to the agencies which were having their authority curtailed during the revision process for the Prisons and Detention Centres Law, in 2020.

To that end, the new ideas and plans were not only abandoned (to remain on paper) due to a lack of cooperation from other state institutions, they also served as a reason for other institutions to dislike the new administration for cutting their ties to the prison system, and to refrain from engaging in prison-related initiatives (even by blocking them, where possible). The MoE, for example, took practical steps to sabotage the new administration's initiatives for independent implementation of its educational programmes.

As explained before, prison-based education has traditionally been part of the MoE's job, hence its staff and budget belonged to the ministry. Due to the revised Prisons and Detention Centres Law (2020), prison-based education had become an independent programme, directly managed by the

Office of Prison Administration. The MoE vigorously opposed this modification in the law, which it translated as an infringement of its authority and institutional structure. However, eventually the ministry agreed to make the prison school independent and gave away its staff and budget to the Office of Prison Administration.⁶

In return, the MoE decided not to recognise the prison school as an official state programme comparable to those overseen by the MoE. This move by the ministry posed a big challenge for the prison administration, because without accreditation the prison school provided no value beyond the prison walls. In addition, when accreditation became problematic, the prison administration started to face several other challenges, including a further lack of prisoner interest in the official educational programme. The prison administration also found it difficult to find resources, such as up-to-date syllabi, teaching curricula, and textbooks.⁷

In much the same way, a number of serious disagreements developed between the office and most of the other relevant government agencies (notably the court and prosecutors), which were linked to power politics and dynamics between state institutions and their individual struggles to expand their areas of control and authority; some of these chaotic situations are recorded in (UNAMA, 2019; AIHRC, 2021). In particular, tensions between the prosecutors and the Office of Prison Administration resulted in a disorderly situation, to the extent that they accused each other of large-scale misuse of authority and corruption.

As a result, the General Director of the Office of Prison Administration, who was appointed just months ago to fight corruption, is now a wanted man (by the judicial administration). He is charged with large-scale embezzlement, corruption, and the misuse of authority (Ansari Mashood, 1399). The most serious allegations against the director involve his receipt of a 34 million dollar bribe to facilitate the escape of Abdul Ahad, a famous criminal convicted of financial crimes connected to the Azizi bank (one of several private commercial banks in Afghanistan) case; the director of Pul-e-charkhi at the time was also accused of facilitating the escape.

In summary, due in part to the controversial nature of the reform and its inappropriate timing, as well as to leadership issues within the civilian administration of the system, post-2020 prison reform soon turned into a

6 The prison school had only one staff member, appointed by the MoE, and he was the principal, or 'headmaster', as they called it in the prison. According to the prison authorities, the headmaster did not go to Pul-e-charkhi regularly, and he did not provide technical assistance, guidance, or help with material support, including teaching materials.

7 The Office of Prison Administration also encountered difficulties in finding private sector partners, due to limited funding and procurement processes. Although, in late 2020, the office was able to partly resolve the problem, by inaugurating an official school in the female section of Pul-e-charkhi, I believe that fundamental recognition and accreditation issues were still in place. Thereby, the much-troubled prison school programme got into deeper difficulty, with both technical and operational aspects strengthening and contributing to each other's issues.

failure. This allowed political elites to become implicated in the large-scale misuse of authority, and paved the way for the embarrassing exploitation of prisons and prisoners, in order to achieve a political deal under the guise of a peace process.

10.3 HISTORY REPEATS ITSELF: PRISON REFORM FOLLOWS POLITICS

As summarised in (10.2 above), the 2020 overhaul of the prison system was planned during a chaotic political and security situation. It was a time when international partners of the Afghan government, had already negotiated a peace process and reached an agreement with the Taliban, later signed in Doha in February 2020 (Farr, 2020).⁸ The agreement essentially called for the withdrawal of the United States and coalition forces from Afghanistan, in return for the Taliban's promise not to allow terrorist groups to operate on Afghan soil. It also stressed the importance of dialogue between the Taliban and the Afghan government.

The United Nations Security Council endorsed the agreement via resolution S/RES/2513 of March 2020, urging its full and expedited implementation, in order to end the long-running conflict in Afghanistan. The Afghan government, however, was neither part of the initial negotiations, nor a signatory to the final agreement. An interestingly relevant aspect of the agreement was the commitment to release up to 5,000 combatants and political prisoners (Taliban) from Afghan prisons. This was reportedly a confidence-building measure, and a condition for the beginning of intra-Afghan negotiations, which did not succeed as Afghans had expected.

Following the Doha agreement in February 2020, the process of releasing national security prisoners began, and within about five months (April to August 2020) over 90% of the 5,000 prisoners were freed. A specific category of (about 400) prisoners that were important to the Taliban remained imprisoned. The government claimed that they were imprisoned for their affiliation with the Taliban, but they were also guilty of other serious crimes, so they could not go free without undergoing due process.⁹

Ultimately, the government invited a consultative Loya Jirga of over 2,300 people, from all the provinces of Afghanistan, to gather in Kabul from 7th to 8th August 2020. The Loya Jirga advised the government to release the remaining 400 prisoners, in return for a promise from the prisoners and

8 The agreement had confidential attachments which have never been made public (at least up until the time of writing), but a copy of the public version of the agreement can be found on the official website of the US Department of State, under: *Agreement for Bringing Peace to Afghanistan* (Last accessed in October 2021).

9 According to the government, of the 400 prisoners in question, 156 were sentenced to death, 105 were accused of murder, 34 were accused of kidnapping that led to murder, 51 were accused of drug smuggling, 44 were on the blacklist of the Afghan government and its allies, six were accused of other crimes, and four were accused of unspecified crimes.

the Taliban to accelerate peace negotiations. The final 400 Taliban prisoners were released a day later (August 9th) by an order signed by the president. This also reminds us of the critical role of Jirgas as informal, but powerful, mechanisms of state-building, law, and order.

After the release of over 5,000 national security prisoners and the announcement of the hasty withdrawal of international troops, the Taliban were in their strongest position ever. As a result, they increased their attacks on the government until they achieved a chaotic takeover of the country, even before the withdrawal of foreign troops had been completed. The Taliban then established an Islamic Emirate as the country's political system, and announced that Amir-al-Muminin ('leader of the faithful') would lead the state. The operation of the government, however, would be overseen by a caretaker government led by a prime minister.

In summary, and against the backdrop of issues discussed in (2.7 and 10.2 above), many of the 2020 peace negotiation conditions and processes, and their connection to prisons, were similar to those encountered in the 1990 dilemma presented by the PDP, in swapping political prisoners for peace negotiations. In 1990, prisoner swaps were relatively easy, due to the dominance of a socialist legality and one party system. It was perhaps not as easy in 2020, particularly with the ANP in charge of security and the management of prisons on the one hand, and fighting insurgency on the other.

One of the most compelling reasons for this complication lies in the fact that the ANP are relatively diverse, compared to the PDP, and they are in a constant state of war with the Taliban outside of prison walls. Due to the fact that both sides have actively killed each other on the battlefield, there has been a great deal of resentment and animosity between them, for some time. In recognition of the police force's role as guardians of the rule of law and public order, and the Taliban's role as an enemy of both the public and order, the police have a negative attitude towards Taliban prisoners; an attitude that has concerned domestic politicians, as well as foreign diplomats and other actors involved in peace negotiations.

A significant factor in the prison system's overhaul has therefore been a shared lack of trust between the government and its international partners in the police. The lack of trust was evident throughout the post-2001 era, and still manifests itself in a recent report from the US Special Inspector General for Afghanistan Reconstruction (SIGAR) (SIGAR, 2022). Thus, amongst several other pressing political and technical factors, the fact that the police were seen as potential spoilers of a smooth process of prisoner swapping undoubtedly resulted in state-led advocacy of an urgent need to reform the prison system. To that end, political factors, namely the negotiation parties' ability to gain political ground by using thousands of insurgents held in prisons as bargaining chips, played a greater role in prison reform than technical factors.

10.4 PRISON ADMINISTRATION AND ITS OPERATION UNDER THE TALIBAN¹⁰

As the Taliban took over, it dissolved the legislature (i.e. the National Assembly), the Independent Electoral Commissions (IEC), and the AIHRC. Likewise, it replaced the Ministry for Women's Affairs with the Ministry for the Promotion of Virtue and Prevention of Vice. However, it preserved most of the other administrative structures provided by the 2004 Constitution, including the Office of Prison Administration and its subordinate institutional structures down to the individual prison level such as Pul-e-charkhi.¹¹ However, normal prison system operations have been severely disrupted, due to the following two factors.

First, in an echo of what has happened during other political ruptures in Afghanistan (discussed in Chapter 2), once they had gained control the Taliban released all prisoners, nationwide. This not only led to murderers, rapists, and thieves being freed, but also to releasing the remaining Taliban prisoners into society, causing all the prison institutions to become isolated and abandoned places. Pul-e-charkhi (for example), once the country's biggest prison, is now littered with the clothing, footwear, and other belongings of prisoners and prison personnel who escaped in the immediate aftermath of August 2021.

According to reports, the prison "is littered with rubbish, and the stench of rotting food and fetid latrines hangs heavy over the site" (AFP, 2021). The only prisoners who reportedly remained in Pul-e-charkhi were those detained on suspicion of being members of the Islamic State. Even from amongst this category, the Taliban kept some prisoners and executed others, including Abu Omar Khorasani, who was leader of the Islamic State of Khorasan and was imprisoned by the previous government (Alan, 2021; The Week, 2021). However, based on lessons from the history, it is safe to argue that prisons will not remain empty for long and the Taliban will soon start to pack prisons with ordinary criminals and their own political oppositions alike.

Secondly, most of the senior and middle management prison administration staff left the country when the Republic fell in 2021. In the rare cases where the staff did not leave, the Taliban removed them from their positions and replaced the majority of them with pro-Taliban personnel. Many former National Security prisoners were instead appointed as prison managers and guards, across the country (Al Jazeera, 2021). For example, Pul-e-charkhi

10 This section is mainly based on news reports and telephone conversations with informants and relevant actors who remained in Afghanistan after August 2021.

11 The Taliban have restructured the judiciary to align with a Sharia court system, composed of a judge (*Qazi*), a religious jurist/legal expert (*mufti*), and a clerk. It has dismissed previous judges and instead appointed individuals with titles like *Mawlawi* and *Akhund*. *Mawlawi*, *Akhund*, and *Mufti* are not standardised titles, and they do not correspond to a fixed set of qualifications. However, the titles suggest that the individual possesses some knowledge of Sharia, and particularly Islamic jurisprudence.

is headed by former prisoner, “Mawlawi Abdulhaq Madani, a 33-year-old Taliban fighter”, who still views the prison with disdain (AFP, 2021).

Since all the laws of the Republic era, including the Prisons and Detention Centres Law, have been annulled by the Taliban and new laws have not yet been introduced, prison institutions are not required to comply with the legal mandates described above. In spirit, prisons exist as institutions that are used for coercion of those opposing the Taliban, and for intimidating members of the general public who demand to be given their civil rights. More generally, summary justice and on-the-spot punishments are commonplace. The Taliban’s militiamen and local commanders deliver justice ranging from public shaming, through corporal punishment and (in severe cases) death, either on the spot or after a brief on-site consideration.

As a matter of fact, the Taliban’s criminal justice system operates in much the same way as their first Emirate (from 1996-2001). They do not rely seriously on the prison system, as their formal criminal justice system handles only a small number of criminal cases. When they do use prisons it is only for a short while, and the prison staff pay less (or no) attention to prisoners’ rights or their living conditions. The Taliban also use the prison facilities for other means. According to some reports, “the Taliban’s first move upon seizing power in Afghanistan was to take extreme measures to tackle the country’s drug epidemic. To that end, thousands of addicts were rounded up, beaten, and marched off to prison” (RFE, 2022).¹²

In addition to this account concerning the official prison system, some reports raise concerns about the countless private prisons that remain hidden from the public. According to local sources, “these informal prisons operate in nearly every province... Kabul itself has at least three of these black-sites” (Jason, 2022). As a matter of fact, these are not completely new phenomenon, as there are plenty of examples of private prisons which existed alongside of the official prison system in very recent history, including during the Mujahidin, the Taliban’s first Emirate, and the Republic era (as discussed in Chapter 2, above).

In the months after the Taliban takeover, efforts were made to place the prison system under civilian command. The formal motive for this was prison reform, whereas giving high priority to security must have been the true primary motive. In retrospect, the real motive was to please the Taliban and approach the Doha agreement, thus marginalising the role of the police within the prison system. After the Taliban takeover, the existing legal mandate was annulled and replaced by a general Sharia mandate. What the latter will amount to remains to be seen. If we look at the legal mandate during the previous Emirate, we can see that (after some time) it

12 Although Taliban officials claim “to have successfully treated more than 2,000 addicts in the past seven months”, and they consider imprisonment a better option for addicts than rehab clinics, local psychologists disagree and assert that coercion is never the best medicine (RFE, 2022).

enacted some legislation which was substantially similar to the preceding legislation, but modified in a more organised way.

As far as implementation of the legal mandate under the Taliban is concerned, the Office of Prison Administration has been retained, although it was already weakened before the takeover. After the takeover, the office was abandoned by high level civil servants who fled abroad, and their replacements were generally Mullahs and others without administrative experience. Similarly, concerning implementation of the legal mandate at the level of individual prisons, the release of all prisoners was an ultimate denial of the purpose of the prison system, especially as former Taliban prisoners are the replacement prison managers.

In conclusion, the modest progress made in Afghanistan during the years of reform has been regressing at an alarming rate, since the Taliban took control. At the time of writing this dissertation, the criminal justice system and prison institutions have already been seriously impacted by the relapse, and the situation continues to deteriorate. With the Taliban's order to annul all the laws made under the republic, the prison system's legal mandate has diminished, and its function has been reduced to paramilitary institutions that are operated by Taliban fighters and governed by an unclear interpretation of Sharia.

