TALIBAN, SHARI’A, PASHTUNWALI AND WOMEN’S RIGHTS IN AFGHANISTAN

On April 14, 2021, American President Joe Biden announced a full withdrawal of US troops from Afghanistan by September 11, 2021, starting on May 1, 2021. Immediately following this announcement, the Taliban intensified its already multi-fronted campaign to fight and overcome the Afghan security forces and increase its territorial gains throughout the country. The climax of these developments was the fall of Kabul on August 15, 2021 when the Taliban entered Kabul and claimed control over the entire country.1

Dominating the narrative and concern of the international community during the evacuation and its aftermath has been the situation for women and girls in Afghanistan vis-à-vis the Taliban rules on the place and role of women in society. The Taliban, however, is far from monolithic nor is it bound to the manner in which it ruled Afghanistan during its 1996-2001 iteration.2

To better understand and plan interventions to support Afghan women, research was undertaken in later 2021 and early 2022 to examine the impact of the Taliban rule on the place of women in Afghan society through three dimensions. These were:

1. The extent to which Shari’a-based law making and practice by the Taliban will have foundations in edicts of Pashtunwali (regardless of their narrative),
2. The extent to which normative conflicts between Pashtunwali and Shari’a can be resolved, and
3. The extent to which the rule of law – based on Shari’a, Pashtunwali, or a combination – would be adhered to in the different and diverse communities throughout the country given the long history of a weak centralized rule of law in Afghanistan.

“Objections to how the Shari’a as implemented by the Taliban contradicts the historical Shari’a based on precedence are rarely raised because few dare to oppose a regime which is far from inclusive and claims to adhere to the true Shari’a”

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1 For reactions to the takeover by the Taliban, see: Global Reaction to Taliban Takeover of Afghanistan, available from: [https://www.reuters.com/world/asia-pacific/reaction-to-taliban-takeover-afghanistan-2021-08-16/](https://www.reuters.com/world/asia-pacific/reaction-to-taliban-takeover-afghanistan-2021-08-16/)

FINDINGS

The findings from this research are based on an extensive review of the available literature and interviews with key informants.

State Authority and Rule of Law in Afghanistan
The broader literature on Afghanistan suggests that the challenges of governing a large, poor, and ethnically diverse population are compounded by the widely shared belief among local communities that national state laws and their enforcement are outside impositions and, as such, to be avoided.

This mistrust of the state (and disobedience of its rules) has little to do with ideology or religion. Rather, it is mostly the outcome of historically weak national state combined with the prevalence of strong customary rules that have governed the many isolated communities around the country for generations.

During the 20th Century, successive governments collapsed as a result of their efforts to modernize the country by introducing fundamental reform to effect social change, including awarding more equitable rights for women. The main driver of the resistance against central state measures for legal reform appears to have been opposition to state-imposed systems, rather than the ideology driving the state reforms.

Shari’a and Pashtunwali
Shari’a developed several hundred years after the Prophet Muhammad’s death in 632 AD – mainly during 8th and 9th Centuries – and evolved as Islam spread to North Africa and China. By 900 AD the sentiment among the scholars was that all essential questions about the implications of Quran and Sunna – the way of the Prophet – had been settled and that from then on, every Muslim must follow the rules of Shari’a.

Shari’a is viewed by Muslims the world over as “God’s law” based on justice, fairness, and mercy and a source of guidance for pious individual behavior (praying, fasting, charity). As such, Shari’a supersedes all rules made by humans. Under Shari’a, men and women are “moral equals in God’s eyes” but with different and complementary rights and obligations.

Unlike Shari’a, which is focused more on the individual, Pashtunwali applies to both the individual and social groups. The emphasis is on personal and community honor and shame, both pertaining to zan, zar, and zamin (woman, gold, and land). Pashtunwali is a code of behavior to maintain community and individual honor rather than a formal legal code as understood in modern (Western) jurisprudence.

In Pashtunwali, the key tenet of the thinking about the place of women in society appears to be seclusion as a means to minimize threats to honor. The logic is that if women are as invisible as possible to the eyes of other people, they cannot disgrace themselves and their families in the eyes of other people.

This thinking has been reinforced and made even more extreme by the decades-long intermittent armed conflict which has created ongoing threats, fears, and uncertainty with women being among the most vulnerable targets.

Pashtunwali has provided Pashtun communities with stability, independence, and defense against external elements which have come in the guise of the national governments as well as various foreign armies: the British, the Soviet Union, and more recently, the United States and NATO.

Taliban and Shari’a
There are three main groups or tendencies within the Salafi branch of Sunni Islam which emerged out of the orthodox Hanbali school. The largest is the introverted purists or quietists who do not engage in politics. The second largest, the activists, are active in mainstream politics. The third and smallest tendency, the jihadists, advocate armed struggle to restore the early Islamic movement and has gained significant ideological sympathy in Saudi Arabia (since the late 1970s) and among the Taliban during its first rule during 1996-2001 in Afghanistan.

In their formative years in Pakistan, the Taliban received religious teaching in over 8,000 madrasas set up by the Pakistani government with support from its anti-Soviet

4 Ibid.
5 Ibid.
7 Ibid.
allies. The Islamic curriculum of the madrassas was based on the teaching contents used at the Darul Uloom Deoband, founded in Deoband near Delhi in 1867 as a center for Sunni education.

The Deobandi school followers are Jihadist in that they seek to recover Muslim lands under occupation, or usurp Muslim regimes regarded as traitorous, and Salafist in that they demand a return to a strict Islam, untainted by local customs and culture.

Officially, the Deobandi School denounces violence. Despite the Taliban identifying with the teachings of the Deobandi school, their conflict tactics, which included indiscriminate bombings in pursuit of political objectives, led to the denunciation of the Taliban by the leaders of the Deobandi School.

The calls for a return to Shari’a-based law making are made by an assortment of usually younger jihadis, including many of the Taliban ranks, best described as “self-declared scholars” and “lumpen intellectuals” or “street jihadis,” who, in addition to their incomplete understanding of Shari’a, also resort to the vague notion of “traditional values.”

Objections to how the Shari’a as implemented by the Taliban contradicts the historical Shari’a based on precedence are rarely raised because few dare to oppose a regime which is far from inclusive and claims to adhere to the true Shari’a. Critics are likely to be dismissed by street jihadis as kafers (infidels), deserving severe punishment. One horrific case of such punishment was that for Farkhunda in 2015. She was stoned, beaten, and her body set ablaze by a mob of street jihadis in the middle of the day in Kabul as a consequence of being falsely accused of burning the Quran by a mullah who had been denounced by Farkhunda for malpractice.

Pashtunwali, Shari’a and Taliban Law Making

The most likely form for Afghanistan’s legal system under the Taliban is likely to be a hybrid system that adheres to Shari’a with provisions based on Pashtunwali and other local customs. Pashtunwali, while widely recognized, accepted, and practiced in Pashtun communities, is not accepted or practiced in non-Pashtun communities. Other ethnic groups tend to have their own, sometimes different from Pashtunwali, forms of customary justice.

Property and inheritance rights for women are fully in line with the provisions of Shari’a. However, objections to how the Shari’a as implemented contradicts the historical Shari’a based on precedence will be difficult to raise because of the authoritarian mode of governance adopted by the Taliban.

One major difference between Shari’a and customary law (including Pashtunwali) is that deliberations on Shari’a have been largely documented. A significant amount of documented research on various aspects and interpretations of Shari’a was carried out in the 8th and 9th Centuries. Pashtunwali is much less documented and there is great variation of its practice among different Pashtun communities.

In drawing on Pashtunwali and other customary law provisions to draft formal laws, the tendency could range between selecting the most just and egalitarian rules and the most austere rules. The egalitarian or austere tendency in selection of the rules from customary law and Shari’a provisions will depend on who does the selection of rules (i.e., the street jihadis or the educated scholars) and the degree to which the law making process includes multiple stakeholders and particularly those most affected by the laws, i.e., women.

RECOMMENDATIONS

◼ A first step in pragmatic intervention programming in Afghanistan is to accept the Taliban as the legitimate government in Afghanistan. Continued talks around recognition are distracting from the human rights crisis that continues to unfold. This acceptance would place the international community in a position to operationally engage and seek consensus with the Taliban on women’s rights and human rights more generally - rather than simply demanding that the Taliban respect women’s equal rights.

◼ A second step in pragmatic intervention programming in Afghanistan is inclusion in design and implementation, as much as possible, of those most affected by the intervention. In addition to the direct beneficiaries, those affected include the government.

◼ Innovation is needed in developing a lingua franca based on Islamic principles in engagements with the Taliban by the international community.

◼ To increase effectiveness, interventions to protect and promote women’s rights in Afghanistan need to resonate with traditional modes of governance which tend to draw on both Shari’a and customary law. To maximize resonance, interventions need to be designed with full and up-to-date knowledge of Shari’a and customary law - particularly Pashtunwali.

◼ Since the popular and official views are that Shari’a is divine and supersedes all human-made rules including Pashtunwali, efforts must be made by the international community and Afghan civil society to use Shari’a principles to contest some of the harsher aspects of Pashtunwali and other forms of customary law which are pervading the Taliban conception of Shari’a.

◼ Support should be provided for initiatives to implement best practices in religious education based on curricula in use in other Muslim countries. Over time, promoting best practices in religious education is likely to counter “street jihadism”, institutionalized misogyny, and arbitrary decision making by government officials and politicians.

◼ Support should be provided for cultural exchanges between Afghanistan and other Islamic countries, particularly in terms of women’s rights and access to basic services. Explore enhanced cooperation and coordination with the Organization of Islamic Cooperation (OIC).

◼ The international community must innovate in their response to Taliban edicts. For example, where the Taliban say that girls cannot attend schools because there are insufficient female teachers, more female teachers should be trained. Creating the enabling environment and conditions which do not directly counter Taliban proscriptions is key.

◼ Protection and promotion of women’s rights needs to be contextualized in broader development and humanitarian programming. Improving the conditions of women in Afghanistan is in part a function of improvements in the physical and material conditions in Afghanistan.

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