

Afghanistan: Incarceration under the shadow of the Taliban

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The history of Afghanistan's justice and prison systems, and how they have been transformed since the Taliban takeover of 2021

Since the Taliban's takeover of power in 2021, the Afghan government has undertaken a complete overhaul of the justice sector in Afghanistan, implementing what it considers to be the Islamic system of justice. The existing evidence suggests that the emerging Taliban justice system is likely to prioritise swift corporal punishments over incarceration, especially with regard to women. In this, the Taliban administration claims to hark back to pre-modern traditions. In reality, the system that it is building continues to retain features associated with modern incarceration, including coercion and cruelty, with punishments often meted out to peaceful protesters opposing the Taliban government, many of them women.

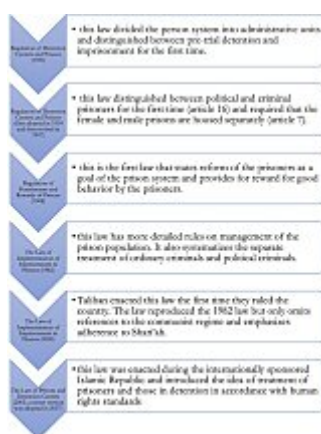
Before the 20th century, Afghan rulers only employed imprisonment unsystematically and infrequently, detaining their enemies in ad hoc holding locations either indefinitely or until they were put to death. Islamic jurisprudence or Shari'ah, which was largely autonomous from the ruler, facilitated and legitimised communal self-governance, save for the enemies of the ruler. Those who transgressed the legal and ethical norms of the community could receive punishments ranging from harsh words to more severe penalties. The primary function of such punishment was psycho-ethical, because what merited punishment was a transgression against a divinely ordained way of communal life and not a mere violation of the command of the state. The punishment was primarily administered against the body of the wrongdoer publicly and swiftly, to allow the punished individual to return to the right path and to assure the community that its ethical norms remained secure.

The philosopher and historian Michel Foucault has convincingly argued that incarceration as the primary mode of punishment emerged concomitantly with the modern state, starting as a technique of "governmentality" in 18th-century Europe. The scholar Wael Hallaq has expanded Foucault's critique, arguing that the modern project - erected on the two pillars of capitalism and liberal democracy - is fundamentally about fashioning a new subjectivity, one that aims to make an ideal subject of the modern state. According to Hallaq, the *raison d'être* of all modern legal institutions - including the modern justice system, where incarceration is the dominant mode of discipline - is to implement this subjectivity-making modern project. Pre-modern political communities embedded in pre-modern traditions - including many originating and thriving in Southasia - did not conceive of a project of re-making their subjects and therefore did not develop mass incarceration as the primary technology of their justice system.

In Afghanistan, a country deeply embedded in the Muslim tradition, incarceration did not become the primary form of punishment until Afghan nationalists and Afghan communists in the second half of the twentieth century undertook a process of re-making Afghan subjects into, respectively, a citizens of a nation-state or communist revolutionaries.

As the modern state in Afghanistan grew in power and scope, the state legal system increasingly displaced the autonomous form of communal self-governance, but it never completely replaced it. A turning point for the development of the state criminal system came in 1976, when the Afghan politician Mohammad Daoud Khan, who had recently taken power in a bloodless coup supported by leftists and nationalist Afghan elites, enacted the country's first systematic Penal Code. The Penal Code of 1976 consisted of two books, eight sections, and 523 articles, and firmly established incarceration as the primary mode of punishment for crimes against individuals, society and the state.

Unsurprisingly, the adoption of the new Penal Code coincided with an increased interest in expanding and systematising the prison system. Up until the present, Afghanistan has had six major pieces of legislation concerned with the regulation of detention centres and prisons. Roughly around the same time that the country adopted its first comprehensive penal code, the legal regime of prison management in Afghanistan underwent a fundamental transformation, under laws from 1968 and 1982. The resulting changes remained largely intact until the introduction of a liberal view of the justice system via a 2005 law under the internationally supported Islamic Republic of Afghanistan government.



A chart of major legislation governing detention centres and prisons in Afghanistan, compiled using historical analysis contained in 'Imprisonment and the Pertinent Laws in Afghanistan : A Focus on the History of Pol-i-charkhi Prison' by Najib Amin.

Chart by Haroun Rahimi

Trials and tribulations

The communist regime that soon replaced Daoud Khan kept the 1976 Penal Code and expanded the prison system until it too collapsed. Its end came in 1992, under the pressure of a popular resistance spearheaded by Islamist mujahideen parties.

The mujahideen too had a state-led programme of remaking society, albeit their blueprint of the ideal state-made society drew from a new understanding of Islam as a political ideology. However, the mujahideen rule of Afghan Islamists between 1992 and 1996 never managed to establish a stable government. Nor did the mujahideen establish a unified justice system. Local commanders and their political parties operated semi-autonomously in their respective areas of influence, running their own court and prison systems. The in-fighting between and abuses committed by of mujahideen commanders created the conditions for the emergence of a traditionalist force from southern Afghanistan, a force that later came to be known as the Taliban.

The Taliban kept the state-led effort to remake society in the image of an ideal Islamic society, but unlike their mujahideen counterparts they defined that image with reference to pre-modern Hanafi sources of Islam and not the modern currents of Islamist thought. In doing so, and while claiming to reinstate the pre-modern operation of Shari'ah, they in effect replaced the communal, autonomous model of Shari'ah law with a rough and coercive mode of penal operations that went hand in hand with great cruelty. Inspired by pre-modern Islamic jurisprudence, the Taliban regime increasingly opted for corporal punishment and the indefinite detention of its opponents over fixed-term imprisonment.

While a justice system run by the ulema, or specialist Islamic scholars, was to be the hallmark of the Taliban version of Islamic rule, the first Taliban regime was never able to displace the fragmented system of the commander-run courts and prisons. Mohammad Omar, the Taliban's late co-founder, once lamented, "Besides some rooms [of the Taliban commanders], there is a container that acts as a prison, and they have courts of their own. This is against Shariat."

After the tragedy of 9/11, a US-led coalition of international forces toppled the Taliban regime and pursued a political process that led to the formation of the Islamic Republic of Afghanistan (IRA) in 2004. This was a liberal project of state-building, with the rule of law and human rights conceptually at the centre of it. When it came to criminal law, the IRA returned to the 1976 Penal Code, but coupled with procedural laws that were meant to introduce due process and an adversarial mode of the criminal-justice system. And as the IRA expanded the reach of the central justice system, under the 1976 Penal Code, the country's prison population also grew.

From roughly 5,000 people in 2004, Afghanistan's prison population exploded to more than 30,000 in 2018. Societally, this meant a rate of more than 80 prisoners per 100,000 people. Since the return of the Taliban government and an alternative system of justice in 2021, these numbers have fallen sharply.

Under the laws of the IRA, in the normal operation of the criminal-justice system, a suspect was to remain in custody until the prosecutor decided whether to indict them, at which point those indicted were to be moved to a detention centre until sentenced. Those who were sentenced were then transferred to a prison to serve their sentence. In practice, however, due to a lack of facilities, as well as concerns over security and a growing number of criminal cases, suspects and accused persons were routinely held in prisons as well.

Inspired by pre-modern Islamic jurisprudence, the Taliban regime increasingly opted for corporal punishment and the indefinite detention of its opponents over fixed-term imprisonment.

Low capacity in the justice system, corruption, increased crime rates and poor case-management systems meant that there was a sizable population of unsentenced people who were held in the state detention and prison systems. To try and remedy this problem, an expensive, privately-run and donor-funded case-management system was developed to provide visibility into the system, improve case management and hopefully speed up the process. With the collapse of the IRA, this case-management system also collapsed.

The IRA also established juvenile-justice centres to try, discipline and rehabilitate "delinquent" children. These were established in most provincial centres, sometimes at rental properties, and relied heavily on donor assistance to operate.

Standards were developed to protect the human rights of those who were held in the IRA's prisons

and detention centres. The Afghanistan Independent Human Rights Commission and a dedicated prosecutorial department were given the authority to supervise the state's prisons and detention centres. In practice, however, abuse and mistreatment of prisoners continued. According to the United Nations Assistance Mission in Afghanistan, torture was common, especially against those accused of anti-government activities.

Which entity should administer the prison system remained a contested issue under the IRA throughout its life from 2004 to 2021. Soon after it was established, the post-2001 transitional Afghan government that ushered in the IRA transferred authority over the prison system from the ministry of interior affairs to the ministry of justice. This was meant to de-securitise the prison system and increase compliance with the newly established human-rights standard of treatment. However, within a decade, the security-centred view of the prison system prevailed again and authority over the system was transferred back to the ministry of the interior. One year before it collapsed, the IRA established a specialised civilian entity, the Office of Prisons Administration, to run the prison system. The IRA was also growing uncomfortable with the "prisons" run by the international forces in Afghanistan - predominantly the forces of the United States - where Afghan and foreign prisoners were allegedly subject to torture.

Rough justice

In 2017, the IRA replaced the 1976 Penal Code with a new one. The 2017 Penal Code did away with shorter prison terms (between 24 hours and 3 months) but as a substitute for the death penalty for several crimes it expanded the maximum length of imprisonment to 30 years. The new code also expanded the power of the courts to suspend prison sentences and opt for non-prison alternatives. The 2017 Penal Code was adopted at a time when the IRA was fighting an existential battle against the resurgent Taliban. Since it eventually lost that battle, it is not possible to assess the long-term impact of this new penal code on the prison population.

After their takeover in 2021, the Taliban facilitated large-scale prison breaks. The Taliban government has also suspended the laws of the IRA at least until it can assess their consistency with its understanding of Shari'ah. In their place, the Taliban has enacted very few new laws. These consist of procedural laws for the Taliban judiciary as well as a decree by the group's supreme leader that sets limits on how long a person can be held without trial.

Under the IRA prison system, which the Taliban government inherited, every district and city has a detention centre, and every provincial centre has a prison. Kabul has a special maximum-security prison, Pol-e-Charkhi, which used to hold high-level Taliban members under the IRA.

While the Taliban government has kept the IRA prisons and prison-administration system, including a prison administration department, the Taliban criminal-justice system is not as reliant on incarceration as the primary mode of punishment. The Taliban has suspended Afghanistan's constitution guaranteeing the political and administrative independence of the judiciary, and done away with the earlier stipulations governing the appointment of judges and legal authorities as well as safeguarding judicial accountability. Today, Taliban-appointed judges advised by Taliban-appointed muftis, or experts in Islamic law, are empowered to issue up to 39 lashes as the sentence for various acts that the judges and muftis consider punishable.

The system continues to retain features associated with modern incarceration, with punishments often meted out to peaceful protesters opposing the Taliban government, many of them women.

Under the Taliban, in addition to the remainder of the IRA's prison population, there are now new individuals held in detention centres and prisons often awaiting the completion of their trial. If a person is accused of *hudud* (transgressions whose punishments are specified in the Quran and the normative tradition of the Prophet Muhammad), *qisas* (authorised retaliation in kind for bodily injuries or death) or any offence a Taliban judge has considered deserving of the death penalty, their case must move through the three-tier court system and the sentence must be approved by the Taliban's supreme leader before the punishment is executed.

Prisons for women were expanded under the IRA as the country modernised its justice sector. While Afghanistan has historically had a small population of female prisoners a significant number of women were held for "moral crimes" during the IRA's time. While the Taliban government continues to prosecute and punish Afghan women for moral crimes, the Taliban judiciary has outwardly shown interest in reducing the population of women prisoners by issuing swift corporal punishments or by holding male guardians of female wrongdoers accountable instead. This approach is based on the Taliban's gendered view of public spaces, rooted in pre-modern Islamic jurisprudence as well as the communal norms of southern Afghanistan, with which the top Taliban leadership is imbued.

Drawing on pre-modern Islamic jurisprudence, the Taliban government considers physical maturity to be the criterion defining who should be treated as an adult in the criminal-justice system, and not necessarily the completion of 18 years of age. However, the Taliban has always been concerned about the mixing of unbearded youth with adults out of fear that this could lead to the sexual exploitation of young people and corrupt the rank and file. When the United Nations Assistance Mission in Afghanistan criticised the Taliban government for disbanding juvenile-justice centres, the group responded by arguing that it is committed to keeping non-mature inmates separate from mature ones and that the closure of certain centres had to do with inability to pay rent for their premises.

Another special category of the incarcerated are those whom the Taliban considers a threat. Such prisoners may be held indefinitely or until the Taliban is given assurances that they no longer pose a threat to the regime. The Taliban's General Directorate of Intelligence (GDI) - earlier the National Directorate of Security - and security and intelligence authorities in every province, can hold those suspected of terrorism or insurgency for extended periods of time, often without charge. The GDI also holds those who are perceived to pose a threat to the regime. This includes individuals who resist the Taliban peacefully - a large portion of them women. Such people are often imprisoned without sentencing as a security measure.

The Taliban has held in this manner former IRA soldiers, ethnic elders, journalists, human-rights and women's-rights activists, and many others opposed to its rule and worldview. Those believed to have engaged in armed struggle against the Taliban almost always face execution, and even others routinely face torture and other cruel punishments. The Taliban's choices in shaping the emerging carceral system under its rule appear to be driven by both ideological and security concerns. Given this, and after the initial dip in prisoner numbers following the Taliban takeover, the population in Afghanistan's Taliban-run prisons and detention centres can only be expected to grow.

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