

POLICY BRIEF

Afghanistan: Ruling by Decree

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In the absence of a constitution or any other legal framework, the Taliban has mostly been relying on the Emir's decrees to guide administrative, policy, and other state issues. However, even the Emir's decrees have often been primarily aspirational and only contained implied orders; this is due to the fact that they have often consisted of messaging akin to moral and behavioral guidance. Moreover, the current Taliban regime, as it is operating, lacks a functional mechanism to effectively translate the Emir's decrees into institutional guidance, which would allow for the implementation and enforcement of the decrees.

Over the past few months, we have seen the first efforts to define law-making procedures (this was made via a decree that explicitly distributes roles to various de facto authority entities but still requires a final endorsement by the Emir). At the same time, the Emir has put in place a mechanism to provide actionable guidance for the administration via the Office of Administrative Affairs as well as established an empowered mechanism in Kabul, the High Directorate for the Oversight and Prosecution of the Emir's Decrees, to supervise the implementation and compliance with the Emir's decrees. Apart from this setup, the Emir also seems to have either intentionally or inadvertently empowered both the defacto Ministry for Prevention of Vice and Promotion of Virtue as well as the Chief Justice as the head of the Supreme Court in dealing with the enforcement and review of compliance with the Emir's decrees by various de facto institutions and by the general public.

All of these changes and seemingly parallel processes to ensure the implementation and enforcement of the Emir's decrees have further challenged the existing institutions and mechanisms. The Emir has dismantled, ignored, and repurposed the existing structures that were traditionally used to guide decree implementation while at the same time haphazardly putting in place de facto institutions that are not only not able to do the job of enforcing implementation of the Emir's decree but also seem to be competing with each other over who should be doing these tasks. These attempts by the Emir in trying to rule by decree and make an administrative configuration that was designed for the Republic work for him might have inspired the Emir to at least contemplate that one cannot run a Republic-era setup administration with decrees sent from Kandahar.

Within days of taking power in August 2021, the Emir started ruling by decree. The first was issued on September 7, 2021, on the establishment of the de facto Cabinet; other decrees followed on topics such as setting up Sharia compliance mechanisms, the status of the flag, regulations for de facto government officials, and the opium ban in April 2022. Overall, the first six months saw fairly sparse use of decrees and proclamations. In 2022, the issuing of decrees accelerated, presumably both because the Emir felt that the de facto ministries in Kabul needed more guidance as well as because the de facto authorities were faced with choices on how to continue to run the de facto Kabul administration that had been set up under the Republic and was now staffed

with officials who had little to no experience drafting laws, regulations, setting up national priority plans, or other policy guiding activities.

Interestingly, the decrees by the Emir seemed to serve multiple functions, from controlling the de facto authority officials to communicating priorities to the de facto authorities. Additionally, the Emir's decrees appear also to be an effort to control the populations with the de facto authorities in charge of the implementation. The hijab order of May 2022, for example, targets the female population and governance offices, and puts the onus of implementation and enforcement on the de facto Ministry for the Prevention of Vice and Promotion of Virtue.

In July and August of 2023, the Emir appeared to take steps to establish greater control of the implementation of his decrees that had been forgotten in terms of implementation or seemed to be barely addressed beyond an announcement. First, the Emir changed the leadership of the department within the Office of Administrative Affairs that traditionally had been tasked with implementing decrees and subsequently started reshaping the Attorney General's Office by removing its prosecution powers. The Emir later decreed the office focus on decree implementation oversight.

Since October 2022, the Emir also used the vehicle of the decrees to announce the establishment of provincial ulema shuras—extending his reshaping approach to the sub-national level with a direct reporting line to the Emir. However, the exact terms of reference are still unclear, nor is it known how exactly these provincial ulema shuras connect to other defacto institutions. Even with the establishment of provincial ulema shuras in all 34 provinces, it was not until the late fall of 2023 that some de facto authorities, presumably at the urging of the Emir, increased their interactions with these provincial ulema shuras, including the Chief Justice.

With the establishment of the High Directorate for the Oversight and Implementation of the Emir's Decrees, the Emir seems to have decided to focus only on using decrees to guide the de facto government. At the same time, there seems to be the perception that the Emir insists on ruling by decree but also uses decrees to communicate decisions that might not have been widely consulted or discussed among the relevant key de facto authorities. More than once, key members of the de facto authorities in Kabul seem to have been caught off guard or only had some vague advanced knowledge of forthcoming decrees with far-reaching consequences, such as the back-to-back decrees banning female students at the tertiary level and female Afghan staff working for international and national NGOs.

This lack of opportunity to provide advice and the ability to effectively influence the Emir

has apparently also become a catalyst of tension between Kabul and Kandahar. For example, de facto ministries in Kabul would prepare guidelines and suggest approaches to provide exceptions and regulations for the bans, yet suggestions submitted to Kandahar for the Emir's review and approval have resulted in no feedback. It is unclear if any of these draft laws and proposals also submitted by other de facto authorities underwent a process in Kabul and then really received final approval by the Emir pending—a mechanism for this approach has, in fact, been authorized by the Emir. According to Decree #9 of October 24, 2022, the de facto Ministry of Justice, with the help of religious scholars, is responsible for reviewing draft legislative documents submitted by de facto ministries, departments, and entities before they are forwarded to the de facto Independent Commission for Final Revision of Legislative Documents headed by the de facto Chief Justice. Thereafter, the final drafts are sent to the Emir for his approval and endorsement, after which the document will be released to the de facto Ministry of Justice for publication in the Official Gazette. The Emir will remain in charge of the approval or rejection of any legal drafts. During the research, it was not clear how many laws, following the full path of design and submission to the Emir for final approval, have been successfully enacted, because nothing has been made publicly available after final approval.

Without a legal framework or even an articulated vision for any hierarchy, there are now several de facto institutions competing over the role of implementing and enforcing the Emir's decrees. The High Directorate for the Oversight and Implementation of the Emir's Decrees and the de facto Ministry of Prevention of Vice and Promotion of Virtue are seemingly in competition with one another over the monitoring and enforcement of decrees within the de facto institutions (in particular, they compete of decrees related to Sharia compliance). Nevertheless, the de facto Cabinet and its de facto Ministries are still struggling to find a way to implement the more technical aspects of decrees without any further legal or institutional guidance. The various commissions formed over the past years, in particular the Administrative Affairs Commission, appear to take onboard some of these tasks, yet in many cases, they hardly have the expertise, either. It is noteworthy that business, trade, and commerce issues seem to be more prominently featured in these fora compared to more political or policy decisions that could potentially clash with the visions of the Emir or might be perceived as too political for the defacto fact Kabul administration to decide on its own.

Despite trying to chart their own course on legal and administrative issues, the de facto authorities have, however, also tried to retain at least some practices that were used under the Republic that they appear to think have some utility. For example, the Emir has started bundling his issued decrees into Gazette publications. While the Republic gazetted all laws and decrees as per the constitution, even those that could later on still be reviewed and vetoed by the Parliament, under the de facto authorities, any decree once issued has been considered valid. Until the use of the Gazette publication, the Emir's decrees were mostly

made public through the de facto spokesperson Zabiullah Mujaheed on social media. It seems that by using the gazetting process, the de facto authorities are trying to provide a more institutional process that would also make the decrees appear more legitimate. This is particularly relevant given that, on occasion, decrees published on social media were not taken seriously as their authenticity was not verified.

It is worth noting that the Emir has not just been gazetting the new decrees but has also apparently tried to connect orders from the past to this current position. So far, a total of five Gazettes have been issued. Decrees and orders spanning the period of 2016–2023 were published as a collection in the Gazette; these range from the year he was appointed as Emir under the insurgency until the time they were published. This move to publish the decrees in the gazette is perceived as an effort to connect legacy orders to the current de facto administration and legitimize rulings that were made under the insurgency, with an emphasis on decrees as a worthwhile approach to governance. This signifies it as the preferred method of governance over any others. The move has also been interpreted to indicate that the Emir hardly sees a difference in governance style between the insurgency and the post-August 2021 era—thus another indication that the Emir seems to have little interest in any other governance approach than just issuing decrees embodying his orders.

While de facto officials were still making public references to an ongoing constitutional process as recently as the fall of 2023, the narrative seems to have shifted away from references to the Republic-era constitution and laws to a focus on the de facto authorities' own guiding framework. The de facto authorities have long stopped talking about a parliament or other standing representative assembly. Various de facto ministries seem to have made an effort to collect information, hold consultation sessions, and entertain petitions from various actors, turning to the most relevant de ministries. So far, only one large national assembly (mostly consisting of religious scholars) has taken place, this was held in June/July 2022. While provincial ulema councils have now been mandated across the country, their function does not seem to focus on sub-national consultations. This means that, on the sub-national level, there are essentially no structured or regular mechanisms for receiving input or consultation on proposed laws and regulations.

While a constitutional review process is still being promulgated, it appears that, with the decisions made and the institutions put in place over the past months, a path has been laid out that will primarily focus on ruling by decree. The transformation of the Attorney General's Office into the High Directorate for the Oversight and Implementation of the Emir's Decrees indicates the probable path forward, and that suggests decrees will continue to be the most important mechanism for shaping the course of governance of the de facto authorities. Therefore, this likely foreshadows that decrees will comprise a significant element of any future de facto authority legal framework or constitutional document.

Despite a number of statements made by de facto authority key representatives as part of the 2023 Accountability Sessions, there appears still to be no tangible progress towards a constitutional process. While many members of the de facto Cabinet keep demanding and declaring that a constitution would make the de facto Cabinet configuration permanent and put an end to the acting de facto minister appointments, a constitutional process seems to have become more challenging in the past months. There now also appear to be concerns that the de facto authorities' leadership in Kandahar has been deprioritizing an independent de facto administration set up in Kabul and that the Taliban leadership in Kandahar might soon move to assert its role via a legal framework and constitutional document that formalizes the ruling by decree approach by the Emir. The Emir chaired his first official de facto Cabinet meeting in Kandahar in November 2023, which resulted in a number of significant decisions related to the security sector being made and the release of an order to draft a "foreign and domestic strategy and approach"; the Emir also seems to have captured the what was previously the most independent governance mechanism. Since then, the de facto Cabinet meetings that have taken place have reverted to the more administrative and economic-driven decision-making style that seems to be based on follow-up of Kandahar-driven decisions alone.

The current ruling-by-decree approach means that the majority of the population has very few formal or informal opportunities to inform, consult on, or even protest the governance approaches by the Kandahar-based Taliban leadership. With the decree process firmly under Kandahar's control and, to some extent, the leadership in Kabul for some categories of appointments of officials, the only means of influence on the governance process is through informal consultations and sharing of concerns with the defacto facta ministers traveling around the country or holding meetings with various constituencies in Kabul. Religious scholars, both within the provincial ulema councils and outside of these structures, have also been perceived as having some influence in certain circles in Kandahar. The international community and other external actors must take these realities into consideration when trying to understand opportunities for influencing decision-making or considering attempts to guide governance-related issues, including lobbying for human rights, women's rights, and access to education.

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