

## AN ANALYSIS OF SULTAN MUHAMMAD KHAN'S WORK: THE CONSTITUTION AND LAWS OF AFGHANISTAN

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### Abstract

*Afghanistan, from its inception in 1747, had remain an ill-defined country with no centralized authority until the rule of Amir Abdur Rehman (r.1880-1901). He not only settled the boarders of Afghanistan but also established a centralized government which, though dictatorial in nature, was ruled under the restrains of the 'Sharia' (Islamic Law) and Customary Laws of the Afghan tribal society. These laws existed in written literature in Pashto and Dari, but not in English. The first ever book in English containing the laws governing Afghanistan is 'The Constitution and Laws of Afghanistan' written by Sultan Muhammad Khan in 1900. The work is mostly derived from oriental customs and Mohammadan law. It describes the laws and constitution of Afghanistan before 1900 in the light of modern European laws. The author, Sultan Muhammad Khan, a British-Indian, the father of renowned Urdu poet, Faiz Ahmad Faiz, had been Mir Munshi (chief secretary) of Amir Abdur Rahman in Afghanistan from 1888 until 1898. After trusting and recognizing his services in Afghanistan, the Amir appointed him as ambassador to England for the period 1899-1901. This paper analyzes the established system of laws as given in 'The Constitution and Laws of Afghanistan'.*

**Keywords:** *Amir Abdur Rehman, Sultan Muhammad Khan, laws and constitution, Muslim Jurisprudence, Oriental versus occidental laws, Private law, Customary law, Rule of the Ruler*

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## Introduction

The work ‘The Constitution and Laws of Afghanistan’ was published in 1900 in London by John Murray publishers. It compares private and constitutional laws of Afghanistan with advanced European countries. The main research question in the work is to find out how the laws of Afghanistan are derived from oriental customs and Mohammadan law? It also explores how much of Afghanistan laws are derived from other sources, such as, India and other neighboring states.<sup>1</sup> The author, Sultan Muhammad Khan was born in Sialkot in 1861. He was father of renowned Pakistani Urdu poet, Faiz Ahmad Faiz.<sup>2</sup> He was well versed in Persian, Dari and English. In 1886, Amir Abdur Rehman, invited him to Kabul and employed him. Sultan was elevated to the position of Chief Secretary (called Mir Munshi in Persian) by the Amir and also served on other positions. During demarcation of eastern borders with British Empire in 1893, known as the Durand Line, Sultan Muhammad Khan was member of negotiating team of Amir Abdur Rehman. The author stayed in Afghanistan for almost a decade from 1888 until 1898. During his stay, he observed closely the events and happenings, ranging from social, cultural and political issues. Thus, his information is first-hand. The writer ran away from Afghanistan in 1898 and reached British India where he was imprisoned at Lahore, and released by the efforts of Dr. Lillies Hamilton. Later on, he went to London, did his Barrister-at-Law from Christ’s College Cambridge. His professional degree helped him in writing on the subject of law.

This study is going to look into the content analysis of the work, *The Constitution and Laws of Afghanistan*, to evaluate its argument, its coherence and intent of the writer. Thus, the work is investigated to check whether it is a pure intellectual pursuit of the writer or part of a discourse, the post-modernist approach, to give meaning to, or legitimize the socio-political realities constructed during that period of time by those in power. Michel Foucault argues, “We must be very suspicious of any information which is produced, even when it seems most self-evidently to be adding to the sum of human knowledge, it may at the same time play a role in maintenance of status quo and the affirming of current power relations”<sup>3</sup>

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<sup>1</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 30

<sup>2</sup> Sarfraz Khan & Noor ul Amin, *Mir Munshi Aala Sultan Muhammad Khan and His Services to Afghanistan: Peshawar*, Bi-Annual Research Journal Central Asia, issue No. 72. 2013, P.3

<sup>3</sup> Foucault Michel, *Critical Thinkers: London*, Routledge 11 New Filter Lane 2003, p.60

Foucault further held that every moment of production of knowledge or instances of someone talking on behalf of someone else, no matter how good their intentions are, needed to be interrogated.<sup>4</sup>

While the work, *The Constitution and Laws of Afghanistan*, was being published, the author was outside Afghanistan and he was no longer on the official roll of Afghan kingdom. Hence, apparently, the book can be equated to just an intellectual pursuit of the writer without being influenced by Amir Abdur Rehman, the sitting Amir, and additionally there is no obvious conflict of interest as the author is no longer Afghan government servant. Despite these two reasons, would it be enough for the work to be called independent and it was produced without having any link to political influence of the Afghan authorities, the Amir. But the work clearly gives credit to Amir Abdur Rehman as pioneer of reforms especially for constitutionalism and new laws to the level that this work seems to be an apology of Amir Abdur Rehman. Thus, it seems that under a discourse, the Amir's policies are being justified and are provided with meaning. The subjectivity of the work and its partiality can be confirmed by analyzing the contents of the work.

In Chapter III, page 29, the work quotes Elphinstone asserting that like in most Asiatic countries, in Afghanistan too, there are no limits to the power of the ruler or Amir except the endurance of the people.<sup>5</sup> It further argues that Amir Abdur Rehman had the right and power to amend customary law and prescribe punishments in order to suit the Afghan circumstances and situation. The work highlights that Amir Abdur Rehman time there were three laws: laws of Islam, laws of ruler, and the customary laws.<sup>6</sup> Amir squeezed the customary laws and laws of Amir into one, along with a number of new laws. These laws were administered mostly through sword and the cases were decided on spot. Under Kabul Police Code, various punishments were prescribed for various social evils, such as, evil speaking in public, evil speaking against the descendants of Prophet, against man of learning or of a civic elder could be punished by 20 lashes and a fine of Rs. 50.<sup>7</sup>

Abdul Latif in his work entitle, *Judiciary in Afghanistan since the Days of Amir Abdur Rehman*,<sup>8</sup> highlights the ruthless treatment meted out on

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<sup>4</sup> Foucault Michel, *Critical Thinkers: London*, Routledge 11 New Filter Lane 2003, p.78

<sup>5</sup> Mountstuart Elphinstone, *An Account of Kingdom of Caubul: London*, Vol. II, Longman Hurst, Rees, Orme, Brown and Murray 1815, p.129

<sup>6</sup> Mountstuart Elphinstone, *An Account of Kingdom of Caubul: London*, Vol. II, Longman Hurst, Rees, Orme, Brown and Murray 1815, p.126

<sup>7</sup> Mountstuart Elphinstone, *An Account of Kingdom of Caubul: London*, Vol. II, Longman Hurst, Rees, Orme, Brown and Murray 1815, p. 121

<sup>8</sup> Abdul Latif, *Judiciary In Afghanistan Since The Days Of Amir Abdur Rehman: Peshawar*, unpublished PhD Dissertation, Area Study Centre University of Peshawar 2003, p.103

public by Amir Abdur Rehman.<sup>9</sup> The same author provides a list of verdicts announced by Amir Abdur Rehman which reflects the standard of laws and quality of administration of justice (see Annexure 1). The torture for the purpose of extorting confession was so horrible in criminal, political, revenue and other cases that could force the imprisoned to admit each and everything. The work justifies these cruel and harsh laws. It argues that it was only after these cruel laws that in fifteen years only five murder cases occurred in Afghanistan against previous practice of almost 500 to 1000 in a clan of 20000 families.<sup>10</sup> The work has quoted some outside sources such as Mr. Wheeler who says,<sup>11</sup>

*“These laws may seem barbarous to Europeans but we must not forget that Orientals look at these things quite in different light”*<sup>12</sup>.

Despite such harsh laws of Amir, why the work justifies his administration of justice and miserable life of those alleged for some folly need to be further explored. Was it an act of atonement by the author to the Amir who helped him in his personal growth and monetary benefits bestowed upon him?

Faizullah Jan says, *“In the Foucaultian sense, a discourse regulates the way a topic can be talked about meaningfully in a particular culture at a particular time in history”*.<sup>13</sup> The discourse that justify and provide meanings to whatever happened in Afghanistan during the rule of Amir Abdur Rehman by the author further reflected in other parts of his work.

Another contradiction in the work under analysis is the author eulogizes the contribution of Amir Abdur Rehman towards growth of a constitutional Afghanistan by introducing legal reforms and new laws. The term ‘constitutional’ in modern language reflect a government where there is sufficient separation of powers in executive, legislative, judicial spheres and these are not concentrated in one hand and with defined parameters. Abdul Latif and Misal Zada in *“Judiciary in Afghanistan Since The Days of Amir Abdur Rehman”*<sup>14</sup> and in *“The Role of Afghan Loya Jirga In Law Making”*<sup>15</sup> respectively, portray how Amir Abdur Rehman took in his own hands judicial powers by exercising original jurisdiction in criminal cases. Even Abdul Latif, in his dissertation portray the moody Amir awarding two

<sup>9</sup> Abdul Latif, *Judiciary In Afghanistan Since The Days Of Amir Abdur Rehman*: Peshawar, unpublished PhD Dissertation, Area Study Centre University of Peshawar 2003, p.p 8-24

<sup>10</sup> Abdul Latif, *Judiciary In Afghanistan Since The Days Of Amir Abdur Rehman*: Peshawar, unpublished PhD Dissertation, Area Study Centre University of Peshawar 2003, p.134.

<sup>11</sup> S. Wheeler, *The Ameer Abdur Rahman*: London, Federk & Co, 1895, p.89

<sup>12</sup> Sultan Muhammad Khan, *The Constitution And Laws of Afghanistan*: London John Murray 1900, p. 122

<sup>13</sup> Faizullah Jan, *Representing the Self and the Other: Discourse of Pakistan Based Militant Organizations*, PhD Dissertation, American University, Washington .D.C., 2016 , p. 14.

<sup>14</sup> Abdul latif, *Judiciary in Afghanistan Since The Days of Amir Abdur Rehman*: Peshawar, Area Study Centre (Central Asia) University of Peshawar, 2003, p.8 & 24

<sup>15</sup> Misal Zada *The Role of Afghan Loya Jirga In Law Making*: Peshawar, unpublished Ph.D. Dissertation. Peshawar: Area Study Centre University of Peshawar, 1998, p. 53

different punishments for the same crime to convicts as laws were not fixed and punishments not defined at that time.<sup>16</sup> He quotes a case, a wife seeking divorce because her husband is toothless. The verdict handed over by Amir was to extract her teeth. Another case related to adultery, both, male and female, were ordered to live together till death as they both were fastened together back to back and were kept on a hill till death by starvation and exposure.<sup>17</sup>

Similarly, contrary to the views expressed in the work, horrible life of prisoners in jails is depicted by other sources such as, Abdul Latif, during Amir Abdur Rehman rule. Amir's son, prince Habibullah, was found guilty in sexual activities, especially he was a frequent visitor to Pari Khana (the fairy House).<sup>18</sup> Pari Khana, the female prison, where female were properly clothed and presented to Habibullah for sex. Thus, presenting a picture of Amir Abdur Rehman as perfect embodiment of law and justice seems a bit exaggerated by Sultan Muhammad Khan in the work. He portrays in the work that Amir Abdur Rehman was known for a strong network of spies in Afghanistan in the following way,

*“A strong and sound intelligence network was being operated by the Amir on the lines of Russian intelligence system which had impressed the Amir during his stay in Russia. Every fourth man in Afghanistan was believed to be a reportchee (spy).”*<sup>19</sup>

How could he remain ignorant in the presence of a well-organized intelligence mechanism, of his son indulgence in Pari Khan? Thus, we can conclude that the work is a wonderful intellectual contribution to Afghan political and socio-cultural literature, especially related to the subject of laws but a bit exaggerated so far portrayal of Amir Abdur Rehman character is concerned.

In Foucaultian sense the author under a discourse legitimizes the sitting Amir, Amir Abdur Rehman, by use of language and the knowledge the

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<sup>16</sup> Abdul Latif elucidate that the intensity of the punishment was dependent on the mood of Amir. There were no defined limits of punishments for the crimes. One individual was sentenced to death for a crime, the other person for the same crime was freed with a thrashing alone. Though in theory punishment for homicide, adultery and apostasy was death, practically the offenders on these points were treated with leniency (probably where expediency involved, kingdom interest, p. 21

<sup>17</sup> Abdul latif, *Judiciary in Afghanistan Since The Days of Amir Abdur Rehman*: Peshawar, Area Study Centre (Central Asia) University of Peshawar, 2003, p. 22

<sup>18</sup> The writer Abdul Latif writes that *Pari Khana* was female prison. Its incharge named as *Najib Kutwal* Sultan Abshar, used to offer female prisoners as gifts both to friends and male members of ruling family. These girls were well fed and well dressed and presented to prince Habibullah. Many girls lost virginity due to his this habit and committed suicide later on, p.23.

<sup>19</sup> Mir Munshi Sultan Muhammad Khan, *The Life Of Amir Abdur Rehman, Vol1*: Karachi, Oxford University Press 1980 , p. 259.

author has to legitimize his actions. All favorable sources and references are referred for the purpose in the work, such as, Wheeler, Lillias Hamilton and Alfred Grey, foreigners serving under the Amir, Lillias Hamilton, admires the peace and security prevailed in Afghanistan under Amir.<sup>20</sup> However, another work, the autobiography of Amir Adur Rehman, “*The Life of Abdur Rehman: Amir of Afghanistan*”<sup>21</sup> gives a picture of Afghan nation as very turbulent, difficult to control. The two dominant classes the tribal leaders, orthodox religious class and customary law are the main determinants in failure of establishing a centralized national political authority. Thus, in the second part of nineteenth century, Amir Abdur Rehman somehow tried to strengthen the power of the national government through a series of suppression of ethnic groups, tribal chief and later religious party.<sup>22</sup> Though there are other local sources as mentioned above which justified Amir Policies of harsh punishments and severe criminal administration for control.

One-fourth portion of the work is related to history of Afghanistan and the author borrowed from and depended on authentic European and Islamic sources. The work picks up the traditional Islamic discourse, the rule of hereditary succession of the eldest son, and the king’s right to nominate his successor, had been acknowledged in the work<sup>23</sup> to justify the nomination of prince Habibullah as future king nominated by Amir Abdur Rehman. Thus, nomination is legalized by constructing its meaning in a particular specific period of time through the use of language and it is linked to power, or maintenance of status quo as conceived by Foucault. Using the same old discourse also utilized in Europe, the work quote the king of England, Henry VIII (1207-1272), faced the issue of his successor when he was authorized to nominate anyone else as he was childless<sup>24</sup> Thus, there is lack of symmetry between the title of the work, ‘*The Laws and Constitution of Afghanistan*’ and the treatment of the text. The text is discussed in term of old discourse, using the language having terms with already constructed meanings, such as *darbar, jirga, Sardar, Khan, Mullah, shariat* etc.

Abdul Jabar Sabit has pointed out that in order to regulate affairs of the state, Amir Abdur Rehman enacted and enforced regulations, in the name of Muqararat. These were printed in leaflets and were not published in written forms. Thus, these documents were temporary and could not serve the

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<sup>20</sup> Lillias Hamilton is referred admiring Amir Abdur Rehman performance to bring peace and security to kingdom, something unseen before. *The Constitution and Laws of Afghanistan*, p. 123.

<sup>21</sup> Mir Munshi Sultan Muhammad Khan, *The Life of Amir Abdur Rehman Amir of Afghanistan* (edited) Volume I & II: London, John Murray, Albemarle Street 1900, p.94.

<sup>22</sup> Muhammad Hashim Kamali, *Laws in Afghanistan a Study of the Constitutions, Matrimonial Law and the Judiciary*, Leiden E.J. Brill 1985, p.5.

<sup>23</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.19.

<sup>24</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 20.

character of any law.<sup>25</sup> Amir Abdur Rehman changed the system and instead put such laws in written form in two documents named *Dastoorul-Hukam Wa Zubat* and *Assosul-e-Quzat*.<sup>26</sup> *Assosul-e-Quzat* was mainly based and derived from Muhammadan law (Sharia). The main subjects addressed in this document were treason, rebellion, embezzlement of state's fund, forgery and bribery on the part of officials. Sabit, argues that despite the establishment of many new institutions, courts, appointment of Nawabul Hukomas (a Viceroy type, overlooking a few Governors), provincial governors, and Hakims (the governors of provincial sub divisions) for controlling administrative affairs of the provinces. He also established the first court of appeals at Kabul with twelve members led by a chief named Khana-e-Uloom.<sup>27</sup>

However, authority of Amir Abdur Rehman was not restricted. In other words executive dominated judiciary by trespassing on its jurisdiction. However, a possible explanation for this situation is the longstanding traditions of executive domination of the judiciary in Afghanistan due to the nature of judicial authority in the constitutional structure of Islam. The leader or Imam exercising temporal power has the fundamental duty to administer the Sharia.<sup>28</sup> But at least even in Sharia there is due process of law but, in Afghanistan, it was up to Amir's mood to follow due process or decide the case. This reality is not highlighted in the work. Besides, how the robbers of Mazar e Sharif, were punished, is a case in point, in this regard.<sup>29</sup> Furthermore, being highest court of law, the Amir could reverse the decisions made by judges.

### Summaries of A Few Important Chapters of the Work

The first chapter of the book covers a brief history of Afghanistan from Mir Wais Hotak (r.1709-1715) to Amir Abdur Rehman (r.1880-1901). The chapter has also highlighted the advent of Islam in Afghanistan. It discusses characters and role of various Afghan rulers, decline of Ahmad Shah Abdali's (r. 1747–1772) descendants and the rise of Barakzais under the leadership of Dost Mohammad Khan (1793-1863). Timor Shah, son of

<sup>25</sup> Abdul Jabar Sabit, *Laws of Afghanistan: Peshawar, Central Asia, No. 11, Area Study Center, University of Peshawar* 1982, p. 107.

<sup>26</sup> Abdul Jabar Sabit, *Laws of Afghanistan: Peshawar, Central Asia, No. 11, Area Study Center, University of Peshawar*, 1982, p.107

<sup>27</sup> Abdul Jabar Sabit, *Laws of Afghanistan: Peshawar, Central Asia, No. 11, Area Study Center, University of Peshawar*, 1982, p.72

<sup>28</sup> Muhammad Hashim Kamali, *Law in Afghanistan A Study of The Constitutions, Matrimonial Law and the Judiciary*, Leiden E.J. Brill 1985, p. 209

<sup>29</sup> Abdul jabar Sabit, *Laws of Afghanistan. Central Asia*, no. 12. Peshawar: Area Study Center, University of Peshawar, 1983, p. 73

Ahmad Shah Abdali made a blunder to divide the country into various territories among his sons. Besides, the legal reforms of Sher Ali Khan (1825-1879) with special reference to his faulty decision to fix head money for murder, led to more killing<sup>30</sup>. The same blunder of dividing territories among the sons was repeated by Dost Muhammad Khan (r.1826–1839&1845–1863) that led to many problems. During this time of change of dynastic rules, the title “King” changed to “Amir”. The title “Amir” was first adopted by Dost Muhammad Khan, having Islamic meaning of “the commander of the faithful”.<sup>31</sup>

## Chapter II: The Title of the Crown

It discusses the subject of crown and issue of the succession to the throne. Sultan articulates that the issue of succession is a big one in Muslim societies. In West, it is generally understood that Muslims societies like Afghanistan has lacked the system of succession. In East, the right of succession is decided through sword and strength. Sultan narrates further that though the laws in the East on the subject of succession of private property are fully explained but have little or nothing to say on the subject of succession to the throne. He has quoted the view of a writer in this connection, published in Edinburg review (October 1883). In Jews, Turkish Empire and Afghanistan, he quotes the example of Muhammad III, who massacred 19 of his brothers to get the throne.<sup>32</sup>

### Three Modes: Reasons and Difficulties<sup>33</sup>

Sultan argues that Muhammad (PBUH) left a republican government but when he died a question about who will succeed in the government of commonwealth raised. Mohammad had often indicated Ali as his successor, but he had not laid down definite rule for that. The Muslims difficulty is that religion and state were never separated. The qualifications which prevailed for a successor were:

1. Historically the right of the eldest son to the throne had been recognized before Mohammad from time immemorial. In Genesis it is mentioned that leadership in the house of Abraham, descended to his eldest son. He

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<sup>30</sup> Amir Sher Ali Introduced several laws during his reign includes: establishment of military conscription, household taxation, the custom of blood feud or blood money.

<sup>31</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 7.

<sup>32</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.12.

<sup>33</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.14.



also quotes old Hindu culture, in the same way.<sup>34</sup> Hence there are ample examples in history, in Turkey, Iran and Afghanistan that the eldest son or nearest male relative to the succession of the office of headship, was observed. Even Arabs accepted the rule. The son of Abu Talib (Ali) was the chief of the family and hereditary prince of the city and temple of Mecca.

2. Election by the people, among the Arabs the chieftaincy is not hereditary but elective. There is rare principle of universal suffrage where all the members of a tribe have a voice in election of a chief. The election is made among the surviving male on seniority of the deceased sovereign. This custom was followed in the choice of successors of Muhammad.
3. Moawyah nominated his son, introducing hereditary principle to the chieftaincy in Islam. After this 14 ruler were nominated in this manner. Hence the rule of hereditary succession of the eldest son has ever since been observed.<sup>35</sup> The king's right to nominate his successor has always been acknowledge. Even in England up to the time of Henry VIII, the uncertainty of the succession to the throne was a continued anxiety to the nation.
4. Wish of the outgoing sovereign, or respect to the expressed wish of the deceased sovereign of Afghanistan:<sup>36</sup> In Afghanistan numerous kings, have successes to the throne when supported by chiefs of the country. But sometimes, a king nominated his son, although he was not the eldest or because his mother was the king favorite. But this nomination often resulted in civil wars. Hence a candidate has never faced difficulties if he was favored by three points: hereditary succession by primogeniture, nomination by his father and approval of the electorate. Amir Abdur Rehman did right thing that he nominated his eldest son.

#### **Comments/Analysis:**

- Among the Muhammadans no law is more complicated than the law of succession.
- In east, laws for private property are defined and explained but not law of succession.

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<sup>34</sup> Sultan Muhammad Khan. *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.14.

<sup>35</sup> *Ibid.*, p.19

<sup>36</sup> *Ibid.*, p.20

- It is believed in the west that in Muhammadans right of succession is decided through sword and strength. Example of Muhammad III<sup>37</sup> who killed 19 of his brothers
- A civil war is the natural sequence of vacancy.
- Among the Muslims one difficulty is that religion and state were never separated. It frequently happened that a person, who was qualified for being the head of the state, has not been qualified of being the head of the religion.

### Chapter III: Prerogative of the Crown

The title of the chapter reflects the prerogative of the crown, or the king of the time. But before addressing the main idea, the author touches upon how the coronation and oath taking ceremony of a new sovereign is conducted. He began from the custom prevailed in period during the time of Muhammad (PBUH). In that time, Arab culture allegiance was generally received by placing the right hand on the right hand of the sovereign, as a token of allegiance, started first by Muhammad (PBUH).

But Amir Abdur Rehman changed this method and instead took the oath of allegiance and fidelity from his subjects by taking oath on Quran. Generally in Pakhtun Culture, still prevailing, the oath on Quran is stronger than any other commitment. Amir did this while he was intending to leave Afghanistan for England in 1891. He was trying to bind them tightly. The same oath was extended to all the subjects again in 1895.

Besides, as general custom in Afghanistan, during Dastar Bandi<sup>38</sup> i.e. coronation, the chief of the tribes would put the turban on the head of the new sovereign, then the chiefs would put their swords at his knee, a symbol of submission. Then the name of the new sovereign is put in Khutba or Friday sermon. Besides, his name is also put on coinage for the country and on the Royal Seal.

The author goes into the history of Islam as to how the republican spirit of Muhammad's short rule was changed from elective to hereditary Kingdom<sup>39</sup>. It was because of this change that war and blood was shed, and the system of succession banished.

The author has compared the prerogative of Muslim sovereign with Roman praetors. Here the author makes a very candid debate on how the

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<sup>37</sup> Muhammad III (1566-1603) was Sultan of Ottoman Empire from 1595 until his death in 1603. Muhammad III was born at Manisa Palace in 1566 (Turkey), during the reign of his great-grandfather, Suleiman, the magnificent, a well known Ottoman Sultan. Muhammad III was known for notoriety to kill 19 of his brothers and half-brother in order to secure throne. They all were strangulated.

<sup>38</sup> Crowning or placing the new turban (investiture of academic turbans)

<sup>39</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.26.

Orientalists ruled with impunity. How Muslim kings could not dispense with Muhammadan laws as they had the power of interpreting them. They made small changes in customary laws and they introduced laws on new points, not been mentioned in Muhammadan laws.

The author has articulated further that in reality, as depicted by many historians there is no limit to the powers of the sovereign in Oriental countries, their word is law and they have the power of life and of death. But exceptions were also there, it doesn't mean that all sovereign had ruled in autocratic way. It is in human nature that they want more power. Even in European history we get examples of Henry VIII, Charles I and James II. Thus the author has discussed the case of Afghanistan, particularly the role and rule of Amir Abdur Rehman, based on outside sources, to reform the legal system.

The founding father of Afghanistan, Ahmad Shah Baba was elected, but later, his sons broke down the democratic government into despotic one, resulting in anarchy.<sup>40</sup> The author has quoted Elphinstone<sup>41</sup> that in most Asiatic countries, there are no limits to the power of the crown except upon the endurance of the people. The king is removed only through a general resurrection.

**Criticism:** The author though quotes outside sources but in fact he tries to justify Amir Abdur Rehman rule and policies giving it a coating of legality.

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<sup>40</sup> Sultan Muhammad Khan. *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.29

<sup>41</sup> Mountstuart Elphinstone (1779 – 1859) book *Account of the Kingdom of Cabul* first published in London in 1815 by M/S Longman Hurst, Rees, Orme, Brown and Murray is the product of his assigned visit to Afghanistan, of which he could only visit the eastern portion and most information was collected at Peshawar from February – June 1809. It took him five years to compose his data in Poona (India) and give the document a book form. His associations with Afghans could be counted to around six months. He entered the area beyond Indus (7<sup>th</sup> January 1809) and re-crossed Indus (20<sup>th</sup> June 1809). It is not mere oral collection of data on Afghanistan but is based on all then known oriental (Persian) and European books plus travel accounts. Chapter V Book V of Volume II of Elphinstone's work concerned with judiciary, the role of *Qazi (judge)*, the *Mufiti (Juriconsult)*, *Amin-e-Mehkama* (in charge of department) and *Darogha-e-Adalat* (Reader). Mountstuart Elphinstone was a Scottish peer: his father John was Lt. Governor of Edinburgh castle, whose two sons James and Mountstuart joined the East India Company at very Young age. They earned political position being of baronial descent in the company services and Mountstuart appointed as a Resident at Nagpur. Here he learned both Sanskrit and Persian. He also visited Persia in between this period and was charmed by Persian poetry. Elphinstone in all served in India for 31 years (1796-1827) retiring as governor of Bombay. He was also offered the governor generalship of India later but he declined. Elphinstone remained bachelor, yet his house remained attached to India, his nephew was assuming the position of governor at Bombay and Madras. He died in 1859.

In Afghanistan, the power of Durrani aristocracy along with other tribes is a main source of control of royal authority. It is also the source of peaceful maintenance of public privileges. But as they have no statutes law except that of Muhammadan Law and no public record of proceeding for their government, it was impossible that a regular constitution would have developed and grown among them. It is because of certain established customs and opinion which is mentioned here and justify crown powers. These are as follow: Privilege of coinage, privilege being mentioned in Khutba, the right and power to declare war and peace and can make treaties on his own authority.<sup>42</sup>

### **Chapter V: The King in Darbar (Court) and Council**

The author compared the Afghan constitution with British constitution that grew slowly overtime. He says that if someone asks him to define the Afghan legislature, during Amir Abdur Rehman rule. I would just quote the well-known Greek poet Homer. Homer in the Odyssey as given in the Sir Henry Main work, the Ancient Law, says<sup>43</sup>,

“They have neither assembly for consultation, nor Themistes, but everyone exercise jurisdiction for his wives and his children, and they pay no regard to one another.”

The author however, argues that the present Amir improved the constitution by combining the old customs and laws of Afghanistan with modern additions both from India and western governments, especially from British constitution. He says that the court or Darbar of Amir comprised of three classes of chiefs, the Sardars, the Khans and the Mullahs. Sardars are like British hereditary peers, being members of royal clan. The Khans are representing the area or country while Mullahs are the representatives of religious class. The author explains that tribe in itself is a multiplication of a small family led by its own hereditary chief. Mostly tribes are dominantly unmixed and have their own independent territory. Each tribe branched into several divisions and each of this division is headed by its own independent chief. The name Ulas is used either to the whole tribe or sometime a branch of it. Each chief of the subordinate tribe is subordinated to the chief of Ulas known as Khan. Khan is always chosen from the oldest family of the Ulas. In most cases Amir has the power to remove a Khan at pleasure, appointing one of his relative instead. During Amir Abdur Rehman rule all cases of appointments of Khans could be made with approval of Amir.

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<sup>42</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.36.

<sup>43</sup> The Greek poet Homer was born sometime between the 12th and 8th centuries BC, possibly somewhere on the coast of Asia Minor. He is famous for the epic poems *The Iliad* and *The Odyssey*, which have had an enormous effect on Western culture, but very little is known about their alleged author.

In some Ulas, Khan is elected by the people. During the election preference is given on the basis of primogeniture, but more to age, experience and character. When Khan dies two or more of his sons or nephews try to make parties in the tribe and sometime this led to open war that causes great damage, as hostile tribes aligned against each other. Amir Abdur Rehman abolished this culture and now king nominate a new Khan without any loss of time.

The head of clans are always elected by people from the oldest family in it, except sub lower level where superior is always natural. The internal administration of tribe is run by a Khan and assemblies of the head of sub clans. These assemblies are called as jirga. In less important cases Khan always decide things himself, however, when a circumstance admits the sentiment of the whole tribes is ascertained. In rare cases the Khan serves in arbitrary manner without consulting jirga. His example is followed by clans. However, mostly the chiefs are neglected and every sub clan or family asserts itself through its own chief promoting its own interest.

### **Laws of the kingdom**

The general law of the Kingdom was Muhammadan which was also adapted to the civil subject of the people. However, their peculiar code, the only one applied to the internal administration of tribe, especially criminal justice, is Pakhtunwali. Pakhtunwali is the way of life of Afghans; a raw system of customary law. The Amir abolished those rough notions of law throughout the whole kingdom but retaining some reasonable customs at the same time.

**Comments/Analysis:** The author has accepted the notion that every man has right and duty to do justice to himself, to revenge his own injuries and take redress for wrong and punishment of crime into his own hands. If he cannot avenge his offender, his vengeance is afflicted on his relatives and in some cases on any man of his tribe. The author informed us that this practice has entirely been abolished by Amir Abdur Rehman.

### **Composition of Kingdom**

Afghanistan, the common wealth is created by assemblage of all under a single sovereign into one state under a king. He was the natural head of the tribe of Durrani. The government of the whole country centered on the king, though he was supposed to consult the Khans, the Sardars and Mullahs.

## Chapter X: Comments on Private Law

In the last chapter of the work, the author informs the reader about the system of private laws prevailing in Afghanistan. He has compared the legal contributions of Amir Abdur Rehman with Napoleon (1769-1821) of France, the Justinian<sup>44</sup> and Peter the Great (1672-1725) of Russia, the world caliber leaders. Even Lord Curzon appreciates Amir Abdur Rehman services to reform laws.<sup>45</sup>

The work under discussion compares, contrast and justify the laws practiced by Amir. The central theme is to explain the laws of Amir, Muhammadan and Customary law. The author summarizes that during Amir Period there were three laws, Islamic law, law of Amir, and the customary law of various Afghan tribes.<sup>46</sup> The writer held that Amir Abdur Rehman squeezed the three into two, the Fraiz (compulsory and unchangeable) i.e. those strictly lay down by Islam and the Koran and secondly, the laws of Amir and customs of the country. The second category was declared amendable and modified by the Amir to suit the socio-political circumstances of the country.<sup>47</sup>

**Comments/Analysis:** Amir could amend and change the customary law and he was the law giver in respect of local customs and traditions. The author justifies that according to Islam any law in clash with Koran, shall be subservient to it, but all the rest of laws are made by men.<sup>48</sup>

The author praised the reforms introduced by Amir such as introduction of engineering and mechanical industries. He justified Amir strong laws and strong arm method of ruling and cruelties due to the wild nature of Afghans. He refers to various laws introduced by Amir and which were so numerous that even a donkey could not be managed without a law by an Afghan. He

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<sup>44</sup> One famous Byzantine Emperor was Justinian I. Justinian ruled from AD 527 to 565. Justinian created a set of laws called the Justinian Code. This code said that the emperor made all of the laws and interpreted the laws as well. The Justinian Code was law throughout the empire. Many of our modern laws can be traced back to the Justinian Code.

<sup>45</sup> But his humble servant, who had the honour of enjoying his confidence for twelve years, as Lord Curzon (1859-1925) says, in one of his friendly letters to the author prefer to call the Amir the "Justinian of Afghanistan", which is a title worthier of him and yet has not been bestowed upon him by any previous writer. Curzon writing is as Follow:

*"My dear Mir Munshi, I congratulate you upon the honourable position that you occupy in the regard of H.H. the Amir who has evidently no more devoted servant than yourself... Wishing you all success in you distinguished career, I am, yours very truly, George Curzon."*

<sup>46</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.126.

<sup>47</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.127.

<sup>48</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 127.

refers to the codes dully sealed and signed by Amir for every office. According to Sultan, if someone denies that Amir did not frame any law; it is like an owl that does not see the light of the sun. He also refers to the cages Amir introduced for putting culprits or looters on the road from Peshawar to Kabul.<sup>49</sup> What Amir did, it was done with best intentions in his mind.<sup>50</sup> The author finds justification in the wild nature of people of hills.

### **Amir Improvement**

The author quoted Stephen Wheeler's work "The Ameer Abdur Rahman" (1854-1937) to explain how Amir administered laws. Amir used his sword and on spot justice himself. In Kabul, he used strong measures to discourage lawlessness. He refers to Kabul Police code in detail, mentioned by Mr. Wheeler. Evil speaking in streets was forbidden. Evil speaking against the Sayyids (descendants of Prophet), a man of learning, or of a civic elder could be punished by 20 lashes, and a fine of Rs 50.<sup>51</sup> Punishment for dishonest tradesmen who cheat public with fake weights, or adulterate the food they sell, the gambler, the charm purveyor, person who misbehave in mosques, those forget to say their prayers or refuse to hold fast. At one place the author writes, "The man who kissed other people's wives had to be punish with 30 lashes and sending to prison for further inquiry".<sup>52</sup>

During Amir Abdur Rehman rule it was decided to take special cognizance of religious offences. If any free thinking Kabuli omitted to bend his head with due reverence at the hour of the prayers, the police would warn first and in case of continuous disobedience could force by police otherwise refer to Amir as last resort. Earlier, the powers of head of family and clan were enormous but Amir finished this practice. The laws of head of clans were in conformity with the law of Amir and Islam. Similarly, Sultan informed that before Amir Abdur Rehman, laws were recorded on loose papers. But in 1894, Amir introduced written books with each page stamped and number of pages counted as previously used sheets were relinquished and replaced.<sup>53</sup>

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<sup>49</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.119.

<sup>50</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.120.

<sup>51</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.121.

<sup>52</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 123.

<sup>53</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.131.

### **A Procedure was Adopted for Handling Violations:**

At first stage the alleged person would be advised to be careful. After this, if violation continued, a guarantee of his good behavior would be obtained, the last stage was to put him in prison.<sup>54</sup> However, reports against the criminal or offender were to be proved. Mostly, the people were bound to report of a loose character person or criminals and they were arrested on spot. This practice of taking guarantee from near relatives or bonding people to report criminals was also in practice in China in old times. Due to this community involvement in pinpointing criminals a popular aphorism developed, that in Afghanistan there is no single house where there is no spy. Any official or courtier who exceeded his jurisdiction was severely punished. The purpose was the official might not misuse the power. Certain persons and places were more sacred, and wrong committed to them was severely taken, such as, offences against property of orphans, widows, judges, tax-collectors, and those committed to mosques or other sacred places.<sup>55</sup>

A severe issue pointed by the work is the issue of bribe in administration of justice. Before Amir Abdur Rehman, the greatest drawback in the administration of justice was bribery to officials, and use of false, borrowed or hired witnesses.<sup>56</sup> The issues was solved by creating a special law of evidence, requiring all evidence to be qualified by law and permitting cross examination, to put a check on false witnesses.

**Comments/Analysis:** There are many new harsh punishments formulated by Amir, not only highlighted in this work under analysis but also by other sources, but these have been justified by the author. He quotes even outside sources such as remarks of the Wheeler. Wheeler argues that these laws may seem barbarous to Europeans but we must not forget that Orientals look at these things quite in different light<sup>57</sup>. However, the author points out two major fault lines during this period in Afghan society and government. One is the system of torture for the purpose of extorting confession in criminal, political and revenue cases. The torture is so inhuman that can force a person to speak untruth due to pain. Secondly there is no limits to punishments.<sup>58</sup> The author rationalizes this brand of punishments which ultimately led to peace in the kingdom. He writes that

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<sup>54</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.136

<sup>55</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.138

<sup>56</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.138

<sup>57</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p.123

<sup>58</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p. 131



the punishment reduced the killing rate as after 15 years of efforts there were only 5 murder cases in the whole kingdom against previous practice of almost 500 to 1000 in a clan of 20000 families.<sup>59</sup>

### **Amir's Contribution to Law<sup>60</sup>**

The author held that Amir Abdur Rehman was quite successful in retaining law and order and ensuring security in the kingdom but against it rebellions were raised by almost every tribe as interference in their internal lives by taking away from them the practice of homicide as well as the private war between the tribes. The tradition of self-revenge in Afghanistan, the author compares with old England during the time of Anglo-Saxons<sup>61</sup> as well as in Germanic laws<sup>62</sup> one find the idea of wrong to a person or his relative is still primary and that of offence against the common is secondary. The work points out the inherent reasons for all tribal traditions, such as, self-revenge, is because of peculiar Afghan culture.

### **Pushtoonwali**

Elphinstone has said that the general law of Afghan Kingdom was Muhammadan but their peculiar code and the only one applied to their internal administration of criminal justice was Pushtunwali. Pushtunwali or usage of Afghans is a raw system of customary law that prevailed before the introduction of civil government. Pushtunwali may be put in this way that it is every man's right and duty to do himself justice and revenge his own injuries. The author narrates that this still prevailed in Afghanistan. The right of society to restrict and take law in its own hand to redress offences and punish the wrong doers was still not accepted. Probably its roots were in the times when the government could not afford protection to individuals and in such circumstance it was considered beneficial and necessary to take root in Afghan culture. It is still lawful and even honorable to seek the self-revenge mode of redress rather than to leave it to government. The injured pray is entitling to strict retaliation on the aggressor, an eye for eye and a tooth for a

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<sup>59</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p .134

<sup>60</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p .138

<sup>61</sup> The Anglo-Saxon were Germanic tribes who inhabited Great Britain from 5<sup>th</sup> century A.D. They migrated from main European continent.

<sup>62</sup> Several Latin law codes of the Germanic peoples written in the Early Middle Ages (also known as *leges barbarorum* "laws of the barbarians") survive, dating to between the 5th and 9th centuries. They are influenced by Roman law, canon law, and earlier tribal customs

tooth. If the offender is out of his power he may inflict on the relative and even tribe of the offender. If no opportunity occurs for revenge he may defer his vengeance for years. But it is disgraceful to neglect or abandon it entirely and it is incumbent on his relations or even tribe to assist him. In many cases retaliation excused lead to new disputes and in serious cases the fighting is often transmitted from father to son. This system encourages assassination and the chiefs of the society or officers of the state are trying to reduce it by levying some compensation to be given to the injured or to his relatives, as it is not thought that society is injured, or that it has any right to punish for the sake of example after the actual sufferer has been satisfied.

**Comments/Analysis:** To cut short the author highlights the procedure and point out two laws, Muhammadan and Pushtunwali prevail in afghan society. But in fact it is Pushtunwali, the rude customary law, the afghan usage that provide real procedure.

The dominate procedure is self-revenge, private responsibility to retaliate. One reason is clearly that civil society or government took a long time to assert its writ. Hence in the absence of any outside authority private system was necessary and beneficial to keep peace. Hence personal right stands above society. The author also refers to the work on situation of frontier tribes under the British sphere (by Warburton, Eighteen Years in the Khyber) Lord Hobhouse Speech in Annexure 11, throw light on the socio-political conditions of frontier tribes.<sup>63</sup>

### **Status of woman**

The author shed light on the subject of status of women. He argues that criminal law related to woman is similar both in west and east. The work ascribes the reason to the influence of Church in Middle Ages. As the religious law of Islam takes its origin from the Law of Moses<sup>64</sup> which is the foundation of Christian law also. The author quotes Amir Ali "Spirit of Islam Chapter XIII" it quotes even Athenians<sup>65</sup> where woman was a chattel, saleable.<sup>66</sup> As with the Romans, and among the Athenians, so with the Afghans, women were originally considered as chattels and part of property.

### **Conclusion**

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<sup>63</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p .142

<sup>64</sup> The name assigned to the whole collection of written laws given through Moses to the house of Israel. The Law of Moses consisted of many ceremonies, rituals, and symbols, to remind the people frequently of their duties and responsibilities.

<sup>65</sup> Athens was a Greek city state and the people living in it are known as Athenians.

<sup>66</sup> Sultan Muhammad Khan, *The Constitution and Laws of Afghanistan*: London, John Murray 1900, p . p. 143-144

Following the analysis of the work of Sultan Muhammad Khan in the light of the discourse theory as enunciated by Foucault, the work reflects use of discourse favorable to and justify Amir Abdur Rehman policies, ultimately linked to power and maintenance of status quo. As Foucault held:

“We must be very suspicious of any information which is produced, even when it seems most self-evidently to be adding to the sum of human knowledge, it may at the same time play a role in maintenance of status quo and the affirming of current power relations”<sup>67</sup>

Besides, the work is written in modern format with proper authentic citations, local, non-local, and under theoretical framework, in Foucauldian sense, Islamic one, in order to justify Amir's son nomination and other related political subjects such as, king absolutism. A number of old civilizations are referred to have had passed through the same stages of development as Afghan society went through. Thus, whatever policies, laws and punishments were prescribed by Amir Abdur Rehman is somehow rationalized under a discourse as being the need of the hour.

Besides, this work if other two works edited by the same author, autobiography of Amir Abdur Rehman are analyzed it convince the reader that Afghanistan was really a turbulent country, a land of unruly independent tribes, inhibited by orthodox religious class and a society where death was lurking all the time. This fact is reflected in Amir Abdur Rehman work “The Life of Amir Abdur Rehman, Vol. I & II. published the same year make an interesting reading. It is an original depiction on the Afghan society witnessed by a person who was going to become a king.

Though in Foucaultian sense the work under analysis seem to be created in order to construct a positive picture of Amir policies but realities of Afghan land, if read the other works justify a strong hand in order to create a shape in the then prevailed anarchy. Reforms such as related to matrimonial life as highlighted by Muhammad Hashim Kamali, (1985), *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, Leiden E. J. Brill 1985, and crushing the strong role of tribal chiefs and religious leaders are contribution of Amir Abdur Rehman no one would deny. Though at what human cost, Amir Abdur Rehman introduced peace and calm is a question needed to be evaluated as a separate subject in future.

Hence, the work, *The Constitution and Laws of Afghanistan* by Mir Munshi Sultan Mohammad Khan, F.R.G.S. (Fellow of The Royal Geographical Society) Barrister-At-Law, Advanced student of Christ's College, Cambridge read in the 21<sup>st</sup> century may not make much transcending impression. As by now much had been known and written on

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<sup>67</sup> Foucault Michel., *Critical Thinkers*, Routledge 11 New Filter Lane, London, 2003, p.60

Afghanistan and its public, yet one centuries back it was indeed a monumental work in a foreign language on laws and legal subject even knowledge on the Afghan constitutional in legal history with in India was limited.

Furthermore, after thoroughly evaluating the work and analyzing, the work shows the writer's originality. He was very relevant and trustworthy of Amir Abdur Rehman and was enjoying status, thus had access to important information. Being the confidante of Amir, this work and richness it reflects speaks of much the author knows about Afghanistan. He, most probably, knows about many things, the internal situation, external affairs and enjoy very personal intimacy to Amir Abdur Rehman. Due to these reasons he was deputed to remain with Amir during the most important historical event, the Durand Mission, in 1893, to discuss and demarcate borders between the British and Afghan kingdom. He was kept behind the curtain to listen to the talks of the British, translate it to the Amir in Dari.<sup>68</sup> Thus, the argument by a section of Afghan writers that he was British spy seems exaggerated. Moreover, after consulting other sources as mentioned above and in the bibliography the work seems to be more authentic and reliable and worth reading for those to understand the judicial administration and laws of Afghanistan.

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<sup>68</sup> Mir Munshi Sultan Muhammad Khan, *The Life Of Amir Abdur Rehman*(edit. Vol. II. London : John Murray, 1900, p.145

**ANNEXURE: I**

## List of Verdicts (Original Text)

1. Two men charged for the rumour for the death of the Amir from cholera were cut in pieces. Their remains were exhibited in the markets for several days.
2. Mullah Abdur Rahim , leader of the Ulema of Kandahar, who supported Sardar Muhammad Ayub, against Amir Abdur Rehman, (whom the Mullah considered to be infidel for being a subsidy holder of the British government) was personally executed by the Amir to cause a deterrent effect on the other likeminded clergy men.
3. A Mullah, named Khishmash, once made a report against the Amir's own son. The charge was proved to be baseless. The poor (probably unwise) Mullah was blown from the mouth of gun.
4. Timur Shah Ghilzai, once deputy commander in Chief of Amir's forces, was stoned to death for taking part in a rebellion against the Amir.
5. After action against the Shinwaris, the Amir ordered that the heads of all those killed in the battle should be filed up in the shape of two big towers, one at Jalal Abad and the other at the presidential palace Shahmod who encouraged the rebellion.
6. During the first three years of rebellion, five thousand people were blown from guns and the army killed ten thousands. Eight captains were blown from guns for attempting coup against the Amir.

**Source:** Abdul Latif, Judiciary in Afghanistan since the Days of Amir Abdur Rehman, unpublished PhD Dissertation, Area Study Centre University of Peshawar, 2003, p. 19

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