



Afghanistan's Constitution Ten Years On: What Are the Issues?

Mohammad Hashim Kamali

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Cover photo:

(From top to bottom): A view of the 2004 constitutional Loya Jirga Sessions; people's representatives gesture during 2004 constitutional Loya Jirga; people's representatives listening to a speech during 2004 constitutional Loya Jirga; Loya Jirga members during the 2004 Constitutional Loya Jirga, Kabul (by National Archives of Afghanistan).

AREU wishes to thank the National Archives of Afghanistan for generously granting access to its photo collection from the 2004 Constitutional Loya Jirga.

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About the Author

Mohammad Hashim Kamali is a world-renowned scholar of Islamic law and jurisprudence and currently CEO of the International Institute of Advanced Islamic Studies (IAIS) Malaysia. He was a member and sometime Chairman of the Constitution Review Commission of Afghanistan (2003), a UN Advisor on constitutional reform in the Maldives (2004 and 2007), the constitutions of Iraq (2004-2005) and Somalia (2010). Professor Kamali has addressed numerous national and international conferences, has published over 25 books and 160 academic articles and his works have been translated in many languages. He is listed in a number of leading Who's Who in the world.

About the Afghanistan Research and Evaluation Unit

The Afghanistan Research and Evaluation Unit (AREU) is an independent research institute based in Kabul. AREU's mission is to inform and influence policy and practice by conducting high-quality, policy-relevant research and actively disseminating the results, and by promoting a culture of research and learning. To achieve its mission AREU engages with policymakers, civil society, researchers and students to promote their use of AREU's research and its library, to strengthen their research capacity, and to create opportunities for analysis, reflection and debate.

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Acronyms

AREU	Afghanistan Research and Evaluation Unit
CRC	Constitution Review Commission
FSC	Federal Shariat Court
ICSIC	Independent Commission for Supervision of Implementation of the Constitution
MJ	Meshrano Jirga (Upper House)
SC	Supreme Court
UNAMA	United Nations Assistance Mission for Afghanistan
UNDP	United Nations Development Programme
USIP	United States Institute of Peace
WJ	Wolesi Jirga (Lower House)

Glossary

'Adl (also 'adalat)	justice
Ahkam-e ghyiabi	Judgments in absentia
Amanat	trust
Anjuman	association
Badd	tribal feud; practice of offering a female into marriage as compensation to settle a dispute
Batil	null and void
Bay'ah	pledge of allegiance
Butlan	nullification, making null and void
ChÉlesh	challenge
Dadgah	court of justice
Dastaward	outcome, gain
Dawlat	state, also wealth
Farz	obligatory
Farz-e kifa'i	collective obligation
Fatwa (pl. fatawa)	opinion, verdict
Faysala	resolution, settlement
Fiqh	Islamic law
Gomrokat	Customs offices
Hadd (pl. hudud)	prescribed penalty
×ijr	interdiction - as of Íijr-e madyĒn (interdiction of the debtor)
Hizb (pl. ahzab)	party, faction
Hizb-e siyasi	political party
Hukum (pl. Ahkam)	ruling, command
Ijtihad	independent reasoning or interpretation
Ijma'	general consensus
'Ilm	knowledge
ImtinĒĒ	refusal
IstĒzĒÍ	censure; inquisition
Jarida-e Rasmi	official gazette
Layeha	code of instructions, regulations
Loya Jirga	grand council, constitutional assembly
Mahkama	court of justice
Mahram	close relative
Markaz	centre
Markaz-e farhangi	cultural centre
Maslahat	benefit, public interest
Mazhab (pl. Mazahib)	school of theology and law
Meshrano jirga	council of elders, upper house of parliament
Moraqibat	invigilation, monitoring
Mufta biha	agreed upon fatwa
Mu'taqadat	beliefs
Muttahidulma'Ēl	administrative circular, uniform instructions
Muttahulma'Ēl-e qaza'i	judicial circular
Muhasabah	accounting, accountability
Nazar (pl. NazarĒt)	viewpoint, opinion

Nawisindagan	writers
NazÉrat	supervision, monitoring
Nizamnama	code of regulations - usually statutory enactments introduced during the reign of king Amanullah Khan (1919-1929)
Pichidagi	complexity
QÉchÉq	contraband, smuggled goods
Qanun-e asasi	constitution
Qanun-e salahiyat	law of judicial authority and organisation
wa tashkilat-e qaza'i	
QawaÑid (sing. qaÑida)	principles
Qawa'id-e rahnoma	guiding rules
Qaza	justice, adjudication
QazÉyÉ	cases, litigations - as of qazaya-e hoquqi (civil cases, or litigations)
Qazi (pl. Quzzat)	judge
Qisas	retaliation
Quwwat	strength
Rahnoma	guide
Rahnoma-e muÑamalat	guide to transactions or commerce
RÉjih	preferred - as of a preferred opinion or fatwa
Shomara-e fawqul 'adah	special issue - as of a journal
Siyasat	politics, policy
Siyasat-e sharÑi (or siyasa shar'iyyah)	judicious policy
Shura	consultation, council
Shura-e Dawlat	state council (as under king Amanullah)
Shura-e milli	national assembly
Strea mahkama	supreme court
Usul	principles
Usul-e asasi	basic principles, constitution
Usulnama	code of principles, statutory law
Usulnama-e gomrokat	customs law
Ta'zir	(lit. deterrence), deterrent punishment
Tanaquz	contradiction
Tanzim	organisation
Tatbiq	implementation
Wakil	agent, representative
Wakonesh	reaction
Wilayat	authority, guardianship
Wizarat	Ministry - as in Ministry of Justice (wizarat-e 'adliyah)
Wolesi Jirga	people's council, lower house of parliament
ZuÑf	weakness

Executive Summary

January 2014 marks the tenth anniversary of the current constitution of Afghanistan. Issues have arisen since then over textual ambiguities in the constitution as well as the locus of authority that can address and clarify them. Ambiguities are not unexpected with a new constitution. The question is whether the constitution itself, and the institution it creates, are able to resolve and clarify the ambiguities in the way that fortifies the constitution and the rule of law. Words of any text and language are characteristically general and do not encapsulate all their possible applications to unforeseen conditions and cases. All major legal traditions are cognisant of this and provide guidelines on interpretation to facilitate clarity and better understanding of an important text - for example of the Qur'an. This may be through clarification of ambiguous words or phrases, specification of the general or of qualifying the absolute in the text. Islamic jurisprudence is elaborate on rules of interpretation due partly to its overtly textualist orientations.¹

Problems of constitutional interpretation arose when in May 2007 the Wolesi Jirga (Lower House-henceforth as WJ) passed a no-confidence vote on two ministers, the Foreign Minister, Dadfar Rangin Spanta and the Refugees Repatriation Minister, Mohammad Akbar Akbar. Spanta's case triggered a pattern of bad relations between President Hamid Karzai and the WJ, which also raised questions over the state of relations among the three organs of state.

This article puts together a selection of themes that feature prominently in the constitution and also pose challenging questions for the future of democracy and constitutionalism in Afghanistan. These are presented in ten sections, beginning with a note on the history of constitution-making in Afghanistan, followed by an overview of the theory and practice of constitutional review in Afghanistan and other Muslim countries. A more detailed account of the Spanta episode and its aftermath is followed, in turn, by a discussion of the parliamentary no-confidence vote in Afghanistan and a select number of other Muslim countries. The position of Islam in the constitution and Afghanistan's unequivocal commitment to the rule of law are taken up in sections five and six. Then follows a discussion, in two separate sections, on the references to human rights and to women's right to equality before the law. Constitutionalism, democracy and Islam are presented in response to a cogent question as to whether they present a picture of harmony or discord in the constitution. The last section presents a round-up of commentator opinion and assessment of the 2004 constitution, to be followed by a conclusion that also espouses a number of policy recommendations.

I may add here that in my capacity as a member of the Constitution Review Commission (CRC) of Afghanistan and a participant of the constitution-making process, I draw occasionally on my personal recollections and experience.²

1 Islamic jurisprudence provides guidelines on clarification of the ambiguous (*bayan al-mujmal*), explanation of the obscure (*khafi*), the difficult (*mushkil*) and the intricate (*mutashabih*). Detailed expositions are also available on specification of the general (*takhsis al-'aam*), qualification of the absolute (*taqyid al-mutlaq*), or drawing of necessary exceptions to a general text (*istithna'*). See for details Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd revised and enhanced edn., Cambridge: Islamic Texts Society, 2003, pp. 117-187.

2 The process that brought about the 2004 constitution consisted of three phases - as per the Bonn Agreement of December 2001: First, a Constitution Drafting Committee of nine members, including two women, completed a preliminary draft in eight months. Second, a Constitution Review Commission of 35 members, including seven women, reviewed the draft - also in eight months. During this phase, the CRC consulted the general public, with the participation and logistic support of the UN Assistance Mission for Afghanistan (UNAMA). And finally a Constitutional Loya Jirga of 502 delegates, including 102 women, convened in Kabul to adopt the draft constitution. The CLJ was initially planned to meet for 10 days but sat for 21 days, due partly to an impromptu removal from the draft of the chapter on the constitutional court and its replacement by Article (121). See for details Ahmad Hijrat 'Asim, "Qanun-e Asasi-e 1382-2004," <http://psir.blogfa.com>. See also Mohammad Hashim Kamali, "References to Islam and Women in the Afghan Constitution," *Arab Law Quarterly* 22 (2008), 270-306, at 276f.

1. A Glance at Constitution Making in Afghanistan

Constitution making in Afghanistan had in the past been almost invariably linked to crises, coup d'états and regime change. Afghanistan had six constitutions in less than a century plus an inchoate constitutional document introduced under President Rabbani in 1990, which was never ratified. The first two constitutions, namely those of 1923 and 1931 articulated an absolute monarchy albeit with a State Council in Kabul and the provincial centres, under the former and an elected National Consultative Council in Kabul under the latter.³ The 1931/1310 constitution (*Usul-e Asasi Dawlat-e 'Illiyya-e Afghansitan*)⁴ was ratified by the Loya Jirga of Kabul in 1309 but promulgated by King Mohammad Nadir in 1310 in (12) chapters and a total of (110) articles. Chapter four (Arts. 27-57) of this constitution provided for a National Council (*Shura-e Milli*) of elected members to be elected for three years. The 1964 constitution introduced a constitutional monarchy based on separation of powers, and a comprehensive bill of rights, which was, however, abolished by a military coup in 1973 that declared Afghanistan a republican state with Mohammad Daud as its President. The political turmoil that engulfed the country ever since resulted in the adoption of four more constitutions: in 1977 (under Daud), in 1980 under the communist President Babrak Karmal, in 1987 under Dr Mohammad Najib, and then in 1990 under Burhanuddin Rabbani. Contrast and contradiction set the pattern: from a monarchy to a pseudo-republic, to communist rule, to Islamic state, and to Taliban, and now Islamic Republic - each introducing a new constitution in want of legitimacy, with the exception perhaps of the Taliban who did not even buy the idea either of constitutionalism or democratic legitimacy - each denouncing the past and promising a new future for the country.

The Taliban notion of legitimacy is closely connected to the Shariah and have, to that effect, also promulgated a Code of Conduct, known as *Layeha* (lit. regulations) 2010, which is purportedly based on the Shariah.⁵ The Code was adopted partly “to curb the excesses of certain problematic commanders, to reiterate the movement’s Emirate-era self-identity, and deal with the practical issues of rule given the increasing amount of territory coming under the movement’s direct control.”⁶

The one exception of note that did not follow a coup or a regime change was the 1964 constitution, introduced under King Mohammad Zahir (r. 1933-1973) in the name of modernisation and reform. But even that was marred by a rift in the royal household and the constitution was actually used to isolate the then powerful cousin and Prime Minister, Mohammad Daud, as explained below:

The 1931 constitution declared Afghanistan a hereditary monarchy in the family line of King Mohammad Nadir, which was then defined as to consist of ‘the eldest male offspring and brother’ of the King. (Art. 5) The 1964 constitution basically upheld this by providing that the royal family consists of the eldest son, then the second eldest and their descendants, then the King’s brother and his descendants. But then it was provided that the son, daughter, brother, sister and cousins

3 The 1923 constitution (*Nizamnama-e Asasi Dawlat-e 'Illiyya-e Afghanistan*) was ratified by the Loya jirga of Jalalabad in 1301 Solar (Hijri- Shamsi) year corresponding to 1923 Gregorian calendar. It consisted of eight chapters and a total of (73) articles. The State Council (*shura-e dawlat*) was to be half elected by the people and the other half appointed by the King. (Art.41- *Nizamnama-e Asasi*). Cf., Wizarat-e 'Adliyah-e Jomhuri Islami Afghanistan, *Majmo'a-e Kamil-e Qawanin-e Asasi Afghanistan 1301 - 1382*, Kabul 1386/2007. See also Sarwar Danish (comp.) and the Cultural Centre of Writers of Afghanistan (markaz-e farhangi nawisendagan-e Afghanistan), *Matn-e Kamil-e Qawanin-e Asasi Afghanistan* (1301-1372), Tehran, 1374/1995.

4 The expression ‘*usulnama*’ and its antecedent ‘*nizamnama*’ represented terminologies of lesser authority in due reverence to Shariah, which was deemed more authoritative. Both expressions were subsequently substituted by what is now commonly used ‘*qanun*’. The 1964 constitutions and all the others that followed were then called ‘*qanun-e asasi*.’ *Qanun* is both an Arabic and a Turkish word but Afghanistan probably took it from Turkey where it tended to carry secularist connotations due to the abolition of the caliphate (1923) and the onset of a secular state in that country.

5 The *Layeha* of 2010 is a revised version of the ones the Taliban had issued in 2006, and 2009 respectively. The *Layeha* 2010 contains a set of guidelines on conduct of armed combat, treatment of civilians and enemy forces, constraining excesses in the treatment of people’s lives and properties. The *Layeha* thus prohibits torture and forced confession (Arts. 15 & 19), outlawing the mutilation of enemies, kidnapping (Arts. 70 & 73) and the killing of soldiers who surrender (Art. 14). Article (78) of the *Layeha* further provided that “Mujahidin are obliged to adopt Islamic behavior and good conduct with the people and to try to win the hearts of the common Muslims.”

6 Kate Klark (Afghanistan Analyst New York), “Calling the Taliban to Account,” 5-6 (2011), available at <http://aan-afghanistan.com/uploads/20110704-Clark-The-Layeha.pdf>

of the King, their spouses and offspring may not participate in political parties nor become minister, prime minister, member of parliament, or a judge of the Supreme court. (Art. 24) This effectively barred the then powerful Prime Minister Daud, his brother (the then Foreign Minister) Mohammad Naim and their families from holding high offices. This became a contentious issue in the royal household marking the beginning of political instability for Afghanistan.

Although in many ways regarded as the most refined of the constitutions Afghanistan hitherto had, and was also designated as ad hoc constitution under the Bonn Agreement,⁷ certain parts of the 1964 constitution, such as its provisions on the formation of political parties, were never enforced, and the reference to it in the Bonn Agreement also proved to be problematic in some ways: Thirty seven years of time lag, several other constitutions in between, a new Civil Code (of 2,500 Articles) and a Penal Code (523 Articles) both introduced in 1976, and over two decades of conflict had brought radical changes in the socio-political realities of Afghanistan. Lawyers and judges continued, even after 2004, to enforce older laws that stood at odds with the new constitution, and problems continue - due partly to the latent confusion over the locus of authority to interpret the constitution and reconcile the existing laws with it.

Implementation of the Bonn agenda necessitated an enabling environment of peace and security for the transitional government to ensure progress - that prospect was unfortunately not realised. The country became preoccupied instead with security problems, the Taliban insurgency, and an aggressive power play between President Karzai and the WJ, which continued right to the end of Karzai's term of office in 2014.

Two different organisations, the Supreme Court (henceforth as SC) and the Independent Commission for Supervision of Implementation of the Constitution (henceforth as ICSIC) are exercising constitutional review functions since the promulgation of the ICSIC Law in 2008. Problems arose partly due to the fact that this law was in conflict with Article (121) of the constitution on the same subject.



Loya Jirga members during the 2004 Constitutional Loya Jirga, Kabul

⁷ The Bonn Agreement was the outcome of a UN- sponsored international conference which produced a blueprint for Afghanistan's reconstruction over the succeeding three years. A phased process of political transformation was visualised with the assistance of UNAMA and foreign aid agencies. The Agreement stipulated for re-establishment and reform, under a new constitution, of the national justice system in accordance with Islamic principles, international standards, the principle of the rule of law, Afghan legal traditions, and comprehensive participation of women in government.

2. Constitutional Interpretation and Review

Constitutional review of parliamentary legislation and government action has, in the last three decades or so, become a hallmark of modern constitutionalism. Most constitutions today provide for some form of judicial review in order to ensure that the legislative and executive branches observe the limits of their powers under the constitution.

Notwithstanding some early 20th century experiments in Iran and some Arab states, Muslim countries are on the whole latecomers to constitutional review. The objectives of constitutional review can be varied. In Egypt, the supreme constitutional court, established under the 1971 constitution and vested with exclusive constitutional review powers, was aimed at creating a judicial system that would be seen by investors as guarantor of legal stability and basic rights, with reference especially to property rights.⁸ In the Islamic Republic of Iran the Guardian Council was created, under the 1989 constitutional revision, in order to preserve the achievements of the Islamic revolution and protect foundations of the Islamic state, whereas in Turkey the constitutional court, set up in 1982, was to protect the Turkish brand of secularism, also known as *Kemalism*.⁹

Two different models of constitutional review can be ascertained: centralised and diffused. In a centralised system, the model used by most European countries, including France, Germany and Italy - a dedicated body, a constitutional court or a constitutional council - is the only state organ granted the power to make authoritative decisions on the constitutionality of a law or government action. When constitutional questions arise in cases before lower courts, they are referred to the constitutional court for adjudication.

Diffused or decentralised constitutional review, the model used in the United States and Pakistan, grants all courts in the judiciary the power of constitutional review. A Supreme Court at the apex addresses questions of constitutionality when they arise in cases appealed from lower courts. In Pakistan, Article (203D) of the amended constitution 1973 specified that the Federal Shariat Court must, at the request of a citizen or the government, examine any law and rescind it if it finds that the law contravenes any injunction of Islam. The lower courts decide in individual cases wherein doubts arise on the constitutionality of an action or statute on which it may be based. If the latter is found to be unconstitutional, the court will refuse to apply it. The last word on this matter rests with the Supreme Court. With regard to the powers of the SC, the decentralised model may be further divided into two types: 1) the SC has the power to invalidate the law upon its ruling as in the U.S and Pakistan, and 2) the law is suspended by the SC but remains on the statute book until replaced or amended by parliament. This latter type of judicial review is practiced in the Yemen, United Arab Emirates, Malaysia, Nigeria, and arguably Afghanistan. Egypt, Turkey, Indonesia and Bahrain belong with countries wherein constitutional review is centralised entirely in a separate constitutional court.¹⁰

Many countries in the French constitutional tradition in North Africa, including Tunisia, Algeria, Morocco, Mauritania, Senegal and Lebanon have designated 'constitutional councils' with more limited review powers. France itself requires its constitutional council to review all institutional acts (statutes which implement or elaborate constitutional provisions) and all private members Bills before they are enacted. This kind of abstract, or *a priori*, constitutional review is generally initiated by political officials, members of the legislature, the executive or regional governments. Constitutional councils are limited in scope due partly to their predominantly political, rather than judicial, character, and the tendency also that they issue advisory, rather than binding, decisions - although this may vary in particular cases and jurisdictions. The decentralised model of constitutional review allows the court to review a law's constitutionality after it has been in effect for long enough for its real world impact to be seen. This type of concrete review, also

8 Cf., Tamir Moustafa, *The Struggle for Constitutional Power - Law, Politics and Economic Development in Egypt*, Cambridge: Cambridge University Press, 2007, 57f.

9 Cf., Rainer Grote "Models of Institutional Control," in eds., Rainer Grote and Tilmann Roder, *Constitutionalism in Islamic Countries: Between Upeaval and Continuity*, Oxford and New York: Oxford University Press, 2012, p. 222.

10 Grote, "Models of Institutional Control," (n 9), p. 224.

known as *a posteriori* review, is typically judicial in character, broadly based and often carry binding force.¹¹ The main trend in the last few decades has been to create separate constitutional courts to carry out the function of constitutional review. This is known as the German model and is adopted widely in many new democracies.¹²

Constitutional review courts do many other jobs. They may hear cases related to presidential impeachment, supervise elections, settle disputes between the organs of state, and even rule on the constitutionality of political parties. Countries and jurisdictions also tend to vary over some key questions pertaining to constitutional review: who can bring a claim, what can it be based on, and what the effects of the court decisions may be. These questions may be addressed in the constitution, in statutes on the organisation of the courts, or in subsequent interpretations by the constitutional court.

The constitutional court can hear disputes arising out of concrete cases, just as it can also consider constitutional issues in abstract, even before a case arose or a law put into effect. An abstract review also occurs when political institutions ask the court to provide an authoritative interpretation of the constitutional text outside of a real dispute.¹³

In Afghanistan, the first constitution, the Nizamnama-e Asasi of 1923, provided for a State Council (*shura-e dawlat*), with powers to review government action which had given rise to complaint by aggrieved parties, especially “when it raised questions about a law-*qanun*.” (Art.43) The Council was further authorised to review all the legislative bills prepared by the government before they were presented to the King for promulgation. (Art. 46) Additionally, the Council had to review all treaties, contracts and agreements Afghanistan had concluded with foreign parties and governments. (Art. 49) This was, as Sarwar Danish, the present writer’s former colleague at the CRC and later Minister of Justice, also observed, the genesis of constitutional review in Afghanistan. The 1931 constitution was silent on interpretation, and the position remained unchanged under the 1964 and 1977 constitutions.

The 1987 (Dr Najib’s) constitution provided for an eight-member constitutional council (*shura-e qanun-e asasi*), which mainly served as a political organ of state. The council was assigned the task to ascertain constitutionality of “the laws, legal documents and international treatise, and advise the President on issues pertaining to the constitution.” (Art. 123) The Council was further tasked to “make recommendations to the President on developments in legal affairs under the constitution.” (Art. 124) The President appointed the council members for a period of six years. Other procedures and organisational matters of the council were “to be regulated by law.” (Art. 127)

The relatively slow pace of constitutional review in Afghanistan may be due partly to a certain tendency on the part of Afghan judges to take a ready recourse to Islamic sources when statutory text and available guidelines fell short of providing the needed guidance. This is reinforced by the fact that many of the constitutions of Afghanistan explicitly instructed the judges to refer to Islamic or Hanafi jurisprudence regarding matters not regulated by statutory law - a position that also obtains under Article (130) of the current constitution. The important qualification of that Article that such a recourse should be guided by the spirit of ‘administering justice in the best possible way’ has unfortunately been frequently overlooked. Ready recourse to Hanafi jurisprudence had the effect of impeding development of a lively discourse on constitutional interpretation. Instead of addressing a constitutional ambiguity on its own grounds, Afghan judges tend to refer to Hanafi sources partly due to its greater flexibility and scope. That said, one might add that Afghan judges have probably engaged more with statutory law, or *qanun*, by way of clarification and interpretation of its provisions than they have with the constitution. There is, of course, the absence of a tradition of constitutionalism in Islam, and the all too obvious reverence to the Shariah.

11 Cf., Katherine Glenn Bass and Sujit Choudhry of NYU Law Center for Constitutional Transition: Democracy Reporting International, Briefing Paper 40, September 2013, p. 8 at www.democracy-reporting.org

12 Cf., Tom Ginsburg, “Comparative Constitutional Review,” p. 1: a United States Institute of Peace position paper at www.usip.org. See also Thierry Le Roy, “Constitutionalism in the Maghreb,” in eds., Grote and Roder (n. 9), p. 111f. Of the three North African countries Morocco has the most developed case law on constitutional review, whereas in Algeria and Tunisia the record has been very modest.

13 Ginsburg (n 12), p. 1-3.

The 1964 constitution created an independent Supreme Court for the first time in Afghanistan. The so-called brief ‘democracy period’ that lasted nine years or so witnessed fresh enthusiasm for judicial reform. The first SC, inaugurated after the Interim Period (Constitution: Article 125) in 1966, took its independent role earnestly, and engaged in numerous questions posed over conformity of the then existing laws with the constitution. The SC attempted this by organising intensive judicial seminars¹⁴ of the leading judges, adoption of seminar resolutions into Judicial circulars (known as *muttahidul ma’al*), and sets of guidelines (*qawa’id*) that regulated court affairs. A series of such circulars and regulations were issued by the SC as a result. One of the most detailed examples of the *qawa’id* was the ‘guiding rules on penalties (*qawa’id-e rannoma dar mawzu’at-e jazai*)’ in 61 articles. These and other such regulations were to be enforced after publication in the Official Gazette (*jarida-e rasmi*).¹⁵ Most of these regulatory measures were concerned with the application of Hanafi jurisprudence under articles (69) and (102) of the constitution. This was a period, it will be noted, which preceded introduction of the civil code (c. 2500 articles) and penal code (over 500 articles) in 1976. It seems that some of these measures did involve constitutional review, notwithstanding the silence of the 1964 constitution on the subject- as the introductory remarks and examples that follow will illustrate.

The unconsolidated state of the *fiqh* manuals was a long standing issue for the courts of Afghanistan. The fact that considerable diversity of opinion existed within the Hanafi school had given rise to problems of disparity in court practices on one hand, and compatibility of the Hanafi *fiqh* with the constitution on the other.

At his inaugural speech of the second judicial seminar of the presidents of provincial courts 1350/1971, the then Chief Justice, Prof. Zia’i, highlighted consolidation of judicial proceedings under Article (104) of the constitution as one of the principal objectives of the seminar. He elaborated that with the introduction of the new constitution “our understanding of the law has undergone transformation. Some of the outstanding issues were addressed in the first seminar in 1347/1968, yet courts proceedings are still beset with disparities.” He stressed the need for developing unified and reliable judicial precedent in the implementation of *fiqh* and law. It was important that court proceedings and decisions in similar cases were made consistent and predictable.¹⁶

Addressing the issue of diversity within the Hanafi *fiqh*, the Chief Justice stressed the need to unify the sources of reference. Distinguishing the preferred (*rajih*) and agreed upon (*mufta biha*) positions in the *fiqh* sources was an arduous task even for the specialist. Most of the *fiqh* manuals were also in Arabic and translating them all beyond our resources. Hence the SC attempted to translate the *Hidayah* [of al-Marghinani], and Guide to Transactions (*Rahnoma-e Mu’amalat*) in six volumes by Al-Atasi al-Suri. The first and sixth volumes have been translated in Dari and work was in progress on the other four, adding that these works relied mainly on the [Ottoman] *Mujallat al-Ahkam*.¹⁷

The following illustrations help to explain the institutions, preceding and succeeding the 1964 constitution, concerned with addressing gaps in the laws as well as issues of conformity with the constitution of the law and Hanafi *fiqh*.

14 The second of these seminars, inaugurated by the then Chief Justice, Prof. Dr. Abdul Hakim Zia’i, lasted for 19 days in Mizan and ‘Aqrab of 1350/1971. A perusal of the seminar resolutions shows progress over many of the outstanding problems of the judiciary. See for details *Qaza* (SC journal), *Shomara-e fawqul ‘adah* (special issue), Second Seminar of the Presidents of Provincial Courts, 1350, p.7.

15 A full collection of the circulars and regulations was published in three volumes covering developments between 1346-1350 (1967-71).

16 Inaugural speech of Chief Justice Zia’i at the Second Seminar of the Presidents of Provincial Courts, *Qaza* (SC journal), *ibid.*, 4.

17 *Ibid.*, p. 5.

1. 'Vitiating of judicial orders in civil litigation cases' (*qawa'id-e marbut dar mawarid-e butlan dar qazaya-e hoquqi*) in seven articles. Briefly, it is stated that instances of vitiating in criminal cases has been dealt with by the Criminal Procedures Law 1965 (*qanun-e ijra'at-e jaza'i* 1344) but similar guidelines were needed for civil litigation. The existing laws had not addressed this and although the Hanafi *fiqh* did provide some rules, they had yet to be adopted for enforcement. Since there was a gap in the law, the Hanafi *fiqh* became applicable under Article (102) of the constitution.

The actual rules address vitiating of a judicial order in cases, for instance 1) when the basic elements of a valid judgment were missing, as in the case of absence of one of the litigants, or of a competent judge; 2) when one of the parties was a minor person incapable of litigation; 3) when the subject matter was incapable of proof but a judgment had still been issued etc. The full text then ends with this note: "subject to approval by the High Council of Judiciary, these rules/*qawa'id* shall be enforceable one month after publication in the Official Gazette."¹⁸

2. Rules pertaining to judgment in absentia in civil litigation cases (*qawa'id-e marbut ba ahkam-e ghiyabi dar qazaya-e hoquqi*). Here again a set of rules in 28 articles were adopted by the second seminar. The basic position was, once again, one of the absences of enforceable law to regulate judgment in absentia, in which case the Hanafi *fiqh* became applicable under Article (102) of the constitution. Briefly the Hanafi *fiqh* did not permit issuance of judgment in the absence of one of the litigating parties but made exceptions to cases where the litigant refused to attend the court session. Should there be no valid excuse, the court must summon the person three times and failing attendance may proceed to issue judgment. There is much detail as to the actual stages of the trial when the party falls absent - whether after presentation of claims by one or both the parties, their representative (*wakil*), as the case may be, and whether before or after the presentation of witnesses and so forth. The detailed rules again end with a note that they became enforceable upon approval of the High Council of Judiciary, and publication in the Official Gazette.¹⁹

Several other seminar resolutions then follow, pursuant to Article 102 of the constitution, over property disputes where court judgement may be difficult to enforce. For instance when the specifications of a landed property recorded in the court judgment appear, upon enforcement, to be substantially different from how the property was in fact. This is the subject of a set of rules in nine articles.²⁰

3. Whereas 1 & 2 above consist of filling gaps in the existing laws, the example that follows may qualify as an instance of constitutional review proper. This is concerned with suppressing the then existing Customs Regulations on Smuggled Goods (*layeha-e insidad-e qachaq* 1317/1938). The SC ruled that these regulations failed to meet the requirements of Article (69) of the constitution and were therefore invalidated. Article (69) defined law as a 'resolution of both Houses of parliament assented to by the king.' Since the regulations at issue were not so approved, they were to be suspended. The SC then referred to Customs Law (*usulnama-e gomrokat* 1313/1934) and other existing instruments that continued to remain in force.²¹ In a related judicial circular the SC clarified a query as to whether search of motor vehicles also required a judicial warrant as in the case of private dwellings. The clarification given was that they did not and that motor vehicle search may be carried by order of the administrative head of the locality.²²

18 *Qaza, Shomara-e fawqul 'adah* (special issue), Second Seminar of the Presidents of Provincial Courts, 1350, pp. 13-16 at 16.

19 *Ibid.*, pp. 17-28, at 28.

20 *Ibid.*, pp. 29-32.

21 Judicial circular No. 3367 of 29.5.1347/1968 in Mohammad Uthman Zhubel (Compiler), *Majmo'a-e Muttahidul Maal-ha-e Qaza'i wa Idari Marbut ba-Mahahakim*, Vol. One, Part 2, *Marbut ba-Saalha-e* 1346 wa 1347, Kabul: Stera Mahkama, 1350 (1971), p. 126.

22 Judicial circular No. 4277, *ibid.*, p. 143.

4. The SC regulations on interdiction of debtors who refuse to pay their debts (*qawa'id-e marbut ba hijr-e madyun wa imtina'-e wey az ada-e dayn*) in 22 articles illustrates an instance of constitutional review over conformity of both the government action and the rules of Hanafi *fiqh* with the constitution. The Hanafi *fiqh* allows interdiction and imprisonment of a solvent debtor who refuses to pay his debt - a position that is *ultra vires* the constitution. The regulations under review expound the problem by citing Article (26. s. 14) of the constitution, which provided: "Indebtedness of a person to another may not cause deprivation of liberty of the debtor. The manner of debt collection and its means shall be regulated by law." But since there was no law on the subject except for a set of regulations on procurement of rights (*layeha-e tahsil-e hoquq*) which was also dated and failed to meet the requirements of the constitution, the Hanafi *fiqh* became applicable, except that this too was at odds with the constitution. Hence the new regulations were introduced to fill the gap for the time being. The actual regulations started with definitions of solvent and insolvent debtors, priority of some debts over others, how and when the court may order sale of the debtor's assets etc., which exclude, however, any provision for imprisonment.²³

In a 17-item judicial circular, the SC addressed many issues, but it began with the following (I summarise):

The courts have all been advised to settle disputes before them in accordance with the laws that did not contravene the constitution. Similarly, in the event where the court received orders from higher authorities in the judiciary, which the judge believed to be contrary to law or Shariah, the judge was hereby instructed to suspend proceedings and refer the matter in writing to the SC for further instruction.²⁴

A reference was then made to Article 128 of the constitution [that laws in force preceding the constitution are valid provided they do not contravene the constitution], and the fact that the SC was preparing a new law on Court Organisation and Jurisdiction (*qanun-e salahiyat wa tashkilat-e qaza'i*). In this connection, all the judges were requested to avail the SC of their considered opinions in details.²⁵

In another judicial circular (no. 959 of 18.2.1347/1968) the SC suggested a certain procedure on how ambiguities in the law or Hanafi *fiqh* should be addressed. With a reference to past experience, the SC expressed the concern that Article (102) of the constitution should not be used as an excuse for causing delays in the progress of court affairs:²⁶

The pre-1964 experience showed a certain neglect on the part of the judges. The task of providing legal advice and instruction was previously handled by the Academic Association of the Ministry of Justice (*anjuman-e 'ilmi wizarat-e 'adliyah*) and subsequently by the Department of Legal Fatwa of that ministry, and then by the SC's research department. Judges were reminded therewith to do their own research first in the existing laws and Hanafi sources in pursuance of Article (102) of the constitution. They may solicit opinion, if need be, from the local ulama and consult the sources directly again. Instead of taking a research-based approach to issues, the courts often asked the SC for instruction "as a delay tactic or want of time to ascertain correct legal positions. This had increased the SC research department's workload, sometimes accumulating 30 or 40 files which cause even further delays."²⁷ Hence the following procedural guidelines:

23 *qawa'id-e marbut ba hijr-e madyun wa imtina'-e wey az ada-e dayn*, in *Qaza, Shomara-e fawqul 'adah* (special issue), Second Seminar of the Presidents of Provincial Courts, 1350, pp. 36-42 at 36-37.

24 Judicial Circular No.1186 dated 17.9.1346 (c. December 1967) in Mohammad Uthman Zhobel (Compiler), *Majmo'a-e Muttahidul Maal-ha-e Qaza'I wa Idari Marbut ba-Mahahyakim*, Vol. One, Part 2, *Marbut ba-Saalha-e* 1346 wa 1347, Kabul: Stera Mahkama, 1350 (1971), p. 45. The compiler writes in his Introduction (p. 5) that three volumes of such collections have been published covering years 1346-1350. The first volume covers circulars prior to the establishment of the SC.

25 *Ibid.*, p. 44.

26 *Ibid.*, p. 78.

27 *Ibid.*, p. 79.

When the courts encounter difficulties over contradiction or absolute ambiguity in given articles of the existing laws that made legal interpretation inevitable, they were to organize their request to the SC in three segments. Firstly, to provide a complete statement of the case and the problem faced; secondly, to provide a considered opinion they had arrived at through investigation of the law or Hanafi *fiqh* as far as possible; and thirdly, to provide documentary attachments, if available, as to where exactly the ambiguity or need for interpretation arose. The District Courts should then send their request for instruction to the Provincial Court of their respective provinces, and if the latter deemed fit, it may refer the matter to the High Council of the Judiciary for further guidance.²⁸

²⁸ Ibid., p. 78: It is then added: if the SC research department finds that the query could have been settled through adequate investigation by the originating court itself, and the attempt is indicative of neglect in research and the effort to upgrade the standards of academic inquiry, and when three such attempts are noted, the matter may be placed in the judge's records.

3. The Spanta Episode and its Aftermath²⁹

It was not until the WJ passed a no-confidence vote against the Ministers Spanta and Akbar that questions were raised over the SC's constitutional review powers. Both ministers were summoned and questioned by the WJ in May 2007 under Article (92) of the constitution for their apparent failure to prevent expulsion of Afghan refugees from Iran. The WJ passed a no-confidence vote on both, but confusion arose when two blank voting slips were discovered in Spanta's ballot box. The vote count would have gone in favour of Spanta had the blank slips been discounted altogether. The House decided, however, to vote a second time within the week, and the result of the second round tilted the balance against Spanta. Article (92) specifies, however, that the no-confidence vote against a minister shall be explicit, direct and based on convincing reasons, yet it does not specify the consequences of that vote. The question as to whether there were convincing reasons was debated and the WJ finally held that the alleged failure of the minister was convincing enough.³⁰

President Karzai questioned the second voting on Spanta and referred it to the SC to determine its constitutionality. Karzai accepted, in the meantime, the no-confidence vote against the minister Akbar.³¹

The SC responded that the no-confidence vote was not based on convincing reasons, hence unconstitutional. It was stated that preventing the expulsion of Afghan refugees was beyond the minister's rational control. Spanta was allowed as a result to retain his position.³² Yet due to a certain ambiguity in Article (92), it was not clear as to whether the censured minister should be allowed to remain in office, must resign, or be terminated.

The Spanta episode received much media coverage. Abdul Rahman Sukut criticised Karzai's decision on three points: differential treatment of two ministers; unusual haste in giving a somewhat emotive response even before his due time (of 15 days-under Art. 94); and involving the SC. How did Karzai justify his decision to dismiss one minister and retain the other while both were allegedly guilty of neglect over the same issue?³³ Partaw Nadery covered a civil society debate and commented that Spanta should have resigned and ended the issue there and then, or else that a joint session of the WJ and Meshrano Jirga (Upper House-henceforth as MJ) should have been held in the presence of President Karzai and found a solution to the issue.³⁴

It was further added that Karzai's referral of the case to the SC had the effect of pitting the SC and the WJ against one another.³⁵ The WJ reacted strongly to say that the SC did not have jurisdiction to hear this case, as it was unrelated to the consistency of a law or a legal document

29 This case has been widely covered and publicised such that makes a full treatment of the political dynamics and implications of the case, both domestic and external, fall beyond the scope of this enquiry. Hence I confine my treatment of the case to its juridical and constitutional context only.

30 See for details Ahmad Hijrat 'Asim, "Qanun-e Asasi-e 1382-2004," <http://psir.blogfa.com> at p. 1.

31 Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan," in eds., Grote and Roder (n 9), p. 679. In the first round the no-confidence vote against Spanta stood at 124 whereas this figure went up to 141 in the second round. See also Abdul Jameel Na'imi, "Wolesi jirga wa tasamim-e ghayr-e maslaki wa kar-nashenasana" (WJ and its unprofessional and unwarranted resolutions) <http://www.afghanasamai.com/afghanasamai8/New/Naimi.html> (dated 7 June 2007, p. 1).

32 Hashimzai (n 9), p. 680.

33 Abdul Rahman Sukut "Bazi-e rangin-e gorg wa-bara miyan-e parleman wa Spanta: Chera ba-mawzu'at-e qanuni rang-ha wa sibgha-ha-e siyasi dadah meshawad (colourful sheep and wolf game between Parliament and Spanta: why are legal issues being politicised in this way?)," <http://www.ariaye.com/dari4/khabari/spanta.html>. Abdul Rahman Sukut is a political commentator on Afghanistan affairs - apparently not well known.

34 Partaw Nadery, "neshast-e goroh-e mashwarati ahzab-e siyasi wa jami'a-e madani - consultative session of political and civil society groups," held on 22 Jawza 1386/12 June 2007, Afghanistan Civil Society Forum-organisation ACSFo http://www.acsf.af/index.php?option=com_content&view=article&id=445:2011-06-29-07-04-22&catid=13&Itemid=18 (at p. 4).

35 Mohammad Qawi Koshan (Chief Editor of *Omid* weekly), Dr ShershahYusofzai (analyst, Afghanistan affairs), and Bashir Bejand (political commentator), "wolesi jirga:dastaward-ha wa chalesh-ha-,Wolesi Jirga's challenges and outcomes" - *Haftanama-e Omid*, 11 Jawza 1387/ 14/07/2009 at <http://dari.trib.ir/political/افغانستان-امروز-نگاه-نو/item/2401-ولسی-جرگه-دستاوردها-و-چالش-ها>

with the constitution's Article (121), and the WJ therefore did not recognise the SC decision.³⁶ Sukut made a credible observation that "the President should not have involved the SC, and should have instead consented and quietly accepted the WJ decision without hesitation."³⁷

The former President Burhannudin Rabbani commentated at a meeting in Kabul with the present writer (24 August 2008) that the SC had no objection to the WJ's no-confidence vote and had even agreed with it, but then it was pressurised by the President who wanted it contested. Ashraf Rasooli, Advisor Minister and a work shop participant in Kabul (25 August 2008 where I was also present) thought that passing a no-confidence vote was the prerogative of the WJ, such that there was no room for interpretation or judicial intervention. There would be no case, Rasooli added, had it not been for the government's insistence to contest it.

Two new initiatives followed to suggest long term solutions. One was the SC response which elaborated an existing statute, namely the 2005 Law on the Organisation and Jurisdiction of the Courts (Art.24 in particular) so as to reaffirm the SC's authority to interpret the constitution.³⁸ The next initiative came from the executive in the form of a draft bill based on Article (157) of the constitution that would allow ICSIC to review draft legislation "prior to the endorsement of the President" and give opinion on the constitutionality of the draft before it became law. ICSIC was to also provide legal advice on "issues arising from the constitution and previous laws for their inconsistency."³⁹ However, when the Bill was tabled at the WJ, the latter altered it so as to empower ICSIC to interpret the constitution.

The two initiatives complemented one another and offered a credible way out of the dilemma. They sought to remove the conflict by assigning to ICSIC an "abstract" review function while entrusting the SC with the authority to provide "concrete" review only after a case or issue arose.

On 12 June 2011 a similar incident to that of Spanta occurred when the WJ passed a no-confidence vote against the Attorney-General, Mohammad Ishaq Aloko, the Acting Chief Justice, Abdul Salam Azimi, and six of the nine SC judges. This was following the decision of a special tribunal the SC had set up to look into the results of the 2010 parliamentary elections and numerous complaints over widespread rigging. But when the tribunal disqualified 62 MPs, within days the WJ summoned the named officials for questioning; they refused to comply, and were consequently slapped with no-confidence votes.⁴⁰

Then in February 2013 the WJ censured the Interior Minister, Mujtaba Patang, over his apparent inefficiency in face of deteriorating security situation in the country, and also over appointment of inefficient officials to sensitive security posts. The WJ summoned and questioned Patang and then passed a no-confidence vote against him. Patang approached the SC to ascertain whether the vote was based on convincing reasons. The SC declined his request on the ground that it had to be by the Executive or President himself. It seems that Patang did not pursue the matter, and in the meantime, Karzai appointed Mohammed Omar Daudzai as the new Interior Minister in

36 International Crisis Group, Afghanistan: The Long, Hard Road to the 2014 Transition, Asia Report (No. 236, 8 October 2012), p. 14. It was further added: "President Karzai's government has frequently cited respect for the constitution as a paramount condition for reconciliation with the Taliban and other insurgent groups; the executive branch, however, has time and again demonstrated a belief that it is above the law...."

37 Sukut (n 33), p. 1.

38 Until 2007 it was generally assumed that the SC had the sole authority to interpret the constitution. For instance, in 2005 when it became clear that District Council elections could not be held and the MJ could not be constituted- as one-third of its members were to be from District Councils (constitution - Arts. 84 & 140) - the SC advised that the Provincial Councils could send two members each to the MJ, instead of only one, until such a time when DCs could be duly elected. Similarly when a question arose over the meaning of the word "majority - *akthariyyat*" in parliamentary votes to approve government ministers, the SC provided the needed interpretation that it meant the majority of the present members. The SC had also provided an interpretation of the 'pronoun 'anha-their' in Article 121 of the constitution so as to include constitutional interpretation. These three instances of interpretation could be said to have established a precedent in favour of the SC. This was the view of Dr. Mohammad Qasim Hashimzai, a Kabul work shop participant the present writer also attended on August 25, 2008). See also J. Alexander Thier, "The Status of Constitutional Interpretation in Afghanistan," United States Institute of Peace, p.3 and passim at www.usip.org

39 Cf., John Dempsey and J. Alexander Thier, "Resolving the Crisis over Constitutional interpretation in Afghanistan," USIP PEACE BRIEFING, United States institute of Peace, March 2004, p. 4.

40 See for details, International Crisis Group (n 36), p. 4.

September. The WJ also approved the new appointment within the month.⁴¹ Without wishing to enter into details, two media observers, Walizadah and Sharifi, also thought Patang was a poor performer during his ministerial portfolio and even before then, but then asked: what would cases like this do to the already strained relations among the organs of state?⁴²

As for the question who is to judge whether the no-confidence vote was ‘convincing and reasonable,’ a credible response was given: “since censure and no-confidence vote are on the whole political in nature... the country’s lawyers are of the view that the people’s representatives are the best judge of this and they should be the ones to determine whether the vote so given was convincing or otherwise.”⁴³

President Karzai vetoed the ICSIC law on the ground that it was violative of articles 121, 122 and 157 of the constitution. His main argument was: a) Article (121) grants broad constitutional review powers to the SC; and b) Article (157) visualised a supervisory body to oversee implementation of the constitution, not a body to interpret. This was a valid explanation, yet in August 2008, the WJ overruled Karzai’s veto by a two-thirds majority, making it enforceable law (under Art. 94).⁴⁴ The new ICSIC Law provided:

For effective implementation of the provisions of the constitution, the Commission shall have the following authorities and responsibilities (including): Interpretation of the constitution on the request of President, National Assembly, Supreme Court and the Executive (Art.8).

Article (9) of ICSIC Law further authorised the Independent Human Rights Commission, the Independent Election Commission, and the Administrative Reform and Civil Service Commission to bring up issues of interpretation to the Commission.

It was unclear, however, whether constitutional review so provided by ICSIC was to be advisory or binding. The basic problem with this law was, of course, its conflict with Article (121) over the SC’s authority to determine the compatibility of laws with the constitution.

A certain ambiguity also exists in the wording of Article (121) which stipulates: “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenant for their compliance with the constitution and their interpretation in accordance with the law.” Those who believe that constitutional interpretation is from the jurisdiction of the SC argue that the pronoun “their - *aanha*, in Dari” in the text of the Article include the constitution as well. Grammatically speaking, it would be just a little short of forced interpretation to say that ‘their’ in Article (121) also includes constitution. Yet if one looks beyond grammar and visualise the overall meaning and purpose of the Article, it would make sense to say that constitutional interpretation is included in the SC jurisdiction.⁴⁵

41 http://www.youtube.com/watch?v=_1Ml9Qhc804&hd=1 Also confirmed through private communication with the relevant department of the SC.

42 See ShafiqWalizadah and Abdul ShokurSharifi’s comments at “*Wakonish-ha ba-salb-e slahiyat-e wazir-e dakhiladarshabaka ha-e ijtimai’i*- Social network reactions to the censure of the interior minister,” <http://avapress.com/vdcc1xqm.2bqsi8laa2.html>, Tuesday, 1 Asad 1392/February 2012.

43 “*Wakonesh-e Karzai be istizah-e wazir-e dakhila/ dadgah-e ‘alimawzu’ rabarrasimikonad* -Karzai’s reaction to the censure of the minister of internal affairs/ SC is considering the case,” Anonymous commentary dated 1stAsad 1392 (3 January 2013)- <http://www.payam-aftab.com/fa/news/23377/> واکنش -کرزی-به-استیضاح-وزیر-داخله-دادگاه-عالی-موضوع-را-بررسی-می-کند

44 To the best of the present writer’s knowledge, this was the first time in Afghanistan for the WJ to pass a law the head of state had vetoed by the majority of two-thirds.

45 At a workshop on the constitution in Kabul (24-25 August 2008) in which the present writer also took part along with several members of the Constitution Review Commission, there was a difference of opinion on the precise import of this pronoun ‘their - *aanha* in Dari.’ Ashraf Rasooli, and Habibullah Ghalib (the late minister of justice) were of the view that grammatically this pronoun (for third persons/objects in plural) immediately follows the reference in Article 121 to four named items. Then comes ‘*aanha* -their’ which can only refer to the named items preceding it, and does not include ‘constitution,’ which succeeds it, especially when the preceding and the succeeding elements are in a state of contradistinction. Sarwar Danish, also a former member of the CRC, thought that Article (121) was somewhat hastily added at a late stage and it was not accurately worded. Mohamad Qasim Hashimzai, the then deputy minister of justice, commented that the drafters of Article 121, who were all alive, intended to include constitutional interpretation within the purview of that Article and a part therefore of the SC jurisdiction. Rasooli and Ghalib were correct in their grammatical analysis. But I believe that Danish and Hashimzai were right to maintain that grammatically ‘*aanha*’ may not include ‘constitution’ in the text of Article (121) but the correct position is that constitutional interpretation rightly belongs to the SC. The former held on to their grammatical analysis whereas the latter to intention and meaning.

The request of interpretation under Article (121) can only come from either the government or the courts, but it does not have any provision that the request can also come from others such as civil society organisations, advocates or general public. It will be noted in this connection that most of the ‘centralised’ models of constitutional review restrict access and referral to courts or other branches of government, whereas the ‘diffused’ models tend to also enable individual complaints brought by citizens. This open access is a powerful tool for ensuring that a constitution’s bill of rights is enforceable. Open access may also help generate popular support for the court, as its decisions contribute to the protection of citizens’ rights. However, allowing any citizen to bring a complaint is also likely to increase the court’s workload, and necessitate for the constitutional court to have sufficient infrastructure, clerks and secretaries, to manage the flow of cases.⁴⁶

Article (157) is also silent with regard to assigning any role to ICSIC to interpret the constitution. For this Article speaks only of the “establishment by the provisions of the law” of a commission and appointment of its members by the President. Unless the laws governing both these bodies are modified through necessary amendment, or a consensus-based delineation of roles between the SC and ICSIC is ascertained, conflict of jurisdiction is likely to paralyse the system.⁴⁷

The President heads the executive, but he is also constitutionally responsible to ensure good relations among the organs of state (cf. Art. 60). Good management requires the ability to facilitate workable solutions and compromise within the framework of the law, especially when the law is ambiguous. In this connection, it is instructive to note that the Islamic constitutional theory offers three basic requirements of leadership: knowledge, just character, and wisdom (*‘ilm*, *‘adalah*, *hikmah*).⁴⁸ A question arose at an early stage whether fulfilling the first two may subsume and make the third redundant, but the answer was given that *hikmah* is a separate quality of the mind, which is manifested in knowing the balance of things and ability to judge strengths and weaknesses in the conduct and opinion of others. *Hikmah* is also a necessary component of the Islamic public law doctrine of *siyasah shar’iyyah* (judicious policy). *Siyasah* thus authorises government leaders to exercise discretion in the interest of good governance, even at the expense occasionally of departing from normal rules. Islamic political discourse provides ample examples of good leaders who have acted through intuitive judgment, and went against normal rules, but who excelled simply by doing that.⁴⁹ *Hikmah* and *siyasah* thus make it a responsibility of good leaders, especially the head of state, to ensure good management of state affairs through judicious policy and initiative.

I recall our discussions at the CRC that ICSIC was meant to supervise the implementation of the new constitution with a view to ensure timely progress on implementation of the Bonn process, and the fact that the constitution itself (Art. 157) had assigned to the transitional government duties to promulgate a number of decree laws and measures that required careful supervision. This is also implied by the fact that the reference to ICSIC in Article (157) occurs in chapter (12) on “Transitional Provisions,” hardly the place really to address interpretation matters. There was no confusion over any of this. Confusion arose when the draft chapter on constitutional court was lifted at the Loya Jirga, and then the haphazard insertion of Article

46 See for details, Katherine Glenn Bass and Sujit Choudhry of NYU Law Center for Constitutional Transition: Democracy Reporting International, Briefing Paper 40, September 2013, pp. 7-8 at www.democracy-reporting.org

47 See also for a discussion, International Crisis Group (n 36), p. 13 and passim.

48 See for details on the qualifications of caliph, Abu al-Hasan al-Mawardi, *Kitab al-Ahkam al-Sultaniyyah wa’l-Wilayat al-Diniyyah*, Beirut: Dar al-Kutub al-‘Ilmiyyah, 2000, p. 6. See also Abu Ya’la al-Farra, *al-Ahkam al-Sultaniyyah*, ed. Muhammad Hamid al-Faqi, 2nd edn., Cairo: Mustafa al-Babi al-Halabi, 1966, p. 25f.

49 See for a discussion of *siyasah shar’iyyah*, Mohammad Hashim Kamali, *Shari’ah Law: An Introduction*, Oxford (U.K): Oneworld Publications, 2008, ch. 11: “Beyond the Shari’ah: An Analysis of Shari’ah-Oriented Policy (*SiyasahShar’iyyah*),” pp. 225-246.

(121) to make up for the gap.⁵⁰ As for the question whether Article (64), which enjoins the President to supervise implementation of the constitution, is in conflict with (157), one can only assume that the President who approves the appoint the ICSIC members may by doing so be delegating his power of supervision to ICSIC. This is because Article (64) is general whereas (157) is specific. The former consist of a 21-item list of the powers and responsibilities of the President, whereas the latter is exclusive to supervision. It might be relevant to refer here to the rules of interpretation in Islamic jurisprudence (*usul al-fiqh*), which provide that when a conflict arises between the general (*'aam*) and the specific (*khaas*), the latter qualifies the former and prevails over it.⁵¹

Doubts have arisen over the precise meaning of 'nazaarat - supervision in Dari' in Article (157) which provides that an "independent commission of supervision for implementation of the constitution shall be formed in accordance with the provisions of law." Questions arose whether supervising the implementation of constitution also subsumes interpretation. Most of the 2008 Kabul workshop participants on constitutional issues, including Sarwar Danish, Mohammad Qasim Hashimzai, then Deputy minister of justice, 'Abdul Malik Kamawi, the then head of the SC Research Department, Din Mohammad Gran, Dean of Kabul University's Faculty of Shariyyat and myself were of the view that 'nazaarat bar tatbiq' (supervising implementation) does not include the authority to interpret the constitution. Danish supported this with an example from Article (64) which also assigns to the President 'supervision over implementation of the constitution' (the phrase employed here is 'muraqibat az ijra-e qanun-e asasi,' which is synonymous to 'supervision' in Article (157). Does this mean that the President also interprets the constitution? The answer is 'No'. It is the same here: ICSIC is assigned a practical task to supervise implementation; interpretation is something else.⁵²

50 The proposed constitutional high court in the initial draft of the constitution had the following powers:

1) Examining the conformity of laws, legislative decrees and international agreements and covenants with the constitution. 2) Interpretation of the constitution, laws and legislative decrees, 3) supervision of elections, and 4) impeachment of the President (draft Art. 146 and succeeding articles in the chapter). The whole chapter was removed on the specious assumption apparently then that the constitutional court might become like Iran's Guardian Council, using the constitution and its provisions concerning Islam to trump the political system. That concern was mainly voiced, according to Din Mohammad Gran, the then Dean of the Faculty of Shariyyat at Kabul university, by Zalmay Khalilzad (then Special Advisor to the US President on Afghanistan) and Ladkar Brahimi (the then Head of UNAMA). The fear was unfounded, however, as Sarwar Danish observed, because Iran's Guardian Council was not a court, but a political organ resembling that of the French Constitutional Council, whereas the proposed constitutional high court of Afghanistan was a judicial organ (from the author's personal notes: Gran and Danish were participants of the August 2008 workshop in Kabul on constitutional issues I also attended). See also Dempsey and Thier, "Resolving the Crisis" (n 39), pp. 1-2, and Alexander Thier, "The Status of Constitutional Interpretation," p. 5.

51 See for details, Kamali, *Principles of Islamic Jurisprudence*, pp. 153-55.

52 The present author's personal notes at the August 2008 workshop in Kabul.

4. The No-Confidence Vote: A Comparative Analysis

The no-confidence vote is an instrument of the checks and balances that parliament exercises against the two other organs of state. Parliaments are normally empowered to approve the appointment of ministers, ranking judges of the SC, heads and/or members of independent constitutional commissions and other leading officials in the first place. Parliament is also empowered, under democratic constitutions, to take back that approval, so to speak, when the officials in question are deemed to be guilty of serious violation and neglect. To balance this out, the executive/head of state is often empowered to dissolve the parliament,⁵³ and veto a legislation parliament may have passed - all under specified circumstances and procedures. But again, Parliament may, in certain cases, override the presidential veto with a decisive majority. The SC, or the constitutional court, as the case may be, is authorised, in turn, to review and under some constitutions strike down a law that may have been duly passed when it is found to be violative of the constitution. Thus while the three organs of state are normally independent of one another, there are ways in which they check and balance one another's conduct in office and also depend, to some extent, on one another's approval and support. This is to ensure co-ordination and commonality of purpose in the key functions and affairs of state.

Within this basic framework, different countries and constitutions may adjust and modify the inter-organ relations according to their particular requirements and procedures. For instance, the 1971 constitution of Egypt authorises the People's Assembly to withdraw its confidence from the Prime Minister, his deputies, or any of the ministers and their deputies if the motion is supported by a minimum of twenty members and then passed by an absolute majority. The Prime Minister's deputies and the ministers in question shall resign and the Prime Minister shall submit his resignation to the President (Arts.126-129).

The constitution of the IR of Iran 1979 (as per 1989 revision) empowers the Islamic Consultative Assembly to question the Council of Ministers, or an individual minister/s, and pass a vote of no-confidence against them if this is deemed necessary. "The Council of Ministers or the Minister subject to interpolation is[then] dismissed," and may not become a member of the next Council of Ministers immediately following (Art.89).

The constitution of Jordan 1954 (Art.54 as amended on 1/10/2011) provides that the motion of no-confidence on the Council of Ministers or on one of the ministers may be raised before the House of Representatives at the request of a minimum of ten members. If the House decides a vote of no-confidence against the Council of Ministers by an absolute majority of the total number of its members, it should resign. If the vote of no-confidence concerns one of the ministers, he should resign his office.

The constitution of Pakistan 1973 (as amended in 1985-Arts. 91 & 95) holds the cabinet, together with the Ministers of State, collectively responsible to the National Assembly. In the event when a minimum of 20 members of the National Assembly propose to summon and require the Prime Minister to obtain a vote of confidence from the Assembly, and he fails to obtain it, or when the National Assembly passes a no-confidence vote by an absolute majority, the Prime Minister submits his resignation to the President.⁵⁴

With reference to Afghanistan, the use of the no-confidence vote by parliament became problematic, due to the manner of its exercise, under both the 2004 and the 1964 constitutions, though for different reasons. The 1964 constitution had clear provisions that empowered the then newly created powerful WJ to pass a no-confidence vote, not only against individual ministers, but also the government as a whole, which had a binding effect in both cases and the minister or government had to resign as result (Arts. 91-94). The WJ of the 1960s took a particularly

⁵³ It will be noted that the current Afghan constitution doesn't give the president/executives an authority to dissolve the parliament. This is partly because the constitution has visualised a powerful president vesting him in effect with the combined powers of the king and prime minister of the 1964 constitution. Granting him powers to dissolve the parliament would have meant concentration of powers in the executive branch.

⁵⁴ The constitution of Pakistan is silent on the status of the National Assembly no-confidence vote against individual ministers. The focus thus appears to be on the Prime Minister and collective cabinet responsibility.

assertive role in the use and frequent exercise of this power, which led to the collapse of four successive governments within a short space of five years. This was the main reason, beside the shift from parliamentary to presidential system, why the CRC in 2003 did not advocate the use of no-confidence vote on the government as a whole but allowed it against a minister or member of government only. There were many factors, but one that was instructive and we learnt with the benefit of hindsight was a certain weakness in the 1964 constitution in that it was assertive on the separation of powers but did not have sufficient safeguards to ensure co-ordination and checks and balances between the three organs of state. Parliament under the 1964 constitution could also impeach the Chief Justice and SC judges accused of miscarriage of duty in accordance with specified procedures (Art. 106). The SC of the 1964 constitution (cf., Arts. 97-107) was also an independent organ of state but was not explicitly vested with the powers to interpret the constitution and review to ascertain conformity of the law with the constitution. Only the King had powers to issue orders to any of the three organs, and even dissolve the parliament (Art. 63). Supposing that parliament or the SC had proposed a certain interpretation to a constitutional clause, the King could issue orders to adopt it. The 2004 constitution opted for a presidential system and consequently changed the more rigorous provisions of the 1964 constitution on the use and scope of no-confidence vote, yet the text was not free of ambiguity over the consequences of that exercise. Article (92) stipulates that the WJ may summon and question a minister if 20 per cent of its membership proposes a motion to that effect. If the minister then fails to provide satisfactory explanation, the WJ may take a no-confidence vote against him with an absolute majority provided that it is based on clear and convincing reasons.

5. Constitutional References to Islam

Islam features prominently in all the constitutions of Afghanistan, except perhaps that of the 1980 (Karmal's). The 2004 constitution contains no less than 17 references to Islam in the various spheres of the nation's life, including Article (1) which proclaims Afghanistan an Islamic Republic. Article (2) declares Islam as the state religion, and Article (3) provides that there shall be no law repugnant to "the beliefs and ordinances" (*mu'taqadat wa ahkam*) of the sacred religion of Islam.⁵⁵ In its chapter on the judiciary, Article (130) provides that the courts shall apply the provisions of constitution and other laws to disputes before them. In the event where no provision is found in these sources, the court "shall follow the provisions of the Hanafi jurisprudence within the limits of the constitution and render a decision that secures justice in the best possible way." Article (131) authorises the application of *Shi'i* jurisprudence in cases dealing with personal matters involving the followers of *Shi'i* Islam. Article (149) stipulates that the provisions of 'this constitution' concerning Islam may not be amended. The constitution thus adopts a variety of measures to manifest Islam as the most visible basis of national identity, reflecting also an entrenched social reality and a source of guidance for law and government.

Notwithstanding the extensive presence of Islam in the 2004 constitution, Article (3) imposes a negative test in that legislation could originate in any source provided it did not contradict the principles of Islam. This is unlike the constitutions of Egypt 1971, 2012 and 2013 which affirmatively identify the Shariah as the principle source of legislation. In practice too, the Afghan legal system had in effect been a dual system in that many of its laws in non-Shariah dominated areas, such as constitutional law, commercial law, administrative and civil service laws have actually been drawn from European models either directly or via other countries -Turkey and Egypt, for example- which had themselves relied to some extent on the continental, mainly the French, legal tradition.

The affirmative reference to Hanafi jurisprudence in Article (130) of the current constitution is also confined to cases that are *sub-judice*. This is unlike the 1964 constitution (Art.69) which made Hanafi jurisprudence the applied law of the land in the absence of any guidance in the statutory law, within or outside the court proceedings. The 1964 constitution (Art. 102) basically repeated the content of Article (69) but then confined it more specially to court cases. The present constitution contains only one reference to Hanafi jurisprudence, which is in Article (130). Article 94 of the present constitution, which is the nearest equivalent of Article (69) of the 1964, has dropped the reference to Hanafi jurisprudence. This would imply that the application of Hanafi jurisprudence under the 2004 constitution is confined to court proceedings only.

That said, the repugnancy clause in Article (3) also widens the test of repugnancy and its scope when compared to its equivalent provision in the 1964 constitution. This latter required that legislation may not "contravene the basic principles of the sacred religion of Islam" (Art.64). Neither of the two constitutions has actually elaborated on the precise applications of these phrases, which tends to enable, as past experience shows, the hard line conservatives to include even the subsidiary details of *fiqh* under them and then lay claims of repugnancy with Islam.⁵⁶ This wording of the repugnancy test under the current constitution would seem to include, not only the basic principles, but virtually all the beliefs and ordinances of Islam. Beliefs (*mu'taqadat*) tend to refer to theological principles whereas ordinances (*ahkam*), which have legal connotations, refer to practical rules governing personal conduct and civil transactions in society. This wider scope of the repugnancy clause, when read side by side with the new designation of the state as "Islamic Republic," makes up a more cogent case for

⁵⁵ See for details Kamali, "References to Islam and Women," (n 2), pp. 270-306 at 280ff. The constitution itself was named as "Constitution of Afghanistan," as it was presented to the Loya Jirga, but it was changed at that stage to its present title as "Constitution of the Islamic Republic of Afghanistan." See Farid Nazari, "*Naqdi bar qanun-e asasi Afghanistan - a critique of the constitution of Afghanistan*" at http://www.kotipost.net/msaleha/nai_4/sh6_18.html who recounts in detail how one Muslim leader, Muhsini Qandahari, stood at the L J and shouted "anyone who is a Muslim should rise to show support whether 'Republic of Afghanistan' should be changed to 'Islamic Republic of Afghanistan!'"

⁵⁶ See examples of spurious claims of repugnancy under the 1964 constitution in Kamali, "References to Islam and Women," (n 2), p. 287.

further development and specification of terms that could help judges and lawyers in their applications. There is evidently scope for further research and formulation of guidelines in the form of explanatory memoranda, supplementary schedules, and authoritative interpretation.

Are these clauses actually justiciable? Clark Lombardi, Associate Professor of Law in the University of Washington, raised this and a series of other questions. Can judges review laws for consistency with Islam and strike down those that do not comply? What method of reasoning should be used to interpret the Islamic clauses? How can the Islamic clauses be harmonised with other constitutional provisions on democracy and international human rights law? It seems, and Lombardi did not claim certainty over this, but still wrote that “no Afghan court has decided a case interpreting this provision [Art.3] to-date. Thus we are not certain the clause is justiciable.”⁵⁷ This is not surprising, one might add, for the following reasons: 1) It is unlikely for the Afghan legislature to pass a law repugnant to the clear injunctions and ordinances of the Qur’an and hadith in the first place. 2) As for the ordinances of Islam that are based on juristic interpretation (ie., the *ijtihadi* corpus of *fiqh*) in almost any of its leading schools of jurisprudence, they are so varied and diverse that it will be difficult to provide a definitive basis for the application of the repugnancy clause. There are times when the jurists have advanced from two to seven or eight different interpretations on a particular issue, which is bound to make decisive conclusions over them somewhat difficult.

Lombardi added: “it seems likely that the clause will ultimately be found justiciable.” If so, Afghans must decide what institution must interpret the Shariah repugnancy clause. It is further stated that Afghan scholars and judges believe that Article (3) is justiciable. Judges in some Islamic (and Hanafi) countries like Pakistan and Egypt have exercised judicial review in a way that not only tolerates protection of human rights but actually requires such protection as a matter of Islamic law.⁵⁸

In Pakistan, the 1973 constitution provides for Islamic review of legislation by the Federal Shariat Court (FSC). In Egypt, regular benches of Egypt’s constitutional court also carry out Islamic review. In both countries, however, legislation is measured against Islamic norms that judges identify through a hybrid method of reasoning that combines elements of traditional and modern interpretation. On a comparative note, Egypt seems to be more successful in this than Pakistan.⁵⁹

In Iran, the Guardian Council examines the compatibility of all legislation passed by Parliament with Ja’fari law. Half of the members of the 12-member Council are *fuqaha* trained in Ja’fari law, whereas the other six are modern lawyers and jurists.⁶⁰ They are all appointed by the Supreme Leader. The 1979 constitution instructs the judges not to enforce laws or regulations that are inconsistent with the Shariah, but that in exercising their judgment, they are to be guided by the Guardian Council. Whereas in Pakistan, the FSC reviews the compatibility of laws with Shariah on appeal by certain bodies of the state or on the Court’s own motion (constitution, Art. 203), it would appear that in Iran, Shariah compatibility is automatic and can be at any stage, before or after ratification by parliament.⁶¹

The Guardian Council turned out to be such a powerful body that its role was curtailed in the 1989 constitutional revision, which set up the Maslahat Council (*shura-e maslahat* - public interest council) as an arbiter in a possible conflict between the Guardian Council and parliament.⁶² If the Guardian Council vetoes a bill or a law on the grounds of inconsistency with the principles of Islam or the constitution, it may refer it to the Parliament for amendment.

57 Clark B. Lombardi, J.D., Ph.D., Associate Professor of law, and adjunct Associate Professor of International Relations, University of Washington School of Law, “The Challenges and Opportunities of Islamic Review: Lessons for Afghanistan from the Experiences of Other Muslim Countries,” USIP Position Paper, 2012, p. 2. The paper is based on a workshop held on the Afghan constitution in September 20-21, 2011.

58 Lombardi, “The Challenges,” (n 57), p. 2.

59 Ibid., pp. 9-10.

60 Articles 91 & 94, Constitution of the Islamic Republic of Iran 1979. See also Lombardi, “Challenges,” (n 57), p. 4.

61 Cf. Ramin S. Moshtaghi, “Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflict Between Them,” in Rainer Grote & Tilmann Roder,” (n 9), pp. 693-4 & 703.

62 See Grote and Roder, eds., (n 9), Introduction, p. 9.

However, if the latter refuses to amend, the matter is referred to the Maslahat Council, which unlike the Guardian Council, can itself amend the disputed bill without referring either to the Guardian Council or parliament.⁶³

The Islamic revivalism of the 1970s influenced public opinion in Egypt and Pakistan so as to include justiciability of Shariah clauses in their constitutions, and in the 1980s and 90s courts in Egypt and Pakistan began to perform Islamic review. In both countries the courts have distinguished between two types of Islamic rules. 1) Rules based on the unambiguous text of the Qur'an or hadith; and 2) rules that were developed through interpretation and *ijtihad*. The courts of Egypt and Pakistan held that two scriptural principles are particularly important: a) that Muslims act with justice ('adl); and b) that Muslims act to promote the public interest (*maslahah*). With regard to *ijtihad*-based rules, it was concluded that the bulk of *fiqh* rules were of this variety, and that the state is free to enact laws inconsistent with the *ijtihadi* rules of *fiqh* provided they are consistent with scriptural principles and promote justice and public interest. In both countries the courts have also made reference, especially in the context of their modernist interpretations, to the Islamic public law doctrine of *siyasah shar'iyah*.⁶⁴

The 2004 constitution of Afghanistan provides for both preventive and *ex post* review of legislation. While the President can veto a draft law he finds to be repugnant to Islam under Article (3), the SC may, under Article (121), review the constitutionality of laws and thereby also their adherence to Article (3) once they have entered into force. This was the position until the controversial ICSIC law of 2008 was passed by WJ. The constitution itself merely provided for the formation of the ICSIC Commission under the law without granting it judicial review powers. There are no provisions in the constitution or any other law to regulate the procedure and the effect of judicial review by the SC under Article (121). It seems that the SC itself views its decisions based on Article (121) as advisory without any binding effect.⁶⁵ However, Article (162) of the constitution provides that upon entry into force of the constitution, all laws contrary to its provisions are automatically invalid. Hence, the SC may, on this basis, declare void a law that is found to be violative of the constitution.⁶⁶ There is, however, no precedent in the existing decisions of the SC on the possible uses of Article (162) and how it may interact with Article (3). There is scope again for further research and guidelines on this.

63 Rainer Grote, "Models of Institutional Control," in Grote and Roder, eds., (n 9), p. 224.

64 Cf., Lombardi, "Challenges," (n 58), pp. 11-12.

65 Cf., Advisory opinion of the SC, annexed to letter no. 1513 of the SC dated 12/03/1386 (June 02, 2006) to the Minister for Parliamentary Affairs.

66 Cf., Moshtaghi, (n 62), p. 694.

6. Rule of Law: Problems and Prospects

Rule of law is the pillar of constitutionalism and modern conceptions of democracy, and the *sine qua non* for accountability. It means adherence to the law and its respect by all citizens, ruler and ruled alike. It also means equality of all before the law regardless of race, language, gender and religion, and a commitment also by the state to regulate all of its affairs in accordance with the law.⁶⁷

For A.V. Dicey, rule of law meant:

That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint... and that no man is above the law whatever his rank or condition.⁶⁸

The Preamble of the Afghan constitution proclaims as its cardinal objectives “the creation of a civil society free of oppression, atrocity, discrimination and violence and based on the rule of law, social justice....” Further articulation of this occurs in chapter two on fundamental rights and duties, which sets the scene with a definitive clause on equality. Article (22) thus prohibits “any kind of discrimination between, and privilege among, the citizens of Afghanistan.” Read together with its other provisions on the impeachment of the President, ministers, and the SC judges (Arts. 69, 78 and 127 respectively) when they violate the law, the constitution leaves no doubt on Afghanistan’s commitment to the rule of law.⁶⁹ The grant of judicial review under Article (121) further manifests the state’s commitment that the law and other instruments that regulate the institutional life of the country must comply with the principles of the constitution.

Article (69) starts with a definitive statement that “The President is accountable before the nation and the WJ,” and continues with a detailed impeachment procedure in the event when the President is accused of crimes against humanity, treason or other crimes. The process begins with a motion by one third of the WJ, and when approved by two thirds, the WJ convenes the Loya Jirga within a month. When the latter approves the charge, the President is dismissed in order to be tried before a special tribunal.

Thus it is imperative for Afghanistan to make the rule of law a reality of its socio-political life. Yet no text, law or constitution will achieve that without a firm resolve on the part of the country’s leaders, state officials, the corporate sector, and common citizens to make the rule of law a tangible feature of everyday life in the country. Much of this challenge remains unfortunately unmet: “The Afghan government has failed to deliver the rule of law to its people” was the conclusion of an Istanbul international conference on Afghanistan. The conference report added that “the lack of an effective system of justice is a common complaint against the Kabul government.”⁷⁰

Spanta’s case, as reviewed above, also prompted civil society debates in Afghanistan that questioned the government’s commitment to the rule of law. The debate underscored President Karzai’s lip-service to the rule of law when he spoke of its breach by others, but was seen himself to be showing scant regard to the sanctity of this principle. Questions are asked over feudalist methods of selecting high-ranking officials, and the pitiful state of rule of law in the country -

67 Harun Amirzada, “Afghanistan azbohran-e hakimiyyat-e qanun ta mafia’i shodan-e rawabit-e qudrat - Afghanistan: from crisis of rule of law to a mafia-like relations among the organs of power” at <http://muqawamat.blogfa.com/post-1895.aspx> (p .2).

68 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, ed., E.C.S. Wade, London: Macmillan, 1948, p. 202. See also Sir Ivor Jennings, *The Law and the Constitution*, 5th edn., London: University of London Press Ltd, 1964, p. 51.

69 Cf., Moshtaghi, (n 62), p. 708.

70 The conference was jointly held by the American Center for Afghanistan Studies and the Holings Center for International Dialogue on “Fundamentals of Governance in Afghanistan.” Conference Summary prepared by Thomas J. Barfield, June 2009, p. 4.

some of which are entirely unprecedented. Ministerial positions in the past were career-tracked and based on merit for the most part, although ethnic and regional factors did play a part in the selection, but not at the expense of merit. Karzai's period marked a departure from that precedent. The emergence of warlords and drug barons is also a recent phenomenon that did not even exist under the Taliban (1996-2001), and selecting people from their ranks for leadership positions in government is unprecedented for Afghanistan.

The broader range of factors that impede the rule of law in Afghanistan includes tenacious tribalism, manifested, for instance, in the Jirga tradition of adjudication by tribal chiefs and influential *mullas*. The emergence similarly of theocracies and ideologically driven regimes that came to power through illegal and bloody coup d'états, foreign interference, collapse of central government and economic infrastructure following months of American air bombardment of Afghanistan in the last quarter of 2001 to oust the Taliban, unprecedented increase of guns among the mujahideen and Taliban militia in the 1990s and ever since, emergence of warlords and drug barons who act with impunity with international connections and support even from wealthy politicians in the country. Added to all this is the spread of dual citizenship among powerful Afghans, who can exit the country and escape when found guilty of violations, and a paralysing constitutional crisis the country is experiencing since 2007.⁷¹

Twentieth century was undoubtedly the most violent in Afghan history, yet it also witnessed the emergence of constitutionalism, incorporation of a bill of rights in constitutions, formation of parliament, improvements in the judiciary, and introduction of a large body of laws to substantiate legal and political awareness in the country. The 1964 constitution was a clear testament of the country's commitment to rule of law and constitutionalism, a comprehensive bill of rights, citizens' equality and supremacy of the constitution.⁷² Yet the gains of the first half of twentieth century in consolidating the basic infrastructure of rule of law in the country were substantially eroded by the lawlessness of the war years, continued militancy, security issues and lack of good governance. Rule of law has deteriorated under President Karzai notwithstanding noticeable improvements in the economy, education and health services.

In his discussion on Shariah and democracy, Enayat wrote that by upholding the supremacy of Shariah, "Islam affirms the necessity of government on the basis of norms and well defined guidelines, rather than personal preferences." Enayat added on the same page that Islam can yet pass another test of democracy, "the requirement that a government should not only rule by law, but also reckon in all its decisions with the wishes of the ruled."⁷³

Khalid Abou El-Fadl similarly observed that Shariah law fulfils the criteria of justice and legitimacy "because the government is bound by a higher law that it may not alter or change, and because the government may not act whimsically or outside the pale of law." El-Fadl added: The notion that the quintessential character of a legitimate Islamic government is that it is a government subject to and limited by Shariah law, is repeated often by classical jurists, who have insisted that a just ruler must apply and be himself bound by the Shariah.⁷⁴

The jirga tradition and the challenges it poses to the rule of law has been widely debated by Afghan and international observers in recent years. Yet in the face of the stark reality that an estimated 80-90 per cent of all legal disputes are handled by local jirgas, many have argued in favour of developing a hybrid system of justice that combines elements of jirga with the

71 Ibid., pp. 4-11.

72 See for details on principle of legality in the 1964 constitution, Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, Leiden: E.J. Brill, 1985, pp. 39-47.

73 Hamid Enayat, *Modern Islamic Political Thought: The Response of the Shi'i and Sunni Muslims to the Twentieth Century*, (reprint) Kuala Lumpur: Islamic Book Trust, 2001, p. 190.

74 Khalid Abou El-Fadl, "The Centrality of *Shari'ah* to Government and Constitutionalism in Islam," in eds., Grote and Roder (n 9), p. 38.

formal judiciary.⁷⁵ One of the proponents of this, Ali Wardak, explained that the informal system had a two-fold advantage: it was a functioning mechanism widely used to settle a range of local disputes, and more importantly, that except for some kinds of transgression, it emphasised restorative rather than retributive justice by reintegrating the offender in the community, and relies mainly on conciliation and restoration of social balance. The ubiquitous use of jirga (also called *shura* in many non-Pashtun areas) is partly a result of widespread corruption in the formal judiciary; it is more trusted by comparison, less costly and more accessible.⁷⁶

Jirgas are convened *ad hoc* to decide on specific disputes and usually meet in an open space or a mosque. They hear the disputing parties, then discuss the matter and reach a decision. The jirga members are volunteers who are not paid by the government or the disputing parties. In a family dispute, the jirga may include representatives from the two sides, and in sensitive issues, only close family members may be allowed. Family members are considered third persons or non-voting arbitrators. Tribal custom is upheld, even if it contravenes the Shariah on issues such as women's inheritance rights. The jirgas are also notorious for condoning child marriage, forced marriage, and abuse of guardianship powers.⁷⁷

Wardak's proposals for a hybrid system of justice were supported by the US Institute of Peace, UNDP (in its second Human Development Report on Afghanistan, 2007), a World Bank report in 2008, and an international conference of donors and government parties held in Kabul in mid-2010.⁷⁸

Jirga practices are, however, vehemently opposed by the SC, the Afghan Independent Human Rights Commission, and most women activists who have spoken on the subject for reasons that jirga condoned violence against women and girls and privileged rights of male parties to a crime or civil dispute. Some aspects of jirga practices, such as *badd* - the practice in some communities offering a female into marriage as a form of compensation in a settlement are particularly inimical to women. Women are excluded from jirgas, and the jirgas are generally seen to be at odds with the promotion of human rights and social progress.⁷⁹

Both sides have credible arguments but have hitherto been unable to establish common grounds. It may be possible perhaps to develop an acceptable formula by excluding some case types from the jirga coverage- such as major land and inheritance disputes, crimes of violence and grave human rights violations, thereby leaving the bulk of civil disputes and minor criminal incidents in the sphere of jirga jurisdiction, albeit with some limitations on the punitive measures it can impose. A certain degree of liaison between the local courts and jirgas is advisable so that the courts can ascertain the conformity of jirga decisions in criminal disputes with the principles of justice and Afghan laws. In areas where the government has little or no presence, a fresh approach to restructuring the jirga could also be used as a means of gaining local presence. I have suggested in my reform proposals on the jirga below that reform and restructuring of the jirga should be selective of certain areas to begin with and that progress in other areas can only be expected to depend on improvement in security situations and stronger government in the country. A possible way forward may be for Afghanistan to adopt a law that defines and delineates the jurisdictional spheres of the local jirgas, and to accord recognition for decisions they reach through mediation and arbitration, which they often employ. I shall have more to say on this in my conclusion below.

75 One researcher who studied *shura-e qarya* and *shura-e woleswali* (village & district *shuras*) in the two districts of Kalakan and Mir Bacha Kot of Kabul province, 2003 - 2013, reported an added dimension in recent years that "villagers are not relying on the government but using Taliban court to solve their cases concerning land, inheritance and family disputes." Unpublished paper by Yutaka Hayashi "Peacebuilding from the Bottom: a Case Study Based on Interviews in Rural Afghanistan," 2014 (compliment of the author), p. 2.

76 See for details Astri Suhrke, *When More is Less: The International Project in Afghanistan*, New York: Columbia University Press, 2011, p. 212f.

77 Kamali, "References to Islam," (n 2), pp. 294-95.

78 *Ibid.*, p. 215.

79 *Ibid.*, p. 213. See also Kamali, *Law in Afghanistan* (n 72), p. 4 and *passim*.

7. Human Rights: Challenges and Opportunities

In its Preamble, Afghanistan's constitution expresses its commitment to the creation of "a society free of oppression...based on the rule of law, and protection of human rights and dignity." Article (6) further commits the Afghan state to social justice and the protection of human rights, and Article (7) provides that the state shall abide by the UN Charter, the international conventions Afghanistan has signed, and the Universal Declaration of Human Rights.

References of this kind are rare in Islamic constitutions such that they make the constitution of Afghanistan in many ways unique.⁸⁰ Chapter two (the largest in fact-Arts. 22-60) provides for a comprehensive catalogue of rights, which include, for the most part, those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights - collectively known as the International Bill of Rights - also as the international human rights law.⁸¹ These are further strengthened by Article (149), which provides that "amendment of the fundamental rights of the people are permitted only in order to make them more effective," thus proscribing any negative amendments to the basic rights. Afghanistan's constitution also "differs from the constitutions of most other Islamic countries in the region with regard to the importance it attributes to democracy and the rule of law."⁸² The picture is further developed by the formation of the Independent Human Rights Commission "in order to monitor due observance, protection and improvement of human rights in Afghanistan" (Art. 58). It is provided in this Article that "every person in case of violation of his fundamental rights can submit a complaint to this Commission." It is significant that the text here entitles 'every person,' rather than citizen, to vindicate his or her basic human rights. Human rights are, in other words, made actionable as a result in the courts of Afghanistan.

A basic difference of note between 'human rights,' and 'constitutional rights' in most countries is that only the latter are justiciable in the national courts, whereas 'human rights' need to be endorsed by another statute or instrument to make them enforceable in the national courts. This distinction would seem, in the present writer's view, to have been overruled by the Afghan constitution, which makes human rights justiciable in the national courts, albeit through the mediation of the Independent Human Rights Commission.

Some commentators have raised questions over the dual commitment of the 2004 constitution to human rights, and then also to Article (3) that no law in Afghanistan may contravene the principles of Islam.⁸³ Explicit references to the requirement of consistency of enacted laws with the Shariah can also be found in the constitution of Egypt, Iran and Sudan, none of which, however, refer to the Universal Declaration of Human Rights. It is understood, according to Said Mahmoudi, that Afghanistan's constitution proceeds on the assumption "that there is no inconsistency between the requirements of Article (3) and human rights and obligations under the Universal Declaration."⁸⁴ It is a relationship, in other words, more of complementarity than contradiction due to the Afghan constitution's unconditional recognition of the Universal Declaration.

The Chairman of Legal and Judicial Committee of the WJ, 'Alimi Balkhi, also subscribes to the notion of complementarity rather than contradiction between Islam and human rights. He said in an interview that some people draw superficial conclusions from the constitution's simultaneous commitment to Islam and human rights, and also to women's equality. The constitution makes these commitments and there are points of convergence and divergence, but these should not be seen as absolute statements. If there are divergences, there may also be ways of narrowing

80 Said Mahmoudi, "The Shari'a in the New Constitution of Afghanistan: Contradiction or Compliment?" ZaoRV 64 (2004), pp. 867 - 880 at 869 www.zaoerv.de/64_2004/64_2004_4_a_867_880.pdf

81 Cf., Mohammad Qasim Hashimzai, "The Separation of Powers," (n 31), p. 672.

82 Moshtaghi, (n 62), p. 684.

83 Mahmoudi, (n 81), p. 873.

84 Ibid., p. 874.

them. “My own understanding is that there is no contradiction... the text of our constitution may admittedly be wanting of greater clarity on points, but there is no contradiction as such.”⁸⁵

Do Articles (3) and (7) contradict one another? There are differences, of course, between the Shariah and human rights, with regard to, for example, on gender equality and freedom of religion - but whether those differences amount to contradiction as such would much depend on how one reads the Shariah. On freedom of religion, for instance, the scholastic positions of *fiqh* penalise apostasy with capital punishment, but the Qur’an provides no punishment for it, notwithstanding the fact that apostasy occurs in over twenty places in the Holy Book. So there are two answers to the question posed, one of which may be said to be one of contradiction, whereas the other is not. A similar situation obtains on women’s right to equality. If one takes the scholastic positions of the *madhahib*, they do clearly stand in a state of tension with the UDHR. But then 20th century legislative reforms in many Muslim countries have revised and changed the *fiqhi* positions in accordance with novel interpretations they have offered to the relevant parts of the Qur’an. I have examined the views of some leading Muslim scholars on the subject of women’s equality below, and may here refer to certain features Islamic family law reform.

The Syrian Law of Personal Status 1953 was the first in a series of Middle Eastern legal Codes which introduced important reforms of the Shariah Law of marriage and divorce. In its preamble on the section on divorce, this law stated that “the true purposes and conditions of divorce in Islam have sadly been misconstrued and distorted by the jurists of the past, whose doctrine has led to a lack of security in marital life.” In this situation, the proper policy would be to “open the door of mercy from the provisions of the Shariah itself, to return to the origins of the law of divorce in Islam and adopt from outside the four [Sunni] schools] provisions which will be conducive to public welfare.” The actual reforms of divorce law that were introduced in Syrian legislation were not as ambitious as might have been expected. But it was nevertheless an important impetus for legislative reform that followed in other countries of Middle East and Asia.⁸⁶ Another widely cited reform is that of the Moroccan Family Law Code 2004, known as the *Mudawwanah*, which brought important changes to the *fiqh* laws of guardianship and custody (*wilÉyah* and *qiwÉmah*) in giving equal status to both the mother and father in family affairs. The wife is to share joint responsibility with her husband for the management and well-being of the family unit. (Art.51) Constitutional reforms passed in July 2011 in Morocco also included greater recognition of gender equality and prohibition of gender-based discrimination. Whereas equality under the 1996 constitution of Morocco was expounded within the context generally of political rights, under the 2011 constitution (Art. 19) equality is framed within the comprehensive framework of human rights.

Space does not permit a fuller details. I may quote perhaps what I wrote in the Muslim World some thirty years ago that “Islamic law must grow abreast of the needs of Muslim society and be responsive to its problems. To achieve this is far more meaningful than conformity to the traditional demand for unquestioning loyalty to the authorities of the past.”⁸⁷ For a variety of reasons, Afghanistan has unfortunately yet to engage earnestly in the Islamic family law reform movement many Muslim countries have adopted in varying degrees, most of which are based on fresh but widely recognised interpretations of the Qur’an .

Human rights have gained wider acceptance in Afghanistan, as indicated perhaps by its constitution (Art. 7) - and even more so in many other Muslim countries. Notwithstanding their differences, the substantial harmony that exists, but not well-recognised, between the Shariah and human rights is undeniable. The differences between them can also be reduced as and when Afghanistan takes a hard look at some of the restrictive positions of the Hanafi *fiqh* to ensure their harmony with the constitution.

85 Sayyid Hosayn ‘Alimi Balkhi’s interview (dated 16 Jada 1385/January 2008) with Mohammad Nazari “*Noqat-e zu’f wa quwwat-e qanun-e asasi Afghansitan dar kojast?* - points of strength and weakness of the constitution of Afghanistan,” www.rahenejatdaily.com

86 See for a detailed discussion of the actual *Qur’anic* verses on divorce and polygamy that became the focus of fresh interpretations Kamali, *Freedom, Equality and Justice in Islam*, p. 76f.

87 M H Kamali, “Divorce and Women’s rights: Some Muslim interpretations of the Q 2:228,” *The Muslim World* 74 (1984), pp. 85-100, at 99.

The Hanafi *fiqh* is also not monolithic in its provisions on apostasy and freedom of religion. This is a contested issue in that a number of prominent ulama across the centuries have subscribed to the view that apostasy is not a punishable offence. Included among these are Ibrahim al-Nakha'i (d. 713/95), the teacher of Imam Abu Hanifah, and the renowned Imam Sufyan al-Thawri (d. 772/161), both of whom held that the apostate should be re-invited to Islam and should not be condemned to death. Al-Sha'arani (d. 1565/973), the author of an important comparative work on *fiqh*, *Kitab al-Mizan*, has quoted both al-Nakha'i and al-Thawri and drawn the conclusion that "the apostate is thus permanently to be invited to repent."⁸⁸ The prolific Hanafi writer and jurist, Shams al-Din al-Sarakhsi (d. 1090/483), author of a 32-volume (the largest in fact) in *fiqh* took a similar view of apostasy:

Renunciation of the faith and conversion to disbelief is admittedly a great offence, yet it is a matter between man and his Creator, and its punishment is postponed to the Day of Judgment (*fa'l-jaza' 'alayha mu'akhhkar ila dar al-jaza*).⁸⁹

On a similar note, the Rector of al-Azhar in the early 1960s, Sheikh Mahmud Shaltut (d. 1985), in his widely acclaimed book, *al-Islam 'Aqidah wa Shari'ah*, translated in numerous languages, analyses the relevant evidence in the sources and draws the conclusion that apostasy carries no temporal punishment, and that in reference to this particular sin, the Qur'an speaks only of punishment in the hereafter. Shaltut added:

The hadith 'one who changes his religion shall be killed' has evoked various responses from the ulama, many of whom are in agreement that *hudud* [prescribed penalties] cannot be established by means of a solitary (*ahad*) hadith, and that unbelief by itself does not call for the death punishment.⁹⁰ Notwithstanding the unequivocal support for human rights and rule of law in the Afghan constitution, the practice of the Afghan courts is hardly reflective of the spirit of those commitments. One rather questionable practice is their frequent recourse to Article (130) of the constitution and how they use it to send people to prison sometimes for extended periods, all in the name of Hanafi jurisprudence. This Article has given rise, as one commentator put it to "a kind of legal crudity which is in stark contrast with the principle of legality in crimes and penalties. People are interrogated, tortured and sent to prison for almost any conduct that displeases the wielders of power."⁹¹ This also goes against the purport of Article (27) which states that "no act is considered a crime unless determined by a law adopted prior to the date the act was committed. No person can be pursued, arrested or detained except in accordance with the provisions of law." There is clearly an issue over the proper, as opposed to excessive and unwarranted, application of Article (130) by the Afghan judges. The courts often resort to the provisions of Hanafi jurisprudence on *ta'zir* (deterrent discretionary punishment) to mete out harsh penalties on questionable grounds.

Sentencing judges make vague references to Article (130) of the constitution and Article (1) of the Penal Code 1976. Both of these are, somehow, being used contrary to their intention. Article (1) provides that "This law regulates ordinary crimes and penalties [in the category] of *ta'zir*. The perpetrator of *hudud*, *qisas* and *diyāt* offences are to be punished according the Hanafi

88 'Abd al-Wahhab al-Sha'rani, *Kitab al-Mizan*, Cairo: al-Matba'ah al-Husayniyyah, 1905/1329, vol. 2, p. 152. See for details also Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and developments*, Kuala Lumpur: Ilmiah Publishers, 2000, ch. 10 on "Apostasy (Riddah)," pp. 203-220.

89 Shams al-Din Muhammad al-Sarakhsi, *al-Mabsut*, Beirut: Dar al-Ma'rifah, 1986/1406, vol. x, p. 110.

90 Mahmud Shaltut, *al-Islam 'Aqidah wa Shari'ah*, Kuwait: Matabi' Dar al-Qalam, n.d., 292-93. For a detailed discussion of the *hudud*, see also M H Kamali, *Punishment in Islamic law: An Enquiry into the Hudud Bill of Kelantan*, Kuala Lumpur: Ilmiah Publisher, 2000. An abridged version of this book can be found in my article "Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia" *Arab Law Quarterly* (1998) pp. 203-234.

91 Behroze Jahanyar, "Pichidagi wa tanaqzat dar qanun-e asasi Afghanistan-complexity and contradictions in the constitution of Afghanistan," <http://kabalpress.org/my/spip.php?article3390>. Women who leave marital home and take shelter to escape domestic violence are a case at point: the law has not provided any punishment for this, but such women are often sentenced to imprisonment under Article (130).

jurisprudence of the *Shari'ah* of Islam.”⁹² The law thus clearly states its purpose, which is to regulate *ta'zir*, and effectively say that it no longer open to judge's unmitigated discretion. This is confirmed further in Article (2) of the Penal Code that “No act is considered a crime unless specified by the provision of the law.” Article (3) of the Penal Code further provides that “No one may be punished except under the rulings of a law that has been put into force prior to perpetration of the alleged crime.”

In an international work shop held in Kabul in May 2006,⁹³ representatives of the Lawyers' Union of Afghanistan made a strong case against the court practice of sending women to prison under the rubric of *ta'zir*. It was reported then that in Pul-Charkhi prison (just outside Kabul) alone, out of 80 women, 20 were accused or convicted of running away from home. Of these 20, eleven were convicted to jail terms ranging from six months to 14 years. All of these women had identified forced marriage, beating, forced labour and domestic violence as the main reasons for their escape from home. Since running away from home was not an offence under the law, the courts were using Article (130) of the constitution, and Article (1) of the Penal Code 1976 in support of their practices. Two expert commentators present at the workshop, the then Advisor Minister, Ashraf Rasooli, and Deputy President of the Supreme Court, Fazl Ahmad Ma'nawi, conveyed a credible understanding of the law to say that Article (130) of the 2004 constitution did not apply to criminal cases and that its application was to be limited to civil disputes only.⁹⁴

There is admittedly no unanimity over this nor over its opposite and the hitherto prevailing view that the Hanafi jurisprudence applies across the board, inclusive of crimes and penalties. What is proposed here is a plea for justice and due observance of the constitutional principle of legality. The argument here is over court practices that actually go against the requirement of Article (130), which qualifies the application of Hanafi jurisprudence to “administering justice in the best possible way.” It is of interest to refer here to a 2011 conference report in Kabul, which reads in part that: “The working group opened with a discussion on the failure of previous Afghan constitutions, noting there was neither public understanding of them nor a focus within academic institutions on the role of religion vis-à-vis the state.”⁹⁵ This is a case of neglect and failure of the rule of law in the sensitive area of penal sentencing.

The *fiqh* literature also records differences of opinion on *ta'zir*. Whereas the Maliki and Hanbali *fiqh* maintain that in certain cases, *ta'zir* may involve death penalty, the Hanafi *fiqh* is more specific and advises a restrictive approach to *ta'zir*. The Hanafis record the view that *ta'zir* must in any case not reach the severity of the *hudud* or *qisas* penalties. This would mean a maximum of 40 lashes of the whip, and according to some only ten lashes, and also imprisonment, in its belated development. *Ta'zir* in our times is also subject to the limitations of the constitutional principle of legality. For a constitution that has been drafted and ratified through extensive consultation by experts and those in charge of the community affairs (i.e., the *uli'l-amr*- cf., Q al-Nisa', 4:59), and approved by the head of state becomes a part of the *ahkam uli'l-amr* (ordinances of the *uli'l-amr*) and commands obedience.⁹⁶ The Hanafi *fiqh* is

92 *Hudud* refer to crimes and penalties that are prescribed and quantified in the Qur'an or hadith. *Qisas* refers to retaliation crimes such as murder, and *ta'zir* to offenses for which no punishment is specified in the sources. It would appear that the Afghan Penal Code has taken the maximalist view of *ta'zir* by including offences that carry the death penalty. Yet upon closer scrutiny, it seems that some of the instances where the Penal Code provides for death punishment would qualify for *qisas*. Note for instance, Article (395) on death punishment for cases of intentional murder. All the nine instances of death punishment for murderers articulated in this Article (e.g murder with explosives, or putting lethal poison in a drinking water well, murder with base motives and evident brutality etc) can be subsumed under *qisas*. Furthermore, *ta'zir* is a sub-theme of *siyasa*. The wider ranges of *siyasa* vests the ruler with considerable discretionary powers in crimes and punishments. See for details on the extensive uses of *siyasa* by the rulers, Joseph Schacht, “The Law,” in G. Von Grunbaum, ed., *Unity and Variety in Muslim Civilisation*, University of Chicago press, 1955, p.75. See also 'Abd al-Wahhab Khallaf, *al-Siyasa al-Shar'iyah*, Cairo: al-Maktabah al-Salafiyyah, 1971/1350, p.3f.

93 Technical workshop on “Gender and Criminal Justice in Afghanistan,” sponsored by the International Development Law Organisation (IDLO), Kabul, 15-16 May, 2006.

94 Cf., Kamali, “Reference to Islam,” (n 2), pp. 291-293.

95 Clark Lombardi, “Conference Report: A Constitutional Discussion,” organized by USIP, 20 September, 2011, Kabul, Afghanistan, p. 8.

96 See for detail Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Cambridge: Islamic Texts Society, 3rd edn., 2003, pp. 507-511.

also cognisant of the principle of legality and proscribes unwarranted extension of penalties by way of what is known in *fiqh* terminology as *tahakkum*, that is, lawlessness by the issuers of hukm, as explained below:⁹⁷

The renowned Egyptian jurist and author of an important text book on Islamic criminal law, ‘Abd al-Qadir ‘Awdah (d.1954), points out that the Shariah imposes certain restrictions on the powers of judges. It is a mistake to say that *ta’zir* offences are not regulated by the text or to suggest that the judge is at liberty to determine both the crime and its punishment on grounds of *ta’zir*. The judge must first determine whether the conduct is a transgression according to the clear text of Shariah. This is then illustrated by reference to a number of *ta’zir* offences, which are proscribed in the text without, however, specification of a punishment for them. The list includes consumption of forbidden substances, breach of trust, cheating in weights and measurements, perjury, usury, obscenity and insult, bribery, unlawful entry into private dwellings, and espionage. In all of these the Qur’an and Sunnah provide authority which renders the conduct into a transgression. While meting out punishment for any of these, the judge selects an approved penalty, ranging from a mere warning to fines and imprisonment. The judge, in other words, enjoys discretionary powers regarding *ta’zir* offences which ‘Awdah characterizes as *sultah al-ikhtiyar* (power to select) as opposed to *sultah al-tahakkum* (power to legislate at will). In the Islamic theory of government, neither the judge nor any other organ of government enjoys unlimited powers of this latter type.⁹⁸ ‘Awdah then explains two alternative positions, which take an expansionist view of *ta’zir*. One maintaining that the upper limit of *ta’zir* is for the head of state to determine, and the other, which extends *ta’zir* to include death punishment, cites in authority the well known hadith wherein the Prophet, pbuh, has said addressing the believers: “when all of you have agreed on a leader and then someone tries to split you asunder and divide your community - kill him.” This hadith is evidently concerned with a particular and very grave political situation, and may arguably not sustain a general extension of *ta’zir* to death penalty.

To take a restrictive view of *ta’zir* is preferable, according to ‘Awdah, and also in the present writer’s opinion. For I believe that an open-ended *ta’zir* would be difficult to combine with the principle of legality in crimes and penalties that Afghanistan has adopted.

It is proposed therefore that extensive reliance on Article (130) in the way that is now the case in the Afghan courts, should be discontinued, and that the SC should take a much needed initiative on this by providing a constructive interpretation of the constitution - failing which we propose that a constitutional amendment should be introduced to restrict the application of Article (130) to civil litigation only.

97 See for details Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge: Islamic Texts Society, 2008 (Section entitled ‘The Principle of Legality’), 84-97. Besides, *ta’zir* is a branch of *siyasah*, for which see also idem., *Shari’ah Law: An Introduction* (n 50) ch. 11 on *siyasah*. Idem., *Moderation and Balance in Islam: The Qur’anic Principle of Wasatiyyah*, Kuala Lumpur: International Institute of Advanced Islamic Studies, 2010, 16-20 (section entitled ‘Moderation and Restraint in Criminal Justice’).

98 ‘Abd al-Qadir ‘Awdah, *al-Tashri’ al-Jina’i al-Islami Muqarinan bi’l-Qanun al-Wad’i*, 13th ed., Beirut: Mu’assasah al-Risalah, 1994/1415, vol. 1, 138-149. See also Mohammad Hashim Kamali, “The Limits of Power in an Islamic State,” *Islamic Studies* 28:4 (1989), pp. 323-352 at 335.

8. Women's Rights: Ideals and Realities

The 2004 constitution stands out for its advocacy of women's equality and takes significant measures to ensure greater participation of women in public life. It contains clauses that address the status of women directly, and also those that are gender-neutral but also supportive of women's rights. With respect to the former, Article (22) unequivocally declares that "Discrimination and privilege of any kind is forbidden among the citizens of Afghanistan." Immediately following this is the clause that "the citizens of Afghanistan, whether man or woman, have equal rights and obligations before the law." It will be noted that the phrase "whether man or woman" did not exist in the draft constitution submitted to the Loya Jirga, but was proposed by the women delegates themselves and was finally adopted.⁹⁹

Women's participation in public life is addressed in at least two ways: First, Article (33) which gives every citizen "the right to elect and be elected." Second, the constitution reserves a minimum number of seats for women in Afghanistan's bicameral parliament. A minimum of two seats from each province are reserved for women, which equals a total of 68 out of the 249 seats in the WJ. A similar quota arrangement is prescribed for the Upper House to ensure that about one-third of its delegates are women (Arts. 83-84). Women were also present, as already noted, in all the three stages of the drafting, review and ratification of the constitution and often successfully pushed for stronger language in support of their rights.¹⁰⁰

In a similar vein, Article (54) declares family as the fundamental unit of society and requires the state to "adopt necessary measures to ensure physical and psychological well being of the family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of the sacred religion of Islam."

The non-gender-specific provisions include Article (6) which commits the state to protection of human dignity and human rights, and Article (7) which requires the state to uphold international conventions and the Universal Declaration of Human Rights.

Most of the provisions of chapter two on "fundamental rights and duties of citizens," are gender-neutral and supportive therefore of women's rights. The guarantees, for instance, in Article (23) (right of life), Article 24 (right to liberty and human dignity) and Article 29 (immunity from torture) have the potential to shield women from injurious customary practices.

These measures represent a notable improvement over the 1964 constitution, which also granted women the right to vote and incentives to improve their political and professional roles. The more assertive clauses of the 2004 constitution bear the imprint of the Bonn recommendations to include women in political life, in the constitutional Loya Jirga and the Interim Administration. But reality may tell a different story:

The Ulama Council of Afghanistan¹⁰¹ issued a resolution in January 2012 advising women to "avoid travel without the company of a close relative (*mahram*) under Shariah," and stressed that women should "keep away from mixing with strangers of the opposite sex in social circles, places of education, the market place, offices and other walks of life," and that women should also recognise polygamy as part of Islam.¹⁰² On the occasion of World Women's Day (8 March 2012)

99 See for details Kamali "References to Islam," (n 2), p. 300.

100 Cf., Hashimzai, (n 31), p. 673.

101 With its fuller designation as National Council of Religious Scholars of Afghanistan (Shura-e Sartasari-e Ulama-e Afghansitan), the Council is located in an upmarket neighbourhood of Kabul; has a Central Council (Shura-e Markazi) of 150 members that meets every month or so. It is a civil society body established in 2002 with the government support, and within two years expanded to all 34 provinces making it the biggest (official) religious body. It has reportedly 3,000 members both ulama and *mullas*, approximately 80 from each province. The members are mainly Sunnis but also consist of about 25 per cent Shia, many of whom were part of the mujahidin factions (*tanzim*) of the 1980s. They are all on government payroll and many also hold other positions, such as imams in urban mosques, government employees, and teachers. See for details Borhan Osman, "The Ulama Council: paid to win public minds - but do they?" 5 November 2012, at <http://www.afghansitan-analysts.org/the-ulama-council-paid-to-win-...>

102 Report by Rasul Rahim, Wira Satar, and Arif Farahmand, DeucheWelle Dari at <http://www.dw.de/افغانستان-اساسی-قانون-علماء-ناقص-شورای-اعلامیہ-شورای-علماء-ناقص-قانون-اساسی-افغانستان/a-15794920> (at p.2)

women activists criticised the resolution and the fact also that President Karzai declared support for it at a press conference two days earlier. Salma Bayat is quoted to have said “what is the meaning of celebrating women’s day then?” For the resolution went against the constitution and was decidedly discriminatory. Mrs. Yoon, has also been quoted to have said: “at present men and women work together in offices. If the government supports the Ulama Council resolution, does it mean that they should all go home?” adding that this was unusual for any country in the region, and “I believe there is a political motive behind it.”¹⁰³

Masuda Kohistani noted that this issue had been debated many times ever since the introduction of the new constitution, partly due to the 2005 elections which brought a relatively large number of women to parliament, and they often had occasion to travel abroad in their official capacities. Kohistani questioned the veracity and timing of the Ulama Council resolution. She wrote that it was admittedly not against the religion of Islam, but it was not in consonance with the prevailing conditions of society and may even cause family rift between relatives. As a Muslim and daughter of this soil, “I have to say we live in the 21st century and I have some questions to raise:”¹⁰⁴

- Why was this resolution timed so as to coincide with the start of negotiations with the Taliban, which had become the top government agenda?
- Why was this resolution not issued years back when the issue became topical?
- Who was stopping it then, the government or foreign hands?

When one tries to answer these questions, Kohistani added, it would appear that the motives behind it had more to do with politics than religion. This resolution can be used as a political tool in the context of negotiations with the Taliban.

The resolution can also be problematic in situations where a family has no male member, none was born into it, or that they lost their lives in wars and accidents, and women consequently had to shoulder the family responsibilities. How are these women supposed to find a male *mahram*? Again, suppose the woman who travels in the course of duty has a living husband who is also employed and cannot get leave of absence, or that it is too costly for the family budget, and costly also if the state had to bear the costs.

These are credible questions, but remained unanswered by the Ulama Council. The resolution is also out of touch with the currents of scholarly opinion and *fatwas* on the subject. Note, for instance, the renowned Yusuf al-Qaradawi’s fatwa that validated air travel for women unaccompanied by male relatives. Al-Qaradawi explained that the prohibitory ruling of *fiqh* on this was intended to ensure women’s physical and moral safety, but added that modern air travel fulfils this requirement. He further supported his view with an analysis of the relevant hadiths on the subject, and arrived at a ruling better suited to contemporary conditions.¹⁰⁵ The Darul Ifta of Egypt has also issued a fatwa on this subject, which reads:

It is allowed for a woman to travel without *mahram* provided that she is sure about safety of her trip and her residence and return and that she will not be interrupted in herself and her religion....The fatwa in our time is that a woman is allowed to travel on her own in the safe modes of travel, populated routes, ports, passages, harbours and airports, by public means of transport. This is permitted in Shariah without any objection, regardless as to whether the trip is obligatory, recommendable or permissible.¹⁰⁶

103 Ibid., p. 4.

104 Masuda Kohistani “*faisala-e shura-e ulamakedar-bara-e zanan-e bidun-e mahramsadir kardachist?*” (What is it all about - the Ulama Council resolution on women travelling without *mahram*?), <http://www.kabuljournal.com/index.php/social/56-2012-03-29-10-19-14>

105 See for details of al-Qaradawi’s fatwa www.alsiraj.net/English/misc/women/html/page25.html See also Mohammad Hashim Kamali, “Law and Society: The Interplay of Revelation and Reason in the Shariah,” in ed. John L. Esposito, *The Oxford History of Islam*, Oxford University Press, 1999, p. 118.

106 Fatwa no. 3684 dated 30.5.2011 available at <http://www.dar-alifta.org/ViewFatwa.aspx?ID=3684&LangID=1>

The leading Shi'ite scholar of Lebanon, Sayyid Fadlullah (d. 2010), advances a penetrating *Qur'anic* analysis on women, which he begins with a question: why is it that when a woman leaves home to go after what she has to do in the social, political or cultural spheres, she is exposed to charges of deviation as if she is a human that lacks ethical and inner restraint, but not so when a man does the same! Is deviation not a possibility also in his case?

The learned writer further elaborated: Issues are evidently still looked at through the lenses of worn-out customary practices, which are sometimes even extended to scriptural interpretation, and textual data that may well have been meant for a set of particular circumstances.¹⁰⁷ We know that the Qur'an sets authoritative standards; we also know that the Qur'an speaks of good works by men and women, just as it speaks of bad deeds by both from exactly the same footing. It speaks of women in exemplary terms, just as it does of men in the same way, in both positive and negative terms. Then also when speaking of 'commanding the good (*al-ma'ruf*)' to elevate the standards of human conduct, and of forbidding the evil (*al-munkar*) that signifies human failings, the Qur'an remains gender-blind. So also is the case when the Qur'an speaks of both men and women as guardians and protectors (*awliya'*) of one another; it makes no distinction between them whatsoever.

Then it is for us to confront the hallowed usages and strip them of the false sanctity they have often commanded. It is possible, of course, that some people misunderstand 'sacred scripture' or exaggerated their purpose. We must, in any case, "have the courage to confront those hallowed usages and also understand our Islamic reality now rationally, such that we do not conflate the beneficial with the harmful... we retain the former and reject the latter." If we fail to do so, Fadlullah continues, we would be following the logic of ignorance (*al-mantiq al-jahili*) that the Qur'an has clearly proscribed: "We found our forefathers following on a certain path and we will certainly follow in their footsteps" (Q al-Zukhruf, 43: 23)?¹⁰⁸

One may refer, moreover, to the *fiqh* legal maxim which provides that "the change of rules is undeniable with the change of times."¹⁰⁹ The maxim here is particularly relevant to the rules of *fiqh* that originate in customary practices and premodern *ijtihad*. When there is a change in the custom and conditions of society, and the requirements of time, the relevant rules should also be changed and substituted with more suitable alternatives.¹¹⁰ The Ulama Council resolution is clearly oblivious of the current conditions of society and issued advice that is likely to cause hardship. Without wishing to enter details, it may be noted that there are no clear injunctions in the Qur'an on gender segregation other than general guidelines on the guarding of modesty and lowering of gaze for both men and women in the public space (al-Nur, 24:30-31). There is incontrovertible evidence in the Sunnah that women were very much a part of public life during the time of the Prophet, pbuh, and evidence in the sources also entitle them to participate in government and to hold public office. Additionally, the *fiqh* literature recognises the authority of general custom (*'urf*) and conditions of society on such matters.¹¹¹

Furthermore, twentieth century scholarship, judicial initiative and legislation on Islamic family law reform have modified certain aspects of *fiqh* on a variety of themes, as already noted, including polygamy, divorce, qualification to be witness, appointment to judicial office, custody, guardianship and made significant contributions to women's rights to equality before the law.¹¹² Afghanistan has unfortunately lagged behind, and the reformist components of the Civil Code 1976 had been altogether negligible on these subjects.

107 Grand Ayatollah Sayyid Muhammad Hussein Fadlullah, *Li'l-Insan wa'l-Hayat*, ed. Shafiq al-Moussawi, Beirut: Dar al-Malak, 2001/1421, p. 230.

108 Ibid., 231.

109 The Arabic version of the maxim reads: "*la yunakartaghir al-ahkam bi-taghir al-azman.*" *Mujallat al-Akham al-'Adliyyah* (Art. 39).

110 See for details Muhammad 'Uthman Shubayr, *al-Qawa'id al-Kulliyah wa'l-Dawabit al-Fiqhiyyahfi'l-Shari'ah al-Islamiyyah*, Amman: Dar al-Nafa'is, 1426/2006, p. 259f.

111 See for details Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Cambridge: Islamic Texts Society, 2002, pp. 61-75. Idem., *Shari'ah Law* (n 49), 267-278.

112 See for details *ibid* (both of my books above provide information on women and family issues).

Afghanistan's constitution has clearly advanced women's formal equality rights. Yet Afghanistan's experience on women's rights has on the whole been confined to prescriptive legislation not followed by policy action and supportive measures to implement them and to address attitudinal issues and practical aspects of discrimination, many of which are derived from tribal or cultural customs rather than Islam per se. Some progress has admittedly been made, as noted in the Afghanistan Research and Evaluation Unit's Issues Paper on women's rights (AREU, 2013): "Important gains have been made to narrow gender differences in education, and women's participation in public life...[But that] progress has been insufficient given the scale of the challenge...[and] results have not matched rhetoric." Then it is added that "legislation is only a foundation... Attitudinal and behavioural changes are required to support gender transformative change."¹¹³ AREU recommended "to engage the religious community...[and] encourage their education about and recognition of women's role...the international community should also continue to extend technical and political support to the government of Afghanistan toward the realisation of these objectives."¹¹⁴ The socio-economic realities of the country unfortunately continue to impede the constitution from becoming a lived reality for most women in Afghanistan.

Women are hesitant to come forward when they experience prejudice and violence because the consequences of bringing attention to their dilemma may be as harmful as the abuse itself. Women may be arrested for breaking inoperable laws and face prejudice within the justice system.¹¹⁵ I shall return to this subject in my conclusion below.

113 Afghanistan Research and Evaluation Unit Issues Paper, Women's Rights, Gender Equality and Transition: Securing Gains, Moving Forward, Kabul, September 2013, p. 42.

114 Ibid., p. 43.

115 Barfield (n 72), p. 3. See also Erica Gaston and Tim Luccaro, "Women's Access to Justice", forthcoming.

9. Constitutionalism, Democracy and Islam: Harmony or Discord?

The twin concepts of constitutionalism and democracy normally nurture and endorse one another, yet they are not the same and can, under certain circumstances, stand in a state of tension. Whereas democracy is focused on majority rule, constitutionalism demands commitment to the rule of law. It may be relatively easy to impose elections on a given country, but it is more difficult to establish legality, commitment to basic rights, and a constitutional order of checks and balances within the organs of power. If democracy can be defined as “popular political self-government,” a simple definition of constitutionalism could be “the containment of popular decision-making by a basic law.”¹¹⁶ At the heart of constitutionalism lies the deliberate choice of a representative government to constitute its political life in terms of commitment to a binding agreement by the ruler and ruled, structured so as to be difficult to change.¹¹⁷ Constitutionalism mandates that there are fundamental social values and individual entitlements that may not be negated by the will even of the majority.¹¹⁸ There is strong empirical evidence that constitutional legality will in time nurture democracy, but that democracy on its own will not necessarily bring a constitutionally committed government. Whereas democracy advocates majoritarian preferences, constitutionalism imposes pre-existing restraints on the range of choices available to governing majorities.¹¹⁹

Muslim scholars have differed in their assessment of democracy and constitutionalism from the viewpoint of Islamic principles. The view has gained ground, however, that a democratic system of rule is on the whole acceptable to Islam. This is because democracy is about fundamental rights and liberties, the rule of law, a representative and participatory government, separation of powers and equality before the law. Rights and liberties are a manifestation of human dignity which must be protected against the coercive power of the state. A constitution is also an instrument of limitation, organisation and division of power among the various organs of state.

Broadly, Islam approves of most of these and takes affirmative positions on protection and realisation of people's welfare (*maslahah*), a consultative and participatory government committed to accountability (*muhasabah*) and justice. Islam advocates a limited government, which is committed to advancement of the goals and purposes (*maqasid*) of Shariah. Islam and democracy both seek to realise people's welfare and basic rights of life, personal security, privacy and ownership. The Shariah recognises these, as also the rights to education and employment, and the individual's entitlement to the essentials of life.¹²⁰

There is evidence to suggest that Islam envisages a civilian system of rule, not a theocracy, because the head of state is elected by the people through consultation, nomination and pledge of allegiance (*bay'ah*), which translate into the modern day equivalent of a popularly elected government in which the locus of authority rests with the people. The head of state is accountable to the people and subject to the authority of the court of justice, and the people have the authority ultimately to depose him in the event of flagrant violation of duty. The civilian character of his office is thus manifested in the legal maxim of *fiqh* that “the affairs of the head of state [his success and failure] are judged by reference to public interest (*amr al-imam manut bi'l-maslahah*).”

116 Cf., Frank I. Michelman, *Brennan and Democracy*, Princeton: Princeton University Press, 1999, pp. 5-6.

117 Lawrence H. Tribe, *American Constitutional Law*, New York: Foundation Press, 2000, 3rd ed., p. 20.

118 Walter Murphy, “The Art of Constitutional Interpretation,” in M. Judd Harmon, ed., *Essays on the Constitution of the United States*, New York (Port Washington): Kennicat Press, 1978, p. 130.

119 Cf., Samuel Issacharoff, “Constitutionalising Democracy in Fractured Societies”, *Texas Law Review* 82, 2004, p. 1861.

120 Cf., Mohammad Hashim Kamali, “Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law,” in eds., Grote & Roder (n 9), p. 24f. Idem., *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge: Islamic Texts Society, 2008, Introduction (xv-xxv) and passim. Idem., “The Limits of Power in an Islamic State,” *Islamic Studies* 28 (1989), pp. 323-353.

Al-Qaradawi approves of democracy and the electoral process, noting that the latter is tantamount to testimony (*shahadah*), in that by voting for a candidate, the people testify to the suitability and trustworthiness of the person, and giving *shahadah* is a collective obligation (*fard kifa'i*) of the Muslim community. Party politics too is a means of organised participation in government affairs. Political parties resemble, in some ways, the *fiqh* schools, or *madhhabs*, which may be regarded as juridical parties that hold different perspectives over issues.¹²¹ One may add to this the point that promotion of good and prevention of evil (*amr bi'l-ma'ruf wa nahya 'an al-munkar*), which is a cardinal *Qur'anic* principle, can be more effectively advocated by parties and associations, rather than individuals acting on their own, and if such be their objective, political parties are not only permissible in Islam but recommendable.¹²²

As for the question that democracy is a Western rather than an Islamic doctrine and that it carries Western values and viewpoints, al-Qaradawi responds that Islamic tradition and scholarship have maintained a relatively open profile of receptivity and contribution to other civilisations. It has taken from other traditions that which is of merit and acceptable to its own values. Electoral democracy does not authorise the people or government to change the beliefs of Islam nor any of its devotional principles, the *halal* and *haram*, and the essentials of morality. These are firmly grounded in the *Qur'an* and *Sunnah* and no one may in the name of democracy interfere with them. As for the management of community affairs and realisation of people's welfare, democracy is more likely to facilitate these rather than obstruct or undermine them. Hence democracy is not contrary to Islam.¹²³ On the subject of sovereignty which belongs to the people, the constitution, or parliament (France, the United States, and the United Kingdom respectively), it is not an Islamic doctrine but an aspect of political democracy over which Islamic scholars have expressed reservations. Yet many have also drawn a distinction between what they term as absolute sovereignty (*siyadat al-hukm*), which can make or unmake any law, and executive sovereignty (*al-sultan al-tanfidhi*). Only the latter obtains in an Islamic polity, simply because it is not vested with the authority to change the essentials of Islam and Shariah.¹²⁴

Some observers have drawn the plausible conclusion from Egypt's return to military rule under al-Sisi that Islam and democracy are incompatible. More accurately, however, it is the Muslim Brotherhood's failure at good governance and refusal to include others in the circle of power. The economy declined, the crime rate rose, social divisions became more pronounced and the quality of life fell significantly. "The counter-revolution was not a rejection of democracy and endorsement of military rule, it was a resounding rejection of Muslim Brotherhood."¹²⁵ The Egyptians themselves have not given up on democracy. Both Islamic fundamentalists and secularists are now protesting against undemocratic measures by the military regime. The failure of Brotherhood does not imply that Islam and democracy are incompatible. There are many reasons for this. One is, of course, that the Brotherhood does not have a monopoly on Islam. And then in Egypt itself, in the last two years or so, the Al-Nour party and the Azhar University leadership have demonstrated willingness to work in a democratic context.¹²⁶ People in the countries that experienced the so-called Arab Spring (Tunisia, Egypt, Libya, and Yemen) had all chosen a democratic alternative as their first choice and there is no indication that this has changed. Countries such as Indonesia, Malaysia, Pakistan, Iran, Turkey and Bangladesh, with various degrees of co-existence between resurgent Islam and democratic political structures assure us that the future of democracy in the Muslim world remains positive. It is essential, however, that the Islamic parties and spokesmen accept not only a procedural democracy as an electoral route to power but also its substantive principles on inclusivity, equality and rule of law.

121 See for details Yusuf al-Qaradawi, *Min Fiqh al-Dawlahfi'l-Islam*, Cairo: Dar al-Shuruq, 1997/1417, p. 138f.

122 See for details Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Cambridge: Islamic Texts Society, 1997-ch. 8 entitled "Freedom of Association," pp. 73-87.

123 Al-Qaradawi (n 122), p. 141f.

124 See for details Mohammad Hashim Kamali, "Constitutionalism in Islamic Countries," (n 9), p. 28f.

125 Muqtedar Khan, "Islam, Democracy and Islamism After The Counterrevolution in Egypt," *Middle East Policy*, Vol. XXI, No. 1 (2014), p. 80.

126 *Ibid.*

10. Commentator Assessment and Opinion

Commentator opinion on Afghanistan's constitution is generally positive, although some have also been critical, but the critics have targeted the process rather than the text of the constitution. Thus it was said that the constitutional Loya Jirga legitimised the warlords, "the very individuals deemed the most illegitimate by the majority of Afghans."¹²⁷ On a positive note, Ahmad Khatibi wrote that it is "one of the best constitutions our country had despite some of its weaknesses... such as the limitations it has imposed on political parties."¹²⁸ Andrew Finkleman commented that the constitution born out of the Bonn process is essentially "a moderate document. The text recognises religious rights for non-Muslims, subordinates customary and religious law to positive legislative statutes, prohibits gender-based discrimination, and embraces the Universal Declaration of Human Rights."¹²⁹ Finkleman added that in contrast to the previous constitutions which were not exposed to public debate "this round of constitution-making was a remarkable improvement and a success in its own right - both for Afghanistan and for advocates of democracy in Southwest Asia."¹³⁰

The UN Secretary General, Kofi Annan described it "a historic achievement representing the determination of the Afghan people to see their country transition to a stable and democratic state."¹³¹ The then US President George W. Bush is quoted to have said: "This new constitution marks a historic step forward, and we (US) will continue to assist the Afghan people as they build a free and prosperous future."¹³²

Mohammad Qasim Hashimzai lamented the latent constitutional problems over interpretation, but then wrote: "The 2004 constitution of Afghanistan is among the most progressive and modern in the Islamic world." He positively appraised the juxtaposition of Islamic norms with the principles of constitutional law in a way that nurtures the prospects of harmony between them. Hashimzai added that "the establishment of a functioning system of constitutional adjudication is crucial toward improved security, stability and civil rights in Afghanistan."¹³³

While celebrating the eighth anniversary of the constitution in 2012, Inayatullah Nabel, Afghanistan's Ambassador in the Netherlands said in a speech that "the constitution of Afghanistan is one of the most progressive in the region," adding that its advocacy of democracy and fundamental rights were among its outstanding features.¹³⁴

According to Ramin Moschtaghi, "due to its well-balanced character, the Afghan constitution provides a good starting point and framework for the development of a society realising these different aims."¹³⁵ He referred in particular to the Preamble of the constitution, which he thought reflected the attempt of a religious society "to establish a legal order in which the rule of law, democracy and human rights can be realised without ignoring the Islamic identity of the vast

127 This is quoted from an AREU's (Afghanistan Research and Evaluation Unit) briefing paper by James Ingalls, "The New Afghan Constitution: A Step Backward for Democracy," http://fpif.org/the_new_afghan_constitution_a_step_backwards_for_democracy (dated March 10, 2004), at p. 5.

128 Ahmad Irshad Khatibi, "Jaygah-e Ahzab-e Siyasi dar Qanun-e Asasi Afghanistan - status of political parties in the constitution of Afghanistan" <http://www.afgjawan.ca/2012/07/28/جاينگاه-احزاب-سياسي-در-قانون-اساسي-افغ>. The 2004 constitution outlawed political parties based on race, language and religion. This is what Khatibi is critical of. But the ban is clearly justified. The constitution of Egypt contains a similar provision, extending the ban even to gender and geography.

129 Andrew Finkleman, "The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002-2004," *al-Nakhlah* (The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilisation), Spring 2005, p. 2.

130 *Ibid.*, p. 3. This comment may not be accurate with regard to the 1964 constitution as the main features of this constitution, persons involved in the drafting and review process of the draft text were made known through the media at different stages of progress. The comment holds true though for most of the other constitutions.

131 "Bush, Annan welcome new Afghan constitution," *The Economic Times* at http://articles.economictimes.indiatimes.com/2004-01-06/news/273@88329_1_afghan-people-new-afghan-constitution-draft-constitution

132 *Ibid.*

133 Hashimzai, "Separation of Powers," (n 31), p. 680.

134 <http://www.afghanistanembassy.nl>

135 Moschtaghi, (n 62), p. 713.

majority of the population.” Moshtaghi added that the Afghan society and its leaders should turn the “promise of the constitution into reality and thereby let Afghanistan, like its constitution, become an example to the Islamic world.”¹³⁶

While comparing aspects of Afghanistan’s constitution with those of I.R. of Iran, Pakistan and Sudan, Said Mahmoudi commented: “in the Afghan case, there are many indications that the drafters have sought to create the most modern constitution in the Islamic world.” Mahmoudi underscored the emphatic commitment of this constitution to equality of men and women and the fact that the President may, according to Article (60), be a man or a woman are highly significant.¹³⁷ Notwithstanding the different positions of early Muslim jurists on the status of non-Muslims, Mahmoudi added, “the fact that the Afghan constitution does not mention religion as a requirement for membership in the National Assembly or the Supreme Court shows that there is no discrimination against different religions in this respect.”¹³⁸

136 Ibid.

137 Said Mahmoudi (n 81), p. 879.

138 Ibid.

Conclusion and Recommendations

The successful presidential election of 5 April, and its re-run on 15 June 2014, the fact both were remarkably peaceful, and the electorate turnout was high on both occasions, showed that the Afghans are supportive of democracy, which they saw as their chosen path toward clean and accountable governance. These were the messages of some of the television interviews with a random selection of voters that I personally heard. They spoke of a peaceful transfer of power for the first time in the constitutional history of the country despite the threats of Taliban militancy. As of this writing, the final results are not known. It is hoped that the new president and government honour the people's trust and aspirations and take strident steps on making democracy and rule of law their priority agendas. I present the rest of my conclusion as follows:

- The *fiqh* maxim I earlier quoted that change of rules is inevitable with the change of times also applies, *mutatis mutandis*, to constitutional law, just as constitutions themselves normally provide for their own amendment procedures. Afghanistan's constitution is no exception. Change for the sake of change is not advisable of course. Afghanistan has already had rather too many constitutions, which may well be regarded as a factor of instability the country is still experiencing. There is a need for continuity in order to realise the potentials of a reasonably good constitution Afghanistan already has. Certain changes may be inevitable in order to resolve the issues over interpretation and verify a correct order of separation of powers, checks and balances between the organs of state. But the approach to constitutional amendment should, in my view, be minimalist and carefully targeted. This should be attempted when there is political stability and reliable leadership. For the fear exists otherwise that even relatively minor issues can become a catalyst for more contentious debates. Until then, and in the case of Afghanistan perhaps always, it is preferable to work out issues through consultation and consensus. Past experience has shown how difficult it is to managing the LJ efficiently. In the interest of efficiency and better organization, it is advisable therefore that the LJ is convened for a definitive agenda and specific articles. Any subsequent addition to the agenda should be possible if supported by a high percentage, say 25 per cent, of the present members. The current constitution is silent on agenda matters, but the subject is important enough to warrant a constitutional amendment.
- As for the larger questions whether to change the presidential to a parliamentary system, and a unitary state to federalism, opinions differ widely at present and there is no case yet for decisive changes. There is sufficient acknowledgment on the other hand, among Afghan intellectuals, including the front runners for presidential elections,¹³⁹ that some adjustments may be in order to diffuse the concentration of power in the person of the President in favour of specialised agencies and institutions within the executive branch and, where appropriate, to regional bodies that could develop policies tailored to the needs of their region. Some devolution and elements of federalism within the existing unitary state structure may also be advisable. These too should preferably be attempted, in my view, through administrative action and evolutionary approaches without amending the constitution, for the time being, but to leave open the possibility of such amendments in the future. Should there be sufficient support for changes along these lines; the changes in question should first be addressed through expert analysis and research.
- Efforts to expand government capabilities in Afghanistan have focused on security and improving the country's army and police force. While understandable, this has resulted in gross underdevelopment of civilian society. Economic problems, unemployment, problems of law and order, corruption and lawlessness by powerful individuals are among the daunting challenges facing the country. The rule of law and corruption clearly pose the biggest challenges for Afghanistan, and both require long term commitment, persistent

139 Cf., Tolo News television debate of February 4, 2014 among Dr. Ashraf Ghani Ahmadzai, Dr. Zalmay Rasool, Dr. Abdullah Abdullah, Raheem Wardak, and Abdul Qayom Karzai. The debate summary can be seen at http://www.iconnectblog.com/2014/04/might-afghans-amend-the-2004-constitution-hints-from-a-televised-presidential-debate/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+I-CONnect+%28I-CONnect+Blog%29

and multi-dimensional engagements to address. In his 2011 publication, Suhrke wrote that “Impunity prevailed for high level officials and power brokers suspected of corruption and involvement in the narcotics sector.”¹⁴⁰ The Afghans’ biggest complaint about their government is corruption. Transparency *International’s* Corruption Perception Index has placed Afghanistan as one of the most corrupt countries in the world ranking at the very bottom of 177 countries surveyed in 2013. Afghanistan ranked next to Somalia and North Korea. This is clear evidence of the failure of rule of law and the trust of governance (*amanat al-hukm*) in the Islamic Republic of Afghanistan. A step by step action-oriented strategy to identify and address issues may need to be provided through consultation, expert advice and research.

- As for the issue over constitutional interpretation, an ad hoc solution should be attempted through negotiation between the concerned parties, not by another presidential decree.¹⁴¹ Until such a time when the Loya Jirga can be convened to approve necessary amendments to the constitution, the SC should continue to interpret the constitution and determine the constitutionality of laws after they have been put into effect. ICSIC could, in the meantime, issue advisory opinion on the conformity of draft laws with the constitution prior to their promulgation by the President. ICSIC may also be entrusted with the responsibility to examine past laws to ascertain their conformity with the constitution. At present, ICSIC appears to be responding mainly to questions it receives from government departments. On occasions certain departmental queries are addressed both to the SC and ICSIC, especially when the department in question seeks more favourable answers to its queries.¹⁴²
- As for a long term solution, it is proposed that Afghanistan should opt for a separate constitutional court, similar to that of Egypt, with exclusive powers to interpret the constitution and carry out both abstract and concrete review of statutes and government action, and also supervise the implementation of Article (3) on the principles of Islam. If this is accepted, all of the responsibilities assigned to the SC and ICSIC should then fall under the jurisdiction of the constitutional court, in which case there will be no need for ICSIC. The long term solution would require constitutional amendment by the Loya Jirga, which should also clarify the consequences of the no-confidence vote by the WJ.
- Those who have committed crimes against humanity and continue to hold usurped properties, trade in narcotics etc., should be brought to justice, and should not be allowed to hold public office. If Afghanistan is unable to try them at home, they should be introduced to the International Criminal Court. As for those who are remorseful, admit their wrongdoing and ready to make amends, a different strategy should be adopted - involving for instance the setting up of a truth and reconciliation commission, as in the case of post-apartheid South Africa, to facilitate reconciliation and compromise.
- The traditional jirga should be reformed. Now that the constitution stipulates women’s participation in parliament and the provincial councils (and hopefully also the district councils of the future), the female members of all three may be required to either sit by themselves or nominate one or two members to sit in the local jirgas. Their meeting modalities and place may be made flexible to facilitate participation. The Independent

140 Astri Suhrke (n 77), p. 184.

141 A Presidential Decree (No. no.11371, November 14, 2010) was in fact issued to the effect that ICSIC should review and examine “the draft laws after the cabinet decision and prior to sending to National Assembly.” But it seems to have done little to resolve the problem.

142 ICSIC has received questions, for instance, from the Cabinet Secretariat over the status of Afghan prisoners convicted to more than 20 years in Tajekistan, whereas maximum imprisonment under Afghan laws is 20 years. Another query was by the office of the Minister for Parliamentary Affairs over clarification of a certain conflict of jurisdiction between the police and the Anti-Corruption High Office as to whether the latter should have a role in investigation and collection of evidence. Yet another query was received from the Defence Affairs Committee of WJ over the status of defence contracts that the WJ had ruled as null and void - whether such a ruling was actionable without a court judgment on the matter. The Independent Human Rights Commission also addressed a query to ICSIC over the legality of non-judicial detention of individuals in Bagram and Pol-e Charkhi prisons under the Afghan-US Memorandum of Understanding. ICSIC has responded often based on provisions of the Afghan statutes. No Shariah issue was addressed to ICSIC - as the files show, nor has the latter referred to any Shariah sources in its responses. (trans. and summary by the present writer of ICSIC documents in Dari all roughly dated for various months of 1391/2012-2013).

Human Rights Commission of Afghanistan may also send representatives, on a selective basis at least, to the jirgas. It is proposed that a Jirga Coordination Unit be established in every province to include these and possibly additional representatives to ensure female participation in the local jirgas. One may start on a pilot basis in some areas perhaps and proceed at a gradual pace. The initial stages of this project should concentrate on localities with credible government presence, and gradually move on to other places as and when security situations and government effectiveness show improvement. This will be a reformed local jirga resembling in some ways the reformed Loya Jirga under both the 1964 and 2004 constitutions. All of this should be regulated by an Act of Parliament.¹⁴³

- If the constitutional quotas on women's participation in parliament were a step in the right direction, then it should be replicated in the other two branches of government, and every ministry for that matter. I understand some progress is being made. What I may propose now is that a 30 per cent quota should be imposed and implemented over a period of say five to ten years.¹⁴⁴ Progress should be measurable over shorter periods of time. The new strategy proposed here should visualise a sustained campaign that consists of practical policy measures and legislation and facilitate women's access to justice and their protection against official abuse.

There can be no prosperity without peace and all aspirations of nurturing a culture of legality and constitutionalism in Afghanistan require an enabling environment of peace and security in the country. This is the first priority and challenge for Afghanistan, the Afghan leaders and citizens in the first place, which cannot, however, be effectively addressed without international cooperation and support of the United States in particular and its European allies, Afghanistan's neighbours and all those involved and interested in the prospects of a peaceful Afghanistan. It is imperative that an effective campaign for the rule of law and eradication of lawlessness and corruption in the country is espoused with parallel efforts to eradicate the causes of war and conflict. The 2014 presidential election and orderly transfer of power offer a valuable opportunity for the country and its new leadership to make a fresh start to address the many challenges Afghanistan is faced with. The Afghans are eager for peace and the promise of a new future. It is hoped that the new President and his team take advantage of this momentous opportunity to unite the people behind the noble objectives of good governance and advancing the prospects of a peaceful and prosperous Afghanistan.

143 The traditional Loya Jirga consisted of tribal and religious leaders, landlords and notables selected by the government as and when issues of great national concern, such as adopting a new constitution, arose. The 1964 and 2004 constitutions regulated the LJ so as to consist of a combined session of the two Houses of Parliament, chairpersons of provincial and district councils as voting members. Cabinet ministers, the president and justices of the supreme court also participate but without the right to vote (Art. 110).

144 This should be possible for Kabul and many other provincial centres, but implementation strategies should be tailored to local conditions and considerations of accessibility and likelihood of actual participation of women.

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