

**ISLAM, ISLAMIC LAW
AND CONSTITUTION MAKING:
International and Domestic Engagement
in the Constitution-Making Process
in Afghanistan**

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Abstract

The making of the 2004 Constitution was a significant moment amidst the continuing conflicts in Afghanistan. It was an attempt to transform differences and conflicts into a shared agenda for the future of the country. The process of constitution-making in Afghanistan was marked by intense negotiations between the international community and actors, on the one hand, and domestic actors, on the other. The outcome would be called a “win-win solution”. This essay focuses on the making of the Islam-related clauses: How was the public participation? How has the negotiation been undertaken? What was the result and why? This article is an attempt to answer those questions. It argues that the process of constitution-making in Afghanistan particularly with regard to the Islam clauses is the acts of negotiations between different competing actors. The Constitution is the product of negotiations not only between international and domestic actors, but also among the domestic actors themselves. As evident in the making of the Islam clauses, these negotiations might be characterized as between puritan Islamist and more moderate Muslim actors.

Keywords: *constitution making, Afghanistan, the 2004 Constitution, Islam clauses, Islamic law*

A. Introduction

Islam has been a unifying factor that could bridge the differences in the Afghan society. As Olivier Roy argued that in Afghanistan “where the concept of the nation has developed but recently, where the state is seen as external to society and where people’s allegiance is

directed primarily towards their local community, the only thing which all Afghans have in common is Islam”.¹

For one Afghan ethnic group, Islam constitutes the shared identity with another ethnic group, and even with the rest of the Muslim communities. Islam as perceived is deeply rooted in the minds of the Afghan people. Its role is just like that of the tribal ideology in that both assume the historic continuity for centuries. Even for many Afghans, the interests of Islam are overriding and put above everything including the interests of the tribe.² However, Islam might reinforce the existing ethnic conflicts or open a new field of conflicts. As it is perceived differently amongst the ethnic or interest groups, Islam might be used to provide legitimacy of one ethnic or political movement. The Mujahideen, Taliban and other Islamist groups, for instance, have fought by using the symbols of this religion.

The withdrawal of the Taliban from power has brought a new phase in the Afghan history. Despite various great problems created following the withdrawal, Afghanistan has attempted to re-build the nation. Nation-building involved the establishment of various aspects of the Afghan society from building infrastructures to providing rule of law and rebuilding the national identity.³ With the assistance of the international community, the interim government was established and the agenda for the future of the nation was set. Two significant tasks ahead were to craft a new constitution and to organize an election to appoint a new accountable government.

The making of the 2004 Constitution was significant amidst the continuing conflicts. It was an

¹ Olivier Roy, *Islam and Resistance in Afghanistan* (Cambridge: Cambridge University Press, 1990), 30.

² Nabi Misdaq, *Afghanistan: Political Frailty and Foreign Interference* (London and New York: Routledge, 2006), 235.

³ Larry P Goodson, “The Lessons of Nation-Building in Afghanistan,” in Francis Fukuyama (ed.), *Nation-Building: Beyond Afghanistan and Iraq* (Baltimore: The Johns Hopkins University Press, 2006), 145.

attempt to transform the difference and conflicts into a shared agenda for the future of Afghanistan. The Constitution was made to a significant extent according to the recent conception of constitution-making which is founded on democratic principles particularly the public participation. The process of its making was marked by intense negotiations between international community and actors, on the one hand, and domestic actors, on the other. The outcome could be called a “win-win solution”. With the great influence of international actors in the process of constitution-making, its process and outcome were not necessarily under the intense pressure of those actors. On the other hand, the inclusion of the Islam clauses does not mean that domestic actors were in agreement in what Islam there should be understood.

This article is an attempt to answer the problems surrounding the process of constitution-making in Afghanistan. It challenges the description of the constitution-making as merely imposed constitutionalism⁴ and also as negotiations between two intellectually solid groups of actors, who argued against each other. It argues that Afghanistan’s new constitution was the product of negotiations between competing actors and ideologies. It was the area of negotiations between international, foreign actors – pursuing to bring the ideals of western constitutionalism into a new constitution – and domestic actors. It was also the field of intense debate among domestic actors who had different conceptions of Islam and how this religion should play roles in the public arena.

⁴ On this issue, see Noah Feldman, “Imposed Constitutionalism,” *Connecticut Law Review*, Vol. 37, No. 4 (2005), 857; Zachary Elkins, Tom Ginsburg and James Melton, “Baghdad, Tokyo, Kabul... Constitution Making in Occupied States,” *William and Mary Law Review*, Vol. 49, No. 4 (2008), 1141; Manon Bonnet, “The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building.” in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds.), *The Law and Legitimacy of Imposed Constitutions* (London and New York: Routledge, 2019), 208.

B. The Making of the 2004 Constitution of the Islamic Republic of Afghanistan

After reigning power for about two years, the Taliban regime was removed from power following the invasion of Afghanistan by the United States and its allies beginning on 7 October 2001. In the late 2001, various Afghan factions, including Afghan military commanders who led the Islamic United Front for Salvation of Afghanistan, known as the Northern Alliance, representatives of Afghan's different ethnic groups, expatriate of Afghans and representative of the exiled monarch, met in Bonn, Germany, under the auspices of the United Nations in order to set the roadmap for the future of Afghanistan. Despite the fact that the meeting was attended by different groups, it was still considered as not representing the people of Afghanistan.⁵ In addition, the external pressures especially from the US to reach an agreement were obvious in the process of negotiations. Finally, on 5 December 2001 the Bonn Agreement was signed. It was aimed at 'the re-establishment of permanent government institutions'⁶ and to make the government progressively more representative.

The agreement restored much of the 1964 Constitution. In this sense, it provided legal continuity. The 1964 Constitution embodied the birth of democratic governance in Afghanistan, providing "guarantees of

⁵ Barnett R Rubin, "Crafting a Constitution for Afghanistan," *Journal of Democracy*, Vol. 15, No. 3 (2004), 7; Human Rights Watch, "Afghanistan's Bonn Agreement One Year Later: A Catalog of Missed Opportunities," 5 December 2003, <https://www.hrw.org/legacy/backgrounder/asia/afghanistan/bonn1yr-bck.pdf>, accessed on 2 February 2020.

⁶ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 December 2001), https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf, accessed on 3 February 2020.

public liberty unprecedented in Afghan history”.⁷ It was regarded the finest constitution ever made in the Muslim world at that time. It was drafted by a seven-member committee of experts. There was relatively wide public participation and consultation that took for about six months. The draft was then put under the scrutiny of the twenty-nine members of the Constitutional Advisory Committee. The process received wide press coverage. The draft was further debated in the Loya Jirga before its adoption.⁸

The Bonn agreement set out the composition, functions and governing procedures for the Interim Administration as well as the Special Independent Commission. This administration would function for six months before the establishment of the Transitional Administration. The appointment of the personnel of the administration according to the Agreement should be based on the consideration of ‘professional competence and personal integrity’. However, in reality, the personnel “were mostly selected to offer patronage to different factions and to recognize the distribution of armed might on the ground”.⁹

The Interim Administration would organize the Emergency Loya Jirga (Grand Assembly) (ELJ) during this time. The Loya jirga, first employed in 1747 in the election of Ahmad Shah Durrani as the first king of modern Afghanistan, has been the national body holding the authoritative decision-making in the country to select a new rule, to pass constitutions and to approve government policy such as in declaring war. Originally consisted of tribal leaders, the Loya Jirga membership

⁷ Barnett R Rubin, “Crafting a Constitution,” 8.

⁸ Angelo Rasanayagam, *Afghanistan a Modern History: Monarchy, Despotism or Democracy? The Problems of Governance in the Muslim Tradition* (London and New York: I.B. Tauris, 2003), 38-40; Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: E.J. Brill, 1985), 21-2.

⁹ Barnett R Rubin, “Crafting a Constitution,” 8.

changed overtime.¹⁰ The 2002 Loya Jirga (ELJ) composed of 1,051 representatives was appointed by the Loya Jirga Commission. The method of appointment was aimed at creating balance in terms of region (rural/urban), ethnicity, gender, and social-cultural backgrounds (such as religious leaders).¹¹ The appointment was considered flawed as military commanders and political parties interfered.¹² The ELJ worked in the situation where insurgency and fear hindered the full exercise of its mandate. The warlords made use of every means including threats and intimidations against the delegates to secure their interests. The intimidations even occurred in the voting stage.¹³

In June 2002, the ELJ established the transitional administration in lieu of the Interim Authority. The Jirga convened to appoint Hamid Karzai as the President of the Transitional Islamic State of Afghanistan.¹⁴ The Administration, however, was regrettably enjoyed by the warlords with little room available for civilians.¹⁵ It was this administration which was responsible for creating a

¹⁰ See Ali Wardak, "Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan," 13-14, <https://pdfs.semanticscholar.org/e1bb/262269286e0c4744de97acf614686b4a49e6.pdf>, accessed on 3 February 2020.

¹¹ International Crisis Group, "The Loya Jirga: One Small Step Forward?," Afghanistan Briefing, Kabul/Brussels, 16 May 2002, 7, <https://d2071andvip0wj.cloudfront.net/the-loya-jirga-one-small-step-forward.pdf>, accessed on 3 February 2020.

¹² Carlotta Gall, "Afghans Gather to Choose Grand Council," *The New York Times* (*nytimes.com*), 3 June 2002.

¹³ Barnett R Rubin, "Crafting a Constitution," 9-10. See also International Crisis Group, "The Afghan Transitional Administration: Prospects and Perils," Afghanistan Briefing, Kabul/Brussels, 30 July 2002.

<https://d2071andvip0wj.cloudfront.net/the-afghan-transitional-administration-prospects-and-perils.pdf>, accessed on 3 February 2020 particularly on the problem of warlordism.

¹⁴ Carlotta Gall, "Traditional Council Elects Karzai as Afghan President." *The New York Times* (*nytimes.com*), 14 June 2002.

¹⁵ Omar Zakhilwal and Adeena Niazi, "The Warlords Win in Kabul," *The New York Times* (*nytimes.com*), 21 June 2002.

commission to provide a draft of a new constitution and within eighteen months should convene another Loya Jirga to approve the draft submitted. Also, it should organize, after twenty-four months, a general election to decide on a new government in accordance with the requirements set out in the new constitution.¹⁶

There were three organs involved in the constitution-making exercise, namely the Constitutional Drafting Commission (CDC), the Constitutional Review Commission (CRC) and the Constitutional Loya Jirga (CLJ). On 5 October 2002, the President appointed nine members of the CDC. It was headed by Vice President Naematullah Shahrani. Its duty was to produce ‘a preliminary draft of the constitution’. This preliminary draft served as “a set of recommendations to the (Constitutional) Commission on constitutional arrangements”.¹⁷ In conducting its activities, the Commission was aided by the United Nations Assistance Mission for Afghanistan (UNAMA). In producing a draft constitution, it relied heavily on the 1964 Constitution. The Commission had to make use of great efforts to create on a single document agreed by all. This was due to the lack of, on the one hand, a competent secretariat and, on the other, the animosity amongst its members. After six months there was no progress in producing the intended draft of the constitution. The delay in this stage was likely to be caused by the absence of the rules governing the Commission’s duties and obligation in the Bonn Agreement. The lack of presidential decree explaining the Commission’s duties also barred the fulfillment of its duties on time.¹⁸ Moreover, the members split into two

¹⁶ The Bonn Agreement, see above note 9.

¹⁷ The Secretariat of the Constitutional Commission of Afghanistan, “the Constitution-making Process in Afghanistan,” 10 March 2003, <http://www.afghandata.org:8080/xmlui/handle/azu/15302>, accessed on 3 February 2020.

¹⁸ International Crisis Group, “Afghanistan’s Flawed Constitutional Process,” ICG Asia Report No 56, (Kabul/Brussels: 12 June 2003), 13, <https://d2071andvip0wj.cloudfront.net/56->

camps, Shahrani and Musa Marufi camps, each of which was providing its own draft. A foreign advisor to President Karzai also provided another draft.¹⁹ In April, the Commission finally submitted a draft constitution to the President.

To follow up the results of the CDC, the CRC was created on 26 April 2003 by the decree of the President. It consisted of thirty-five members, including the members of the CDC. Other members involved religious leaders, academic staff, representatives of various groups and eight women.²⁰ The Commission's functions included: preparing and publishing the draft constitution; facilitating and promoting public information on the constitution-making process; conducting public consultations in each provinces and among Afghan refugees; receiving written submissions from individuals and groups of Afghan; conducting or commissioning studies regarding options for the draft constitution; preparing a report regarding public consultation; and educating the public on the draft constitution.²¹ Despite the Administration and UNAMA's promise to be on time and accountable, the appointment of the members of the Constitutional Commission was in fact delayed for about two months. And, the selection process was not transparent. There were no governing rules regarding criteria or appointment procedures. The Politics of

afghanistan-s-flawed-constitutional-process.pdf, accessed on 3 February 2020.

¹⁹ Ibid, 14-5; J Alexander Thier, "The Making of a Constitution in Afghanistan," *New York Law School Law Review*, Vol. 51 (2006/7), 566-7.

²⁰ "The Constitutional Process," http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/Draft%20Constitution%20Factsheet.doc, accessed on 23 September 2007.

²¹ The Secretariat of the Constitutional Commission of Afghanistan, "the Constitution-making Process," 3.

comprise with political factions together with those flaws would undermine the legitimacy of the Commission.²²

The CRC discussed and debated the preliminary draft of the constitution. It was grouped into four committees consisting of eight members. Each group made comments and changes to the draft. These reviews and changes were then submitted to the Executive Board. The Board 'compiled, discussed and refined the proposed changes for presentation to the General Assembly of the Commission'.²³

In discussing constitutional issues, the Constitutional Commission consulted with Afghan as well as international experts.²⁴ No longer since the establishment of the CDC, many constitutional experts from the US, Germany and Swiss visited the Commission. President Chirac of France offered President Karzai a technical assistance.²⁵ A French constitutional lawyer, Guy Carcassone, was employed to assist the drafting process. He first provided a draft to the president, but it was rejected. Then he proposed another failed draft that gave emphasis on the power of the president, international human rights and established a constitutional court.²⁶ The UNAMA, willing to provide similar assistance, invited several international constitutional lawyers such as Yash Ghai, Bruce Ackerman and Donald Horowitz to provide option

²² International Crisis Group, "Afghanistan's Flawed Constitutional Process," 16-7.

²³ Carolyn McCool, "The Role of Constitution-Building Processes in Democratization: Case Study Afghanistan," International IDEA Democracy-building & Conflict Management (DCM) (2004), 13.

²⁴ The Secretariat of the Constitutional Commission of Afghanistan, "the Constitution-making Process," 4.

²⁵ International Crisis Group, "Afghanistan's Flawed Constitutional Process," 15 (note 147).

²⁶ Shamshad Pasarlay, "Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory," PhD Dissertation (University of Washington, 2016), 215-217; cf. International Crisis Group, "Afghanistan's Flawed Constitutional Process," 15 (note 147).

papers.²⁷ Barnett R Rubin of the United States was also a chief among those foreign experts.²⁸ International constitution experts were invited to discuss various constitutional models in front of the CRC. They even actively negotiated in support of particular constitutional norms, for instance international human rights principles, when confronting Islamic legal norms (Shari'a) supported by members of the CRC. The negotiation process resulted in a seemingly achieved "balance between the Shari'a and human rights".²⁹

In order to gain more legitimacy, it was decided that the constitutional process should reach diverse, public opinions. However, this should not involve controversial items of the draft constitution in order to avoid instability.³⁰ Prior to public consultation, the Commission was required to conduct public education on, among others, the constitution-making exercise and their role in this process, information about the nature of constitution and its impacts on people's daily life, the Bonn Agreement, and the structure of incumbent government.³¹ However, the public education was deemed inadequately prepared and not well-funded. The UNAMA and the Commission were criticized for having "no effective plan for such education".³² Civil society organizations

²⁷ International Crisis Group, "Afghanistan's Flawed Constitutional Process," (note 149).

²⁸ Barnett R Rubin, "Crafting a Constitution," 19 (note n 2). He noted two other experts (Yash Ghai and Guy Carcassone) who together with him were closely engaged with the constitution-making. The option papers presented by some international experts could be found in Afghanistan Constitutional Reform Resources, Center on International Cooperation, New York University, <https://cic.nyu.edu/afghanistan-constitutional-reform-resources>.

²⁹ Yash Ghai, "A Journey around Constitutions: Reflections on Contemporary Constitutions," *South African Law Journal*, Vol. 122, No. 4 (2005), 804, 827.

³⁰ J Alexander Thier, "The Making of a Constitution," 568.

³¹ The Secretariat of the Constitutional Commission of Afghanistan, "the Constitution-making Process," 7.

³² International Crisis Group, "Afghanistan's Flawed Constitutional Process," 17-8.

conducted separate public education. In June 2003, for instance, the Afghan Civil Society Forum (AZSF) initiated civic education training community leaders in 32 provinces.³³

Public consultation was conducted for two months. Regional offices carrying out the consultation procedures were opened such as in Kunduz, Kandahar, Jalalabad and Herat. Offices were also established in Iran and Pakistan to serve the refugees. Members of the CRC traveled to 32 provincial capitals. They held meetings with pre-selected groups and engaged public education regarding the new likely constitution, preparing for public consultation. Ten target groups were deemed the most representative groups of Afghan society by the Secretariat of the CRC. They were tribal elders, *ulama*, women, members of the ELJ, businesspersons, academics, professionals, youth, Afghan members of national and international NGOs and any other groups identified as important to be consulted with by the Commission.³⁴ Here, printed materials were distributed. Public consultation began on 7 June 2003. More than 150,000 people attended 523 consultative meetings. The members also circulated questionnaires. More than 80,000 questionnaires were returned. In addition, there were about 6,000 proposals and 17,000 verbal opinions submitted to the CRC.³⁵ Describing this process, Thiers noted:

The public consultation process did manage to reach to a number of people. Independent civil society networks played a role by holding training sessions and consultations, while working groups

³³ Carolyn McCool, "The Role of Constitution-Building Processes," 14.

³⁴ Secretariat Constitutional Review Commission, "Public Consultation Strategy," http://constitutionnet.org/sites/default/files/public_consultation_strategy.pdf, accessed on 3 February 2020.

³⁵ "The Constitutional Process," above note 23; The Secretariat of the Constitutional Commission of Afghanistan, "the Constitution-making Process," 7-8.

*contribute to the process from the outside. In the end, thousands of comments were received and logged by the staff of the Constitutional Commission.*³⁶

In fact, the UNAMA acknowledged that the process of public consultation had many limitations. It did not reach rural areas and not engage the majority of people. It was designed “to minimize the ability of Afghans to speak freely”.³⁷ The main concern in this stage as in others is security. Together with the weakness of the Transitional Administration and the threats of warlords, the “light-footprint” policy of the international regime contributed to the unsatisfactory process of public consultation.³⁸ The light-footprint policy meant that the UN “should first and foremost bolster Afghan capacity – both official and non-governmental – and rely on as limited an international presence and as many Afghan staff as possible”.³⁹

The public consultation was concluded in late July 2003. And, based on this the Constitutional Commission should finalize the draft in the required date, August 2003. However, the draft was submitted to the President in late September 2003 and then released to the public on 3 November 2003. The delay of the release was mainly caused by the center’s attempts to impose its interest in the draft constitution. Several members of the cabinet and other influential figures were unhappy with the draft submitted by the Commission. They attempted to revise some critical issues in the draft particularly that was dealing with the power of the President.⁴⁰ It was this

³⁶ J Alexander Thier, “The Making of a Constitution,” 569

³⁷ International Crisis Group, “Afghanistan’s Flawed Constitutional Process,” 19.

³⁸ See *ibid*, 22-4.

³⁹ Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University press, 2005), 89.

⁴⁰ J Alexander Thier, “The Making of a Constitution,” 568; International Crisis Group, “Afghanistan: The Constitutional Loya

revised draft that was submitted to the Constitutional Loya Jirga (CLJ).

The creation of the CLJ, which would decide on the ratification of the draft, was put into effect with the decree of the President on 15 July 2003.⁴¹ The CLJ consisted of five hundred members (Article 2). Four hundred and fifty members are elected: 344 members are elected at the district level; 42 members are elected from refugees and displaced people, of whom fifteen percent are women; and 64 women members. Fifty members are appointed by the President, of whom 25 are women. The other 25 appointed members are selected from legal scholars, constitutional and other experts (Article 6). The Secretariat of the Constitutional Commission was entrusted to organize, hold and convene the election of the CLJ's members (Article 7). In the election process, harassment and intimidation was reported to occur before delegates went to vote.⁴² Granted by the law, the Executive Committee was established to "[take] measures aimed at correcting, deterring, prosecuting and punishing such abusers" (Article 9b). The CLJ had more favorable condition for meetings and discussions, than the previous Jirga. The UN could maintain security for the delegates. The government provided better organizational infrastructure for the work of the CLJ as well. The warlords to some extent could no longer use threats and intimidation towards the delegates.⁴³

The constitutional process in the CLJ took place for about 22 days from 14 December 2003 until the adoption

Jirga," Afghanistan Briefing, Kabul/Brussels, 12 December 2003, 2-3, <https://d2071andvip0wj.cloudfront.net/afghanistan-the-constitutional-loya-jirga.pdf>, accessed on 3 February 2020.

⁴¹ Decree of the President of the Islamic Transitional State of Afghanistan on the Convening of the Constitutional Loya Jirga, 24/04/1382 (15 July 2003), <https://www.refworld.org/docid/5b27b20f4.html>, accessed on 3 February 2020.

⁴² Carolyn McCool, "The Role of Constitution-Building Processes," 14.

⁴³ Barnett R Rubin, "Crafting a Constitution," 10.

of the constitution in 4 January 2004. The rules of procedure of the CLJ were established by the Order of the President in November 2003.⁴⁴ Briefing the delegates on the draft constitution would be carried out by the CRC, assisted by the Secretariat (Article 17). In the Plenary on the draft, the delegates would opine and debate the contents of the draft (Article 18). The thorough discussion on the provisions of the draft would be held by ten working committees of the CLJ. The concluding reports of the committees would be presented to the Plenary and Reconciliation Committee (Article 19). The Reconciliation Committee, consisting of the members of the Bureau and the Chairpersons of the Working Committees, would 'seek reconciliation of the views and proposals of the Working Committees'. The Bureau, composing of the Chairperson, three Deputies and three Rapporteurs-General, would prepare a revised draft of the constitution based on the agreement reached in the Working Committees and the Reconciliation Committee. This revised draft should be given an agreement by the Reconciliation Committee. The Bureau would present the amended draft to the Plenary for adoption (Article 20).

The dynamics of relatively free speech marked the constitution-making process in the CLJ: in the debating stage, several constitutional provisions became highly contentious amongst the participants, including the power of the President, the role of parliament and the Supreme Court, official languages and the "Islamic republic" clause;⁴⁵ one delegate, Malalai Joya, sharply criticized the Mujahideen and called its leaders as criminals destroying the country; the Jihadi delegates boycotted the Committee work as they were unhappy with

⁴⁴ Order of the President of the Islamic Transitional State of Afghanistan on the Rules of Procedure of the Constitutional Loya Jirga, No 4913, 16/09/1382 (November 2003), http://www.unama-afg.org/docs/_nonUN%20Docs/_Loya-Jirga/CLJ/rules%20of%20procedure.doc.

⁴⁵ J Alexander Thier, "The Making of a Constitution," 570-1.

the procedures; there was also fear of deadlock prior to the adoption of a new constitution.⁴⁶

It is remarkable that women were engaged in the constitution-making exercise, particularly in the CLJ. Their involvement was recognized in the making of previous constitutions. The constitutional Loya Jirga in the making of the constitution of 1964 contained four women and the constitution of 1977 twelve women.⁴⁷ In post-conflict Afghanistan, women were engaged not only in the CLJ but also in the Constitutional Commission and public consultation. As stated in the draft prepared by the Secretariat of the Constitutional Commission:

*“the Commission [would] ensure broad participation of women in the constitutional-making process. The Constitutional Drafting Commission [consisted] of nine members including two women. The representation of women [would] increase in the soon to be established Commission. The women commissioners [would] lead, where possible, consultations with women in light of culture sensitivities in some areas”.*⁴⁸

Amongst thirty-five members of the CRC, eight of them were women. In the CLJ, women constituted 19% of all representatives. Despite this development, however, criticism remained. In public consultation, it was complained that in various regions women were not fairly represented. The security concerns were of the main

⁴⁶ See Institute for War and Peace Reporting, “Afghan Recovery Report,” http://iwpr.net/?p=arr&s=p&o=-&apc_state=heniarr2003, accessed on 25 September 2007.

⁴⁷ International Crisis Group, “Afghanistan: Women and Reconstruction,” ICG Asia Report N 48, Kabul/Brussels, 14 March 2003, 19, <https://d2071andvip0wj.cloudfront.net/48-afghanistan-women-and-reconstruction.pdf>, accessed on 4 February 2020.

⁴⁸ The Secretariat of the Constitutional Commission of Afghanistan, “the Constitution-making Process,” 3.

reasons barring women from attending the consultation process.⁴⁹

Finally, the CLJ agreed to adopt the new constitution on 4 January 2004.⁵⁰ Instead of vote, the ratification was made by asking the participants to stand for one minute to show their agreement to the document. It was signed by President Karzai on 26 January 2004.⁵¹ The new constitution was generally accepted by the Afghan people and international community, hoping that the Constitution would solve the conflict and initiate the better future for the country. Speaking at the closing ceremony of the CLJ, Lakhdar Brahimi said,

*Is this Constitution perfect? Most probably not. Will it be criticized? I fear it will, both inside and outside of Afghanistan. But nevertheless, I think that you have every reason to feel proud of what you have achieved and I am certain that the people of Afghanistan are very happy tonight and see in this constitution a new source of hope.*⁵²

The Constitution lays down the future settlements for governance, the national identity, the recognition of ethnic and cultural differences, the entrenchment of Islam as state religion, the protection of human rights, the guarantee of gender equality, etc. It preserves some Afghan cultural heritage, while providing reform agenda

⁴⁹ Ariane Brunet and Isabelle Solon Helal, "Seizing an Opportunity: Afghan Women and the Constitution-Making Process," Rights & Democracy Mission Report May-June 2003, 13-4, http://www.afghandata.org:8080/xmlui/bitstream/handle/azu/15261/azu_acku_pamphlet_hq1735_6_b78_2003_w.pdf?sequence=1&isAllowed=y, accessed on 4 February 2020.

⁵⁰ Carlotta Gall, "Afghan Council Gives Approval to Constitution." *The New York Times* (nytimes.com), 5 January 2004.

⁵¹ J Alexander Thier, "The Making of a Constitution," 571.

⁵² Impromptu Remarks by the Special Representative of the Secretary-General, Lakhdar Brahimi, at the Closing Ceremony of the Constitutional Loya Jirga (2004), http://www.unama-afg.org/news/_statement/SRSG/2004/04jan04.htm, accessed on 22 September 2007.

in many sectors in Afghan society. In the next section, this paper discusses how some constitutional clauses with respect to Islam were made, negotiated and debated. It critically analyzes how this process was explicated by some observers and the likely consequences of such explication.

C. Islam and Shari'a in the Afghan New Constitution

The making of the Islam-related clauses is an excellent example of how recent constitution-making is discussed, debated and negotiated amongst diverse actors in Afghanistan. This is the arena where foreign actors tried, to some extent, to impose their values, the chief among them was human rights, and where disagreement happened among indigenous actors.⁵³ The process also demonstrates how (religious) tradition was negotiated with the demands of democracy and modern constitutionalism. To look the extent the Islam clauses and the Constitution in general could or has achieved, it is important to locate the significance of the Islam clauses within the constitutional tradition of Afghanistan. Special attention is paid to the 1964 Constitution as it laid the basis for the creation of the 2004 Constitution.

1. The Place of Islam in the Previous Constitutions

Two dominant factors are deemed as characterizing the constitutions of Afghanistan, namely modern reform and preservation of religious and traditional values. Modern reform concerns the ideals of democracy and liberalism, whereas tradition refers to Islamic tradition as embedded in Afghan tribalism. The first two Afghan constitutions reflect this contrasted culture. The first constitution was promulgated in 1923 under the King Amanullah. It attempted to build "a modern state governed by statutory law of dominantly

⁵³ Barnett R Rubin, "Crafting a Constitution," 14; Yash Ghai, "A Journey around Constitutions," 827; Noah Feldman, "Imposed Constitutionalism," 868-870.

secular nature”.⁵⁴ After the removal of Amanullah from power, the 1931 constitution was crafted under the King Mohammad Nadir. In contrast to the previous constitution, the 1931 constitution greatly emphasized the adherence to Islam and Islamic Shari’a. For instance, Article 1 of the 1931 Constitution stated that “Islam is the sacred religion of Afghanistan and the religious rites performed by the state shall be according to the provisions of the Hanafi doctrine”. In Article 19, it was enshrined that “no one may be punished except by the order of the Shari’a and Islamic Constitution of Afghanistan”.⁵⁵

The King Mohammad Zahir reigned after the assassination of the King Nadir in 1933. Under his leadership, the 1931 Constitution remained to govern the country until the promulgation of the 1964 Constitution. This later constitution attempted to

⁵⁴ Mohammad Hashim Kamali, *Law in Afghanistan*, 20. The 1923 Constitution with respect to the status of Islam was amended on 28 January 1925 to accommodate the demands of religious leaders. In the original version, Article 2 stated that ‘the religion of Afghanistan is the sacred religion of Islam. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided they do not disturb the public peace’. After stating that the religion of Afghanistan is the sacred religion of Islam, the amendment asserted that ‘and its official religious school is the sublime Hanafi school’, and added the provision that ‘Hindus and Jews must pay the special tax and wear distinctive clothing’. See Fundamental Principles (Constitution) of the Kingdom of Afghanistan (*Nizamnamah-ye-Asasi-e-Daulat-e-Aliyah-e-Afghanistan*), April 9, 1923 (20 Hamal 1302) Amended January 28, 1925 (8 Dalw 1303), http://www.afghanistantranslation.com/Constitutions/Constitution_1923-1302_ET.htm#_APPENDIX_B>.

⁵⁵ Ussole Assasi (The Main Principles) Government of Afghanistan, Published 3 Jadi 1311 (13 December 1932), http://www.afghanistantranslation.com/Constitutions/Constitution_1931-1310_ET_CSTC-A.htm. On the place of Islam in the 1931 Constitution, see Shamshad Pasarlay, “Rethinking Afghanistan’s Longest-Lived Constitution: The 1931 Constitution Through the Lens of Constitutional Endurance and Performance Literature,” *Elon Law Review*, Vol. 10 (2018).

balance the two different determinations in the previous constitutions. As Hashim Kamali noted, it attempted to “preserve the basic tenets of Islam while also responding to the need for social change and democratic reform ... [and] to reconcile Islamic and modern legal and constitutional principles”.⁵⁶ This constitutional approach was followed by the subsequent constitutions (the constitutions of 1977 and 1980).⁵⁷

As is the case with the 1931 Constitution, Article 2 of the 1964 Constitution stipulated that Islam is the official religion of Afghanistan and that the state should uphold the Hanafi doctrine.⁵⁸ The constitutional status of Islam was guaranteed by the King, who according to Article 7 is “the protector of the basic principles of the sacred religion of Islam”. The Hanafi legal doctrine would be binding for judges whenever there were no constitutional and statutory provisions regarding a particular case before the court (Article 102). This school’s doctrine was also considered as law if in a particular area there was no law promulgated by parliament (Article 69). The power of the Parliament to legislate was limited so as not to repulse “the basic principles of the sacred religion of Islam” (article 64). The supremacy of Islam in this Constitution was likely to be the result of religio-political trends in the previous era. Of the causes of the withdrawal of the King Amanullah was that he failed to accommodate the Muslim traditionalist aspirations in the making of the 1931 Constitution. The adoption of the 1931 Constitution, which more Islamic and (Hanafi-based)

⁵⁶ Mohammad Hashim Kamali, *Law in Afghanistan*, 21. See also Said Amir Arjomand, “Constitutional Developments in Afghanistan: A Comparative and Historical Perspective.” *Drake Law Review*, Vol. 53 (2005), 952.

⁵⁷ Mohammad Hashim Kamali, *Law in Afghanistan*, 22.

⁵⁸ Constitution of Afghanistan, 9 Meezan 1343 (1 October 1964, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=afghanenglish>, accessed on 3 February 2020).

Shari'a oriented, was considered as the answer to them. In this regard, the 1964 was arguably the continuation of this trend, although providing some changes as mentioned before.

The 1964 Constitution differs from the previous constitutions in many provisions.⁵⁹ It deprived for the first time members of the royal family from the privileges of holding position of prime minister, of seating in parliament and being posted as the Supreme Court justices (Article 24). It established the supreme power of parliament above the other branches of the government. Article 41 stipulated that the Parliament "manifests the will of the people and represents the whole of the nation". The Government, according to Article 65, was responsible to the House of People (*Wolesi Jirga*). Furthermore, the 1964 Constitution particularly departed from the 1931 Constitution in its consistent reference to statutory laws (legislative acts) instead of the Shari'a. This was likely to be the consequence of the principle of the supremacy of the Parliament. However, as Hashim Kamali argued, the preference of statutes over the Shari'a was merely a formal provision in an attempt to unify legal and judicial system. In substance, with reference to Article 64 ("there shall be no law repugnant to the basic principles of the sacred religion of Islam"), there was no significant difference from the 1931 Constitution in its adherence to the *Shari'a*.⁶⁰

2. The Making and Status of Islam in the 2004 Constitution

In the 2004 Constitution, Islam is granted a robust status. In the Preamble, the first statement is concerned with the declaration of the conviction to

⁵⁹ Mohammad Hashim Kamali, *Law in Afghanistan*, 42; Said Amir Arjomand, "Constitutional Developments in Afghanistan," 952-3.

⁶⁰ Mohammad Hashim Kamali, *Law in Afghanistan*, 42.

God and Islam.⁶¹ Islam constitutes the very basis of the existence of the country. The name given to the state is Islamic Republic of Afghanistan. Article 2 then provides that “the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan”. All law must not contradict the tenets and provisions of Islam (Article 3). Its national insignia includes the phrase “There is no God but Allah and Mohammad is His Prophet, and Allah is Great” (Article 19). The right to form a political party requires that its manifesto and charter must not contravene Islam (Article 35). The tenets of Islam are of the basis of the national educational curriculum (Article 45). The state is obliged to eliminate family-related traditions which contradict the principles of Islam (Article 54). The president must be an Afghan Muslim (Article 62) is sworn to obey and protect Islam (Article 63).

Noah Feldman said that the Constitution was “pervasively Islamic” and “thoroughly democratic”.⁶² It is Islamic because elsewhere in the Constitution, there are references to the religion of Islam: Afghanistan is called an Islamic Republic, Islam becomes the official religion and all law has to be in accordance with this religion. Its democratic character is enshrined in the Preamble of the Constitution (“to [e]stablish an order based on the peoples’ will and democracy”). The Afghan Constitution, he argued, is “one possible picture of how Islam and democracy can live side-by-side in the same political vision”.⁶³

In fact, the making of the Islam-related clauses was among the most negotiated constitutional clauses. In this respect, Barnett R Rubin gives a

⁶¹ The Constitution of Afghanistan, (ratified) 26 January 2004, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>, accessed on 3 February 2020.

⁶² Noah Feldman, “A New Democracy, Enshrined in Faith,” *The New York Times* (nytimes.com), 13 November 2003. He commented on the draft constitution.

⁶³ *Ibid.*

widely cited description of what happened in the constitution-making process. He describes the activities in the formulation of the Islam clause as “balancing outside actors” demands for the acceptance of international standards with the demands of domestic actors, notably Islamist politicians and the *ulama*.⁶⁴ Another observer called this process as the struggle between secularists and fundamentalists, between fundamentalists and international experts and activists.⁶⁵ Within these rivalries, Islamist leaders were described as demanding the entrenchment of Islam in the new constitution. Vice-President Nematullah Shahrani particularly urged the inclusion of the words “Islamic Republic of Afghanistan” in the new constitution. International actors, on the other hand, aware of the embeddedness of this religion in the Afghan society and political discourse, accepted the inclusion of Islam but required that nothing in the constitution any explicit reference to the Islamic Shari’a.⁶⁶ Of the negotiated compacts, as Rubin noted, Islamist leaders agreed with the international demands to accept the provision, unqualified by the notion of Shari’a, requiring the state to observe the Universal Declaration of Human Rights (UDHR) and international treaties to which the government has signed (Article 7). Also, they agreed to the principle of equality of men and women in rights and duties before the law (Article 22).⁶⁷

The abovementioned description wanted to explicate the process as negotiations between domestic and foreign actors. However, to explain the constitutional negotiations in this way seems to fail to

⁶⁴ Barnett R Rubin, “Crafting a Constitution,” 13-4.

⁶⁵ Hannibal Travis, “Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq,” *Northwestern University Journal of International Human Rights*, Vol. 3 (2005), 17.

⁶⁶ Barnett R Rubin, “Crafting a Constitution,” 14.

⁶⁷ *Ibid.*

acknowledge the complexity of Islam. This is likely to be grounded on the assumption of the contrast duality between international, western ideals and the Islamic tradition: the international actors aim at spreading the western constitutionalism, while Islamic tradition requires a religious-based system and, to great extent, undemocratic provisions. Islam here seems to be described in rigidity and absoluteness, ignoring the richness and heterogeneity of its perspectives. Islam in the recent Afghan experience, as demonstrated above, has been identified as “fundamentalism” and “theocracy”. Does this explanation reflect the reality of the making of the Islam clauses in contemporary Afghanistan?

The debate regarding the character of the state, whether Afghanistan should be an Islamic republic or merely a republic (Article 1), occurred in the CRC.⁶⁸ In the two out of three occasions, most of the CRC members agreed to the second proposal declaring that Afghanistan is a republican state. In the third occasion, however, the first proposal that stated Afghanistan as an Islamic republic adopted by the Commission and then upheld by the CLJ. Although it was finally concluded that the state was an Islamic republic, the fact remained that the members of the Commission, as domestic actors, had not been in agreement about the relation the Afghan state had to religion (Islam). One of the members, Mohammad Hashim Kamali, also known as a Muslim scholar in Islamic law, was amongst those who supported the

⁶⁸ Mohammad Hashim Kamali, “Islam and its Shari’a in the Afghan Constitution 2004 with Special Reference to Personal Law,” in Nadjma Yassari (ed.), *The Shari’a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law* (Tübingen: Mohr Siebeck, 2005), 24. This Islamic Republic clause had been debated together with the title of the constitution, namely whether it read the “Constitution of Islamic Republic of Afghanistan” or simply the “Constitution of Afghanistan”. More on the disagreement on the Islamic republic clause, see the dShamshad Pasarlay, “Making the 2004 Constitution of Afghanistan,” 202-204.

republic clause only. His refusal to the Islamic Republic clause was based on the fact that this clause “had not been expounded anywhere in the text, and as such it would appear as somewhat of an isolated addition”.⁶⁹ He warned the implication of adopting the Islamic Republic clause that is relating to the issues of Islamic punishment, banking interest and women’s rights. The lack of definition of what constituted an Islamic republic would have a serious unresolved problem to the system, as demonstrated by those issues.

Kamali and other members of the CRC’s standpoint on the topic show that the concept of an Islamic state (Afghanistan as an Islamic republic) is clouded by uncertainties and inconclusiveness. Instead of internationally imposed, this was part of the members’ consideration; a consideration that was based on religious deliberation, stemming from a self-critical reflection. Kamali criticized the puritan Islamist agenda and argued that it was more of an idea than an obvious system. As he takes a substantive approach to this issue, he suggests that “an Islamic state is thus any system of rule that upholds the injunctions of Islam on equality and justice, on consultation, and the basic rights and liberties of the people”.⁷⁰ His substantive approach is shared by many Muslim scholars around Muslim countries.⁷¹

⁶⁹ Mohammad Hashim Kamali, “Islam and its Shari’a,” 25.

⁷⁰ Mohammad Hashim Kamali, “The Islamic State: Origins, Definition and Salient Attributes,” in K S Nathan and Mohammad Hashim Kamali (eds.), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century* (Singapore: ISEAS-Yusof Ishak Institute, 2006), 295.

⁷¹ Such as Mohammad Asad, Fazlur Rahman, Nurcholis Madjid, Abdol Karim Soroush, Khaled Abou El Fadl, Abdullahi Ahmed An-Na’im. See, eg, Charles Kurzman (ed.), *Liberal Islam: A Source Book* (Oxford: Oxford University Press, 1998); Khaled Abou El Fadl, et al, *Islam and the Challenge of Democracy: A Boston Review Book* (Princeton and Oxford: Princeton University Press, 2004). On the

The disagreement among domestic actors also occurred with regard to Article 2. The earlier draft of this article agreed by the CDC stipulated that “the religion of *Afghanistan* is the sacred religion of Islam. Followers of other religions are free to exercise their creeds within the provisions of the law”.⁷² The sweeping reference to ‘Afghanistan’ was considered problematic since it would ignore other religions followed by the Afghan people. A proposal for changing the draft so that it would limit the designation of religion only to the state was rejected at the CRC. The idea was then accepted during the CLJ convention.⁷³ The final version of Article 2 establishes Islam as the religion of the state of the Islamic Republic of Afghanistan.

3. The New Role of Islamic Law

The 2004 Constitution enshrines a new but significant role of Islamic law in the country. It departs quite substantially from that of the 1964 Constitution. On the one hand, the 2004 Constitution becomes more inclusive in that it provides relatively equal treatment to all legal schools (*mazhab*), both the Hanafi and the Shi’a. The 1964 Constitution provided that the state’s school of law was in accordance with the Hanafi doctrine (Article 2). In the drafting process of the 2004 Constitution, a recommendation was proposed to omit the preference to the Hanafi school. Instead, the reference was made to “the sacred religion of Islam” so as to encompass both Hanafi and Shi’ite

substantive approach to Islam, see Nadirsyah Hosen, *Shari’a & Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

⁷² The (Draft) Constitution of Afghanistan Year 1382, http://www.constitution.org/cons/afghan/draft_cons_eng.htm, accessed on 3 February 2020.

⁷³ Mohammad Hashim Kamali, “References to Islam and Women in the Afghan Constitution,” *Arab Law Quarterly*, Vol. 22 (2008), 285; Barnett R Rubin, “Crafting a Constitution,” 14.

schools.⁷⁴ Politically speaking, the removal of the Hanafi phrase might be explained, as Rubin said, according to the fact that Shi'ite community in post-war Afghanistan had more significant bargaining. This factor together with the influence of Iran necessitated that the religion clause should be stated in general without reference to particular schools or rites.⁷⁵ The robust status of the Shi'ite school is further emphasized in Article 131 providing a guarantee on the application of the Shi'a jurisprudence for its followers in cases related to personal matters. However, the Hanafi doctrines still have residual legitimacy in that courts will apply this school's jurisprudence in cases to which no constitutional or statutory provision is available (Article 130). Kamali correctly said that Hanafi doctrine would now be "applied law only if the existing statutes for not cover a case under judicial consideration". It does no longer supplement statutory law generally as was the case in the 1964 Constitution.⁷⁶

On the other hand, the 2004 Constitution grants Islamic law more decisive role and even supreme authority within the Afghan legal system. This is evident from the repugnancy clause. Article 64 of the 1964 provided that basis of the validity of all laws is that they should conform to the basic principles and other values embodied in this Constitution. The draft constitution of 2003, attempting to reinstate this formulation, changed the provisions into "the sacred religion of Islam and the values of this Constitution". The debate over this provision in the CLJ was mostly concluded with a significant amendment, when 105 delegates supported a proposal to change the draft

⁷⁴ See Saïd Amir Arjomand, "The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan," in *Afghanistan: Towards a New Constitution* (Center on International Cooperation, New York University, 2003), 18.

⁷⁵ Barnett R Rubin, "Crafting a Constitution," 14.

⁷⁶ Mohammad Hashim Kamali, "Islam and its Shari'a," 36.

and the Reconciliation Committee adopted.⁷⁷ The proposal which was adopted in the new constitution provided that the principle underlying the non-contravention clause is ‘the tenets and provisions’ (*mu‘taqadāt wa aḥkām*) of Islam, while the words ‘values of this constitution’ were omitted. The words ‘the tenets and provisions’ embodied the very substance of Islam, namely Islamic creeds (*‘aqidah*) and laws (*sharī‘a*).⁷⁸ In this sense, Islamic doctrines whether beliefs or laws are the supreme reference which determines the legality of any law passed by the parliament. For many observers, this is highly considered as the entrenchment of Shari’a law.⁷⁹ This also demonstrated that international actors’ demand of the removal of any reference to Shari’a in the constitution has accordingly been defeated.⁸⁰

The repugnancy clause raises a question of which state institution has the final word in deciding that a particular law is in accordance with or contrary to the tenets and provisions of Islam. Article 121 of the 2004 Constitution provides that “at the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law”. This provision grants the Supreme Court for the first time the power of constitutional review. Previously, in the

⁷⁷ Michael Schoiswohl, “Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan,” *Vanderbilt Journal of Transnational Law*, Vol. 39 (2006), 836-7. See also Said Amir Arjomand, “Constitutional Developments in Afghanistan.” 958-9.

⁷⁸ See Maḥmūd Shaltūt, *al-Islām ‘Aqidah wa Sharī‘ah* (Kuwait: Dār al-Qalam, 1980).

⁷⁹ See also Barnett R Rubin, “Crafting a Constitution,” 15; J Alexander Thier, “The Making of a Constitution,” 578.

⁸⁰ Michael Schoiswohl, “Linking the International Legal Framework,” 837, 854; Hannibal Travis, above n 66, 19.

drafting process experts debated the possibility of establishing constitutional review. It was also debated whether such review would be granted to a specialized court (constitutional court) or to a chamber in the Supreme Court. One optional opinion recommended the establishment of a constitutional court, arguing, among others, that such court would solve the existing problem of the unaccountable judiciary and state bureaucracy whose personnel were mostly unqualified for the new system.⁸¹ The Commission approved to the proposal and had brought it to the CLJ. However, the proposal was rejected for the fear that such court would be similar to the Council of Guardian of Iran.⁸² The final draft of the new constitution was concluded with vesting the power of constitutional review to the Supreme Court (Article 121). This along with few changes was then adopted in the 2004 Constitution. While the text itself might be understood otherwise, Article 121 was originally intended to grant the Supreme Court with such authority as to interpret the Constitution.⁸³

Although the idea of establishing a specialized constitutional court had not been adopted, the CLJ agreed to establish the Independent Commission for Overseeing of the Implementation of the Constitution (Article 157).⁸⁴ This article was drafted for the transitional purpose as its provision is placed in the Transitional Provisions chapter. Its authority, however, is not clearly defined. It has been contentious whether the Commission has the authority in interpreting the Constitution. This in

⁸¹ Saïd Amir Arjomand and Kim Lane Scheppele, *Constitutional Court for Afghanistan*, in *Afghanistan: Towards a New Constitution*, 125.

⁸² Barnett R Rubin, "Crafting a Constitution," 15; Michael Schoiswohl, "Linking the International Legal Framework," 838.

⁸³ Mohammad Hashim Kamali, *Afghanistan's Constitution Ten Years On: What are the Issues?* (Kabul: AREU, 2014), 12-3, note 45.

⁸⁴ See J Alexander Thier, "The Making of a Constitution," 578.

practice would give rise to a conflict of jurisdiction between the Commission and the Supreme Court.⁸⁵

For some scholars, the provision on constitutional review in conjunction with the repugnancy clause (Article 3) would mean that the Supreme Court would have the supreme power to determine whether a particular law or international treaty is in conflict with Islamic beliefs and provisions. These provisions, they argued, could give the Court ammunitions to undermine international human rights norms⁸⁶ and as the 'back door' for the fundamentalists to enforce their interpretation.⁸⁷

Despite the fact that no cases of judicial review have been decided,⁸⁸ constitutionally speaking it is clear that the Supreme Court has the ultimate power to strike down any legislative acts, international treaties and covenants which according to the Court's interpretation contradict the Constitution. The fear that this provision would provide the Court with the review against Islamic law and thus would undermine international standards might be justified on the ground of specific interpretation of Article 3, which refers the tenets and provisions of Islam to a puritan and fundamentalist view. This is also supported by the Court's decisions under the Chief Justice Fazel Hadi Shinwari.⁸⁹ However, the Constitution itself does not give a direct reference to Islamic law as the sole basis of constitutional review. It reads that the basis of all review is the compliance with the Constitution and their interpretation in accordance with the law. In deciding the constitutionality of law, the Supreme Court would be

⁸⁵ See Mohammad Hashim Kamali, *Afghanistan's Constitution*, 13-4; Ghizaal Haress, *Judicial Review in Afghanistan: A Flawed Practice* (Kabul: AREU, 2017), 14-5.

⁸⁶ Michael Schoiswohl, "Linking the International Legal Framework," 837-8;

⁸⁷ Hannibal Travis, "Freedom or Theocracy?," 19.

⁸⁸ See Ghizaal Haress, *Judicial Review in Afghanistan*.

⁸⁹ Hannibal Travis, "Freedom or Theocracy?," 20-5. Amongst those decisions include outlawing secular political parties, curtailing political debate, persecuting religious minorities, enforcing cruel punishment and discriminating against women.

bound by the Constitution as the Court interprets it. One line of interpretation might be similar to the one assumed above, the fundamentalist interpretation. The other line, on the other hand, might suggest that the Court should consider the tenets and provisions of Islam along with other constitutional provisions such as on equality between men and women and adherence to international human rights norms. Thus, it depends on the approach taken in constitutional interpretation by the Court. In this respect Noah Feldman correctly noted that “one dominated by illiberal religious scholars might interpret the text one way, while one with a majority of judges trained in the secular tradition might see it very differently”.⁹⁰

In addition, the conclusion that the reference to Islamic law in the constitutional review would undermine international human rights norms and principles of democracy comes from the underlying assumption that Islamic law is incompatible with human rights and the ideals of democracy. A bulk of literature on the relations of Islamic law and human rights and democracy will show that there are various approaches in the Islamic scholarship to the issue.⁹¹ These different approaches span from a puritan extremist to a very liberal approach. To speak of Islam as a single and absolute standpoint accordingly becomes impossible. Islam and its law (Shari’a) have in fact been interpreted in a way that, for some observers, is compatible with human rights norms

⁹⁰ Noah Feldman, “A New Democracy”.

⁹¹ On the normative relationships between Islam on the one hand, and human rights and democracy on the other, see, eg, Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2009); Abdullah Saeed. *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law* (Cheltenham, UK: Edward Elgar, 2018); M A Muqtedar Khan (ed.), *Islamic Democratic Discourse: Theory, Debates and Philosophical Perspectives* (Lanham: Lexington Books, 2006); Nader Hashemi, “Islam and Democracy.” in John L. Esposito and Emad El-Din Shahin (eds.), *The Oxford Handbook of Islam and Politics* (Oxford: Oxford University Press, 2013), 68.

and democracy. For some Muslim scholars, this is truly the position of Islam from the very beginning of its history. Apart from the so-called Islamist perspective, this view supports the moderate position. As Abou El Fadl argued “many moderate Muslims believe that while it would be disingenuous to pretend that Islamic law offers its own ready-made list of human rights, human rights as a concept and democracy as a system of governance are entirely reconcilable with Islamic theology and law”.⁹²

With this in mind, it is plausible and justifiable that the interpretation of the tenets and provisions of Islam would go hand in hand with the constitutional provisions that uphold human rights and democratic values. It is ‘Islamic’ that the constitutional review would consider equally Article 3 of the Constitution together with Article 7 (human rights) and 22 (gender equality). Thus, the difference of interpretation is not only between ‘illiberal religious scholars’ and secularly educated judges as Feldman said, but also between puritan and moderate Muslim scholars or judges.

D. Conclusion

The above discussion demonstrates that the constitution-making in Afghanistan particularly with regard to the Islam clauses is the acts of negotiations between different competing actors. It is not only between international and domestic actors, but also among domestic actors. As evident in the making of the Islam clauses, these negotiations might be characterized as between puritan Islamist and more moderate Muslim actors. The descriptions provided by some observers about the role of international and domestic actors in constitution-making reveal their underlying assumption that makes these descriptions flawed.

The new constitution of Afghanistan was crafted as an instrument of conflict resolutions resulted from dialogue and negotiations. The Constitution was aimed at

⁹² Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperSanFrancisco, 2005), 183.

transforming and even resolving the current conflicts amongst Afghan interest groups. Its goal was also to provide constitutional settlements that would create a better future for Afghan people. How successful the Constitution fulfils these objectives is a matter beyond the scope of this essay.

The international and foreign engagement in the process of constitution-making was obvious in the making of the post-world war constitutions. The essay shows the role of international experts in preparing the draft and negotiating the contents of the draft. The role of these foreign actors in the formulation of constitutional provisions, however, could not be exaggerated.⁹³ For some observers, as discussed above, the creation of the Islam clauses was the result of the negotiations between international actors, who proposed the provisions commonly entrenched in the western liberal constitutions, and domestic Islamist actors, who urged the establishment of Islamic norms in the constitution. This explanation, however, failed to acknowledge the debate amongst domestic actors. There were in fact negotiations between moderate Afghan Muslims and puritan Islamists. This leads this essay to uncover the assumption underlying this explanation. It is likely that the observers perceived Islam as religion of totality, closeness, homogeneity and stability. Islam was understood as unified doctrine which negated the plurality of perspectives. In this sense, it failed to provide the fair description of constitution-making in Afghanistan. Islam is perceived differently as in Afghanistan as anywhere in the Muslim world. There are radical Islamists who are against democracy and gender equality, but there are moderate Muslims who see the compatibility of Islam and human rights and the ideals of constitutionalism.

⁹³ Shamsahd Pasarlay demonstrates that there was no significant influence, if any, from the international community in the constitution-making process in Afghanistan. Their part might be best described as 'mere suggestions'. Shamsahd Pasarlay, "Making the 2004 Constitution of Afghanistan", 218-221.

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