



The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002-2004

Andrew Finkelman

Among the many daunting challenges of nationbuilding, the process of constitutional development has proved particularly obstacle-ridden. Integrating customary or religious legal traditions with modern statutory provisions in order to form a cohesive national charter is a difficult task, but one that remains essential for the viability of a constitution.¹ Recent UN missions to East Timor (UNTAET) and Kosovo (UNMIK) provide key lessons for this process, and for the larger nationbuilding project underway in Afghanistan, but fail to address a defining aspect of the Afghan scenario: Islam.

This paper will investigate the role and impact of Islamic law, *shari'a*, on Afghanistan's constitutional development process. Examining the Islamic content of the new Afghan constitution will in turn provide the basis for an analysis of the international community's constitutional development initiatives in general. It will also reveal the impact of those efforts on the extent and nature of the Afghan constitution's embrace of Islam. Furthermore, several normative considerations for Afghanistan's constitution-making will be discussed with reference to the country's new judiciary, and how the new constitution lends itself to interpretation by that body.

Background

"We want to share in democracy and to learn, but if it is outside the context of Islam, then we do not want it."²

Establishing a purely secular legal system in Afghanistan has never been a viable option, given that distrust of central government is deeply entrenched, and Islam is the most common source of identity.³ Even the Afghan constitution of 1964, which was regarded as the nation's most progressive constitution and a model for its new charter, declared the country to be an Islamic state with a deeply rooted Islamic heritage. Against this backdrop, a UN-sponsored international conference took place in Bonn, Germany, in December 2001 and set Afghanistan on its path towards reconstruction. The meeting produced a blueprint for nationbuilding, termed the "*Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions.*" The Bonn Agreement outlined a fixed timetable for reconstruction, and called for a three year, phased process of political transformation to be implemented by the UN Mission to Afghanistan (UNAMA) and foreign aid agencies. An Emergency Loya Jirga (a tribal grand council) held in June 2002 elected members of the Afghanistan Transitional Administration (ATA) who would govern what was later renamed the Transitional Islamic State of Afghanistan, headed by Pashtun leader Hamid Karzai.⁴ The agreement mandated the formation of a

Constitutional Commission to begin work on a draft constitution. The draft constitution was to be finalized and approved in a Constitutional Loya Jirga to be convened within 18 months of the establishment of the ATA.⁵

Islamic Content of the Afghan Constitution and the International Community

The Constitution

The constitution born out of the Bonn process is essentially a moderate document. The text recognizes religious rights for non-Muslims,⁶ subordinates customary and religious law to positive legislative statutes, prohibits gender-based discrimination, establishes a human rights commission, and embraces the Universal Declaration of Human Rights.⁷ The constitution does not even make mention of the term *shari'a*. Yet, its embrace of Islam and Islamic law is unambiguous and, in the case of several prominent provisions, potentially problematic.

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The first three articles each relate to Islam in some respect. Article One declares Afghanistan to be an "Islamic Republic" while Article Two adopts Islam as the state religion. These are intended primarily as a symbolic statement of identity, and will have little practical effect, at least in the short term, because they impose no concrete

obligations.⁸ The third of these introductory provisions is the most important. The 'repugnance' clause, as it is termed, has in various forms been a mainstay of prior Afghan constitutions. Purporting to prohibit statutes at odds with Islam, it reads: "*In Afghanistan there shall be no law repugnant to the ordinances of the sacred religion of Islam and other values in this constitution.*"⁹ This is a subtle, but significant revision to a provision that is otherwise equivalent to its 1964 permutation. The earlier version merely referred to the "basic principles of the sacred religion of Islam;" the 2004 text

substitutes this wording with "ordinances of the sacred religion of Islam." The 1964 construction implied that statutes repugnant to subsidiary rulings in Islamic law, but which did not oppose the basic principles of Islam, could be tolerated.¹⁰ Conversely, with the 2004 rewrite, any ruling in the annals of *shari'a* could in theory be used to substantiate a claim of repugnance.¹¹

In practice this means that together with the guarantee of judicial review (Article 121), the repugnance clause makes the Afghan Supreme Court a particularly strong platform for potential spoilers. Sitting atop a three-tiered unitary judiciary, the Supreme Court is empowered to "review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law." The decision to hand the Supreme Court such oversight powers is surprising, since Afghanistan had no prior history of judicial review. In a letter to Afghanistan's Constitutional Commission warning it of the danger of such a provision, one scholar alluded to neighboring Iran and described the decision to allow "appointed Islamic jurists to have the monopoly over interpreting the Shari'a in opposition to an elected parliament" as the "gravest mistake in the constitutional history of Iran."¹²

Article 130 defines the scope and applicability of *shari'a* in relation to statutory law. Consonant with its 1964 counterpart, the constitution only recognizes application of Hanafi jurisprudence where the constitution and "other laws" are silent.¹³ This provision clearly establishes the priority of the constitution and positive law over un-enacted Islamic law. Where direct reference to *shari'a* would have been expected in this section, the term is notably absent. This decision obviously reflects the overwhelming support Hanafi doctrine enjoys across Afghanistan.¹⁴ The phrasing prevents judges from selecting rulings from outlying juridical frameworks, such as the Hanbali,¹⁵ but also purports to induce a degree of objectivity into *ijtihad* (independent reasoning) by restricting direct recourse to the *Qur'an* and *hadith*, thereby constricting the extent of an individual judge's

personal interpretation. While the effect of this may be to prevent renegade judges from imposing their own archaic interpretations of *shari'a*, it may also restrict the type of contextualization and flexibility a court needs to “serve justice in the best possible manner.”¹⁶ In either scenario, Article 130 places great stake in the particular interpretative penchants of future Afghan jurists. A later article breaks further constitutional ground in that it provides for the application of Shi'a law in matters of personal status involving the minority Shi'a population.¹⁷

The Process

In order to fully understand the constitution's incorporation of *shari'a* law, and the legal consequences which arise therefrom, it now remains to investigate how the international community influenced the document. This investigation requires that one ask two distinct but related questions: To what extent did foreign actions influence the Islamic provisions of the constitution? Was this influence the result of conscious goals of these international actors, and, if so, were their objectives met? In the end, it is not clear that foreign attempts to shape the constitutional approach to *shari'a* proved dispositive. The effects and implications of the new constitution are presently being played out. Identification of the causal links between international initiatives and constitutional results is further muddled by Afghanistan's complex religious and political dynamics.

The Constitutional Commission, the one body mandated by the Bonn Agreement to deal specifically with constitutional drafting and public consultation, was inaugurated in April 2003. The thirty-five member commission inherited a preliminary version loosely based on the 1964 constitution from a nine-member drafting commission.

UNAMA and the ATA organized multi-stage popular consultation and education initiatives while the draft underwent debate and review. Commission members along with UNAMA staffers met with citizens and distributed questionnaires across the country—and in the refugee communities of Pakistan and Iran—

soliciting advice on the constitution.¹⁸ These public consultation initiatives were preceded by a public education campaign and simultaneous provincial elections for Constitutional Loya Jirga delegates. As a final step, the Constitutional Loya Jirga successfully debated and adopted Afghanistan's new charter in January 2004, a mere year and a half after the establishment of the ATA.

Evaluation

In contrast to previous Afghan constitutions, which had been drafted in secret and imposed with no 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. It appears that Afghans have accepted the document as an authentic and legitimate expression of nationhood. Although security situation has worsened in 2005, with the country still mired in small-scale war, encouragingly, the constitution and its interpretation have not yet emerged as a major cause of tensions among Afghan factions or of the violence which has afflicted the southern and eastern portions of the country in particular.

Notwithstanding this achievement, the process resulted in a constitution that, due to the nature and extent of its Islamic content, is what one constitutional advisor to UNAMA described as “a package deal that contains potential contradictions to spark future conflicts.”¹⁹ Most importantly, the Afghan process lacked several elements key to the constitution-development process.

Firstly, there was a lack of transparency and inclusiveness. Previous nationbuilding experience has shown that it is vital that a

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national ‘conversation’ be held in an open forum, whereby the population achieves ownership of their national charter through widespread participation.²⁰ Despite the promise of ‘broad consultation’ on the composition of the commission, the appointment process was “opaque and secretive,” as described by the International Crisis Group.²¹ From the start, the makeup of the Constitutional Commission reflected the entrenched interests and power of the conservative parties. Moderate Islamic leaders were excluded from the thirty-five member commission, which instead reflected the interests of *jihadi* groups such as *Shura-yi Nazar* and Abd al-Rab al-Sayyaf’s *Ittehad-e Islami Afghanistan*.²² The ATA’s secretive selection of *mujahidin*-era hardliners had two consequences: First, their presence at the highest levels of

decision making provided an ideal platform from which to push for inclusion of *shari’a* norms in the constitution—an effort that proved successful in many cases. The lack of transparency in the appointments also sent the message to the Afghan people that the drafting process was only an elaborate political theater designed to buttress the interests of the powerful.

The accelerated timeframe, allowing a mere 13 months for drafting,

public education and public consultation, and with a limited budget, further hampered public inclusion. A maxim of the modern approach to the development of the rule of law is that a public education campaign must precede popular consultation to ensure meaningful participation.²³ Given that Afghanistan’s education infrastructure had been virtually eliminated under the Taliban, Afghans could not be expected to make a valuable contribution to the constitutional process without being first informed of the nature and possibilities of representative democracy. The Secretariat of

the Constitutional Commission produced booklets summarizing, among other issues, the Bonn process and the history of constitution-making in Afghanistan.²⁴ While it is difficult to estimate how many of these books were circulated or what percentage of the population was able to review them given widespread illiteracy, we do know that numerous delays left only a few precious months for this vital effort. Public education initiatives thus did not serve their vital role, nor could they have.²⁵

More troubling still was how the distribution of the draft constitution was withheld until the final months of 2003.²⁶ Releasing an advance copy of the draft constitution would have been an easy step to make the process more transparent, but this was not done until the eve of the Constitutional Loya Jirga, for fear of empowering Islamist groups. Even the Afghan Independent Human Rights Commission questioned the secrecy of the process.²⁷ This is not to say that concern over extremist groups was completely misplaced. Conservatives pushed for making Islamic law supreme over its civil counterpart, for applying *shari’a* rulings which are discriminatory towards women, and for reducing religious minorities to *dhimmi* (minority, literally “protected”) status.

Nevertheless, attempts to mute fundamentalist voices during the drafting period may serve to embolden hardliners in the long run.²⁸ To the extent that conservative elements feel excluded, they are handed ready-made reasons for later challenging the constitution. A report by Harvard University’s Conflict Prevention Initiative from 2003 confirms that conservatives perceived themselves as being excluded from the process: “HPCR research demonstrates that there are significant political and legal actors, largely representing a more conservative position, who feel that they are being left out of the current legal reform process. Many such leaders command a large segment of public opinion, or are seen as respected religious scholars.”²⁹ Radical Islamic groups are well organized and well funded in Afghanistan, and Afghan history bears witness to the ability of

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mullahs to use Islam effectively as a purely political tool to resist change.³⁰

Further, there is little proof, despite concerns at the time, that further engaging hardliners in discussion would have allowed them to push Afghanistan's constitution towards a more rigid, fundamentalist direction to Islamic law. Indeed, their influence was already guaranteed, with or without their involvement in the pre-Jirga debates. The disproportionate representation of Islamist conservatives on the Constitutional Commission (each of them appointed by President Karzai) and in the Constitutional Loya Jirga had already ensured that their input would be heard at the highest levels.³¹ The voices of Abd al-Rab al-Sayyaf, and others like him who enjoy the legitimacy of Islamist credentials, were heard inside the Jirga tent to no small effect. The chairman of the event, Sighbatullah Mojdeddi, aired his views on the inferiority of women from the Jirga platform before later lambasting those who opposed naming Afghanistan an Islamic Republic, calling them "infidels."³² And it was an elected representative to the Constitutional Loya Jirga, namely the Saudi backed Sayyaf—infamous for persecuting the Shi'a Hazaras and as doctrinaire as any of the Taliban leadership—who is credited with forcing Karzai into accepting the repugnance clause into the Constitution.³³ International negotiators conceded to fundamentalists on several points, but they did manage to draw lines in sand to protect the status of women and to prohibit codification of *shari'a*-based limitations on international human rights obligations.³⁴

In short, further engagement of the conservative religious segment in Afghanistan by the international community would not have hurt, and might have added to a more transparent process. In any case, experience showed that overly aggressive drafting timetables, secretive appointments, and attempts to stifle debate are clearly ineffective strategies in dealing with Islamists. Despite the failures on the consultation and civic education fronts, given the debilitating Bonn timetable and lack of funding, it is indeed doubtful whether UNAMA could have done

much beyond hard-nosed negotiating at the Constitutional Loya Jirga to modify the constitution's approach to Islam. The latter approach was at least successful in curbing the most retrograde constitutional impulses of the Afghan fundamentalists but hardly stymied the conservative agenda as a whole. Engineering a potentially unstable balance of giveaways to conservatives and liberals alike, which is what eventually occurred, is likely the best result international efforts could have achieved.

Normative Considerations for Islamic Provisions in the Afghan Constitution, and its Interpretation

The challenges of influencing the constitutional integration of *shari'a* law are formidable when attempted within a holistic framework for the development of the rule of law. Such a framework must be built on a foundation of local participation, sensitivity to cultural norms, and an appreciation that a document imposed from the outside will have little future. The presence of Islamic law is not an excuse to disregard these maxims. On the contrary, *shari'a* can abet a constitution's legitimacy while engendering a sense of ownership and national unity. Use of customary norms, which generally enjoy a greater level of trust and adherence by the population, has proved vital in the past.³⁵ In the case of Afghanistan, which has suffered years of ethnic strife, political infighting and hostility between Sunni and Shi'a, Islam creates perhaps the sole shared value system around which the population may rally.

To be sure, secular illegitimacy and fundamentalist discrimination are the Skylla and Charybdis menacing the international community's approach to Islamic law. A secular legal framework will be seen as illegitimate, and therefore ignored. Certain tribal practices, which

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clearly violate human rights standards, will continue to flourish.³⁶ By contrast, giving a polysemous *shari'a* elevated status *vis-à-vis* the government's civil statutory authority could invite the application of a decontextualized interpretation of the antiquated decisions which have more in common with 7th century Arabia than with modern day Afghanistan. Establishing mechanisms of government that can regulate interpretation of Islamic law in the legal system is essential. A state legal system perceived as Islamic will certainly not eliminate tribal law, nor should it, since some tribal mechanisms can prove useful for local dispute resolution. However, failure to co-opt Islamic law may result in alternative centers of political power and legitimization, which will have an unequivocally destructive effect on national government.³⁷

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Central government in Afghanistan is already feeble; stripping it of Islamic legitimacy will only make it weaker.

Strictly defining the set of inviolable Islamic norms and indicating an approach to the acceptability of *ijtihad* are essential. Constitutions define the relationship of a state and citizens, and

"recognize and proclaim the religious and national identity of the people, and proceed to the main objective, which is to define the organization of the state based on the rule of law."³⁸ In harmonizing state and *shari'a* law within a constitution, ambiguity can be dangerous.³⁹ When application of *shari'a* law is mandated in such a document, as is the case in Articles 3 and 130, dangers inhere in imprecise constitutional wording and in misconceived governmental power structures.

An elemental question must also be considered: should the international community even contemplate shaping the Islamic content of the constitutions of Muslim countries and the religious approaches of their judges? Indeed, one school of thought might suggest that, since nationbuilding should be driven by native citizens

rather than foreign consultants, integration of religious mores into government ought to take place unfettered. There is merit in this perspective, since allowing 'locals' the lead role in re-forging a broken nation lends the process indispensable legitimacy.⁴⁰ Remaining true to the country-specific Islamic identity of the nation in question must therefore be a stated goal of the international community, but it *should* seek to minimize the extremist threat.⁴¹ The Afghan people and their leaders bear responsibility for the success of their nation, but the present regime exists and is able to sustain itself only through international assistance; it has little future without the patronage of external supporters. Importantly, Afghans seem to be largely accepting of this reality and to desire foreign help. Few have interest in seeing a return of the Taliban, nor, given the country's tradition of pious adherence to a moderate version of Islam, do they wish to cede control to extremist mullahs. This being the case, the international community can and should engage with Afghan leaders, conservative and liberal alike, to ensure that the popular will of the people finds expression in the constitution. Given that the aid community has generally enjoyed the good will of the Afghan people, at the time of the Constitutional Loya Jirga and now, international intervention towards this end represents positive engagement not onerous interference.

Unfortunately, the nature of the constitutional process and events in Afghanistan over the past twenty years conspired to provide conservative elites and warlords a prime opportunity to integrate their religious viewpoints in the constitution.⁴² However, there is no reason that the religious views of entrenched conservatives had to form an unalterable component of a permanent constitution. One more effective approach for the international community could have been to implement an interim constitution.⁴³ This procedure, which has been used successfully, most notably in South Africa, could have reduced the long term impact of the Islamists by allowing for popular review and renegotiation of the constitution after a set period of years.⁴⁴ Reformulating Afghan constitutional development as a two-stage process

would have given security, civic, and legal education initiatives time to work. The results of these would likely have been a population less threatened by warlordism, aware of the possibilities of democracy and the formation of a group of moderate Islamic jurists, educated outside *madrassas*, and able and willing to formulate a coherent mixture of Islamic values and civil law.⁴⁵ Another approach, as contemplated by President Karzai,⁴⁶ could have been to build in a constitutional review process to take place five or ten years down the road. Convincing the Afghan legislature to revisit troublesome constitutional provisions, especially those relating to Islam, would now be facilitated if such a step had been mandated from the outset.

Consideration of Islamic law-sensitive legal development in Afghanistan, however, cannot take place without some reference to the judiciary as the institution charged with interpreting the new constitution. Because the Supreme Court has the power to reject virtually any law or treaty as un-Islamic, the prospect of a Court controlled by Islamic fundamentalists could, in the opinion of one expert, be catastrophic.⁴⁷ Mohammad Kamali, a constitutional advisor to the ATA, frames the issue thus:

An enlightened approach to the Shar'[i]a, to matters of interpretation and *ijtihad*, can be conducive to the establishment of a just government that is observant of its duty to serve the people. A rigid and doctrinaire approach to the Shar'[i]a can, on the other hand, also turn it into an instrument of oppression...Past experience tends to show that they [shari'a and statutory legislation] are not natural allies; to forge a good and purposeful pattern of interaction between them requires resource development, fresh and relevant research as to how to build a people-friendly legal order in which the traditional and the more modern legal acumen can work together to realise the objectives of the new constitution⁴⁸

Judicial capacity building can begin by reforming the Kabul *shari'a* faculty as a means of fostering the "enlightened" approach that Kamali advocates. This is especially important in light of Article 118 of the constitution. The provision allows jurists to be appointed to the Supreme Court bench with just an Islamic law background and no civil law experience, stating that judges "should have higher education in law or in Islamic jurisprudence."⁴⁹ As noted in a recent conference on Afghan legal development,⁵⁰ a new approach to Islamic legal instruction should de-emphasize the concept of imitation (*taqlid*) and bolster the practice of *ijtihad* to contextualize Islamic norms as a means to deliver "justice in the best possible manner," as permitted by Article 130. Traditionalists might counter that such a method contemplates altering laws that are unalterable. However, this modern view would not reformulate the theory of *ijtihad* itself, but permit it to be applied even by secular judges outside the restricted class of *ulama* in the name of social justice.⁵¹ With this modern approach of flexible *ijtihad*, the incompatibility between Islamic law and the state begins to fall away.⁵²

The point is not to engage in a theoretical discussion of the new Islamic jurisprudence, but rather to illustrate that such theories already exist and should be actively acknowledged, embraced, and employed as a means of countering conservative religious factions. The type of "resource development" Kamali has called for is not accomplished overnight. There are few quick-fixes in the legal development field, especially in a country with entrenched religious, tribal, and patriarchal structures. Strategic initiatives designed to engender key changes in Islamic jurisprudence are no exception. But promoting moderate Islamic capacity is likely to cultivate judges and legislators who place greater value in

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realizing the constitution's rights-affording provisions than exploiting its religious content.

The heated discussion over reformulating Islamic law for the 21st century—to say nothing of the debate over Islam and democracy—has produced many proposals, few concrete solutions and even fewer examples of demonstrated success. We are now witnessing a desperate effort

to make sure a final resolution in Afghanistan places it definitely in the latter category. While the constitution could provide a spark for future conflict, it may also prove workable in the long term. A keener awareness of, and informed approach to the *shari'a* in Afghan legal reform is hardly a magical remedy, but it may be the beginning of a solution.

¹ On the value of integrating customary legal traditions into the formal judicial system in a post-conflict country, see Ranheim, Christian. "Legal Pluralism in East Timor: The Formal Judicial System and Community Based Law" United States Institute of Peace. October 2003.

² Melia, Thomas O. "Afghan Perspectives on Democracy: A Report on Focus Groups in the Kabul Area On the Eve of the Emergency Loya Jirga"; National Democratic Institute for International Affairs, 15. Available at: http://www.accessdemocracy.org/NDI/library/1411_af_report_052802.pdf; (accessed November 28, 2004) quotation from a university-educated Pashtun woman.

³ Lau, Martin. "Afghanistan's Legal System and its Compatibility with International Human Rights Standards"; p. 27; Available at: <http://www.icj.org/IMG/pdf/doc-51.pdf> (accessed November 28, 2004)

⁴ Jirga is the Pashtun word for "assembly"

⁵ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions. December 1, 2003. Available at: <http://www.unama-afg.org/docs/bonn/bonn.html>. (accessed December 5, 2004)

⁶ Article Two states: "followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law". Although the final version is more tolerant than was the draft, which only provided for freedom to perform religious rites, it remains to be seen whether the provision will be interpreted as guaranteeing unequivocal "religious freedom. For criticism of the draft version, see testimony of President of the Institute on Religion and Public Policy: Congress, House, Committee on International Relations, Subcommittee on International Terrorism, Non-Proliferation and Human Rights, State Department Report on International Religious Freedom, 108th Congress, February 10, 2004. Available via Lexis-Nexis.

⁷ See Articles 131, 22, 58 and 7

⁸ Kamali, Mohammad. "Islam and Its Shar'a in the Afghan Constitution 2004, With Special Reference to Personal Law". Paper given at the conference on "The Shari'a in the Afghan Constitution and its Implication for the Legal Order: Family and Succession Law, Commercial Law and Trade." February 23rd and 24th. 4

⁹ *Id.*, at 13. I rely on Mohammed Kamali's translation of Article 3 of the 2004 constitution from the official Dari, as well as his translation of the 1964 language.

¹⁰ *Id.*, 13.

¹¹ *Id.*, 14. Kamali describes the Afghan parliament's debate on the Marriage Law of 1971, in which opponents of reform of child and marriage law were able to point to "almost any provision of Islamic law on the topic of their concern". With the expansion of the possible bases for the repugnance argument expanded in the 2004 constitution, such arguments are likely to be seen again.

¹² Arjomand, Said Amir. "The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan." Available at: <http://www.cic.nyu.edu/pdf/E14RoleofReligioninConstitutionArjomand.pdf> (accessed November 28, 2004)

¹³ The Hanafi School is one of the four primary schools of shari'a, and predominates in Afghanistan.

¹⁴ Kamali, 8. The author's conclusions are drawn from his experience traveling the country as part of the Constitutional Commission.

¹⁵ The Hanbali school (named after its founder, Ahmad ibn Hanbal) became the conservative response to the rise of the rationalist Mutaliziite party in 9th century Baghdad. Hanbali fiqh relies heavily on the Qur'and and sunna, to the exclusion of techniques of personal opinion and analogy. The Hanbali school is favored by the Wahhabi "unitarians" and is currently dominant in Saudi Arabia.

¹⁶ Article 130 also mandates that the court's decision be made "in a way to serve justice in the best possible manner"

¹⁷ Rubin, Barnett R. "Crafting a Constitution for Afghanistan" *Journal of Democracy* 15, No. 3, July 2004, 14.; Kamali, 11.

¹⁸ Kamali, 8.

¹⁹ Rubin, 13.

²⁰ Hart, Vivien. "Democratic Constitution-Making" United States Institute of Peace Special Report. Available at <http://www.usip.org/pubs/specialreports/sr107.html>. (accessed October 3, 2004) 2.

- 21 International Crisis Group. "Afghanistan's Flawed Constitutional Process" ICG Asia Report No. 56; June 12, 2003. Available at <http://www.reliefweb.int/library/documents/2003/icg-afg-12jun.pdf> (accessed November 16, 2004) at 16.
- 22 Shura-yi Nazar means "Supervisory Council of the North" a mujahidin group founded by former President Rabbani and Ahmed Shah Massoud. Sayyaf is a Saudi-backed, Wahabbi Pashtun warlord. See Gannon, Kathy. "Afghanistan Unbound" *Foreign Affairs* Volume 83, issue 3.
- 23 A statement by East Timorese NGOs issued during that nation's constitution-making process best articulates the importance of such public information and civic education initiatives: "[a] people have to be provided with the information on the choices that have to be made, information on what a Constitution is, information on the options available to them on the fundamental issues. They will then need time to consider and debate so that they are able to form opinions, time to hold discussions in order to seek consensus...None of this can happen in three months. See Louis Aucoin and Michele Brandt, "East Timor's Constitutional Passage to Independence" (Draft) United States Institute of Piece Project on Constitution-Making, Peace building and National Reconciliation. April 15, 2003
- 24 The Secretariat of the Constitutional Commission of Afghanistan, "The Constitution Making Process in Afghanistan." Available at: <http://www.constitution-afg.com/resrouces/Constitution-Making%20Process%20Final.doc> (accessed December 15, 2004)
- 25 International Crisis Group, 18.
- 26 International Crisis Group, 16. ICG interviews with UNAMA staff form the basis for this contention. Farooq Wardark, Director of the Secretariat of the Constitutional Commission responded to the ICG commentary in a letter disputing some of Aziq Huq's conclusions regarding the ATA's public consultation efforts. Apart from stating that the ATA would meet with "religious leaders," Wardak does not respond to Huq's characterization of the ATA's position vis à vis the empowerment of Islamists. Letter available at: <http://www.constitutionafg.com/resrouces/The%20ICG%20Report,%20edited%20by%20Farooq%202.doc>. For more on the ATA's withholding of the draft constitution during public consultations sessions, see Rubin, 10.
- 27 Agence France Presse, "Afghanistan Launches Public Consultation on Constitution Amid Criticism," June 3, 2003, in Ariane Brunet and Isabelle Solon Helal, "Seizing and Opportunity: Afghan Woman and Constitution-Making Process" (Rights & Democracy Mission Report). *Droits et Democratie*. September 2003. Available at: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016657.pdf> (accessed December 14, 2004)
- 28 International Crisis Group, 26.
- 29 Harvard Program on Humanitarian Policy and Conflict Research- Conflict Prevention Initiative. "Afghan Legal Reform: Challenges and Opportunities (HPCR Policy Brief, January 2003)" Available at: <http://www.preventconflict.org> (accessed November 28, 2004)13.
- 30 King Amaanullah, who attempted to institute radical progressive reform in the 1920s, was eventually defeated by a coalition of disparate tribal elements led by politically minded mullahs under a banner of Islam. See Poullada, Leon B. *Reform and Rebellion in Afghanistan, 1919-1929*. (Ithaca, NY.:Cornell University Press, 1973), 131.
- 31 Stephen Graham. "Women's Rights, the Place of Islam are Focal Points in Afghanistan Debate" *St. Louis Post-Dispatch*. December 20, 2003. Available via Westlaw. (accessed November 25, 2004)
- 32 Amy Waldman, "Meeting on Constitution, Afghan Women Find Old Attitudes" *The New York Times*, December 16, 2003, A1. See also "Mujaddedi calls delegate 'infidel'" (accessed December 10, 2004); available from <http://www.rawa.org/ai-lj.htm> (accessed December 2, 2004)
- 33 Ustad Abdul Rasul Sayyaf (accessed December 4, 2004); available from <http://www.globalsecurity.org/military/world/afghanistan/sayyaf.htm>. For information on Sayyaf's atrocities, see Gannon, 1. For more on Sayyaf's Wahabbi beliefs and on Wahhabism itself, see also Algar, Hamid. *Wahhabism: A Critical Essay*. (Oneonta, NY: Islamic Publications International, 2002).
- 34 See Rubin, 14 for a discussion of the provisions to which Islamist elements removed their opposition (Articles 2, 3, 7 and 22)
- 35 This is especially true in Afghanistan, where decades of war, religious tyranny by the Taliban, corruption and misrule have instilled a large degree of mistrust of the central government in the Afghan population. On flexibility and efficiency of customary legal systems, See Ranheim.
- 36 For a discussion of Pashtun customary laws (including the concept of Poar, where in penance for a murder the perpetrator's family may be forced to provide the family of the victim with "two fair and virgin girls") see International Legal Foundation "The Customary Laws of Afghanistan" (2003) Available at: http://www.theilf.org/ILF_cust_law_afgh_10-15.doc (accessed December 1, 2004)
- 37 Lau, Martin. "Islamic Law and the Afghan Legal System" Available at: <http://www.bglatzer.de/arg/arp/lau.pdf>; (accessed November 8, 2004)
- 38 See Arjomand, 2; See also Hart.
- 39 Kamali discusses the problem of ambiguity in light of hudud punishments, banking interest and women's rights. See Kamali, 3.
- 40 Carothers, Thomas. *Aiding Democracy Abroad: The Learning Curve*. (Washington, DC.: Carnegie Endowment for International Peace, 1999) 260, 266.
- 41 Such threats may materialize in the form of mullahs serving their own political or social ends by obstructing reform from a platform of apparent Islamic legitimacy. Moreover, while myriad treatises have demonstrated the compatibility Islam and democracy, some may attempt to apply shari'a penalties such as the hudud punishments, or God's "restrictive ordinances," which call for death by stoning, amputation, etc. which are prima facie at odds with human rights standards, the application of which the international community has the right to prevent. See Schact, Joseph. *An Introduction to*

Islamic Law. (Oxford, UK: Clarendon Press, 1964) 175. Also, certain verses of the hadith also call for stoning, see Volume 3, Book 49, Number 860 of the Bukhari translation.

42 Intimidation efforts were widespread in the CLJ elections, while many of the eventual delegates were either closely tied to Karzai or to the warlord factions. See Sifton, John. "Flawed Charter for a Land Ruled By Fear: Afghanistan." *International Herald Tribune*. December 22, 2003. Available via WestLaw.

43 Barnett R. Rubin, former advisor to UN SRSG Lakhdar Brahimi, endorsed such an approach. See Rubin, 19.

44 East Timor provides a good example of where entrenched political interests, the Freitlin political party in this case, exerted undue influence in the constitutional process and were able to ignore the results of a popular consultation because they were in power at the time. See Louis Aucoin and Michele Brandt.

45 Ambassador-at-Large for Religious Freedom in the US Department of State, John Hanford, identifies the lack of jurists trained outside a "religious milieu" as a major problem for Afghanistan, and recommends training. See Congress, House, Committee on International Relations, Afghanistan: Democratization and Human Rights on the Eve of the Constitutional Loya Jirga, 108th Congress, 1st Session, November 19, 2003

46 In his final speech to the Constitutional Loya Jirga, President Karzai reflected the value of flexibility in constitution-making: "The constitution is not the Koran. If five or ten years down the line we find that stability improves, proper political parties emerge, and we judge that a parliamentary system can function better, then a Loya Jirga can at a time of our choosing be convened to adopt a different system of government." See "Address to the Closing Session of the Constitutional Loya Jirga" by Hamid Karzai, January 4, 2004. Available at: <http://www.unama-afg.org/docs/> (accessed December 15, 2004)

47 Thier, Alexander. "Judiciary Not Upholding Afghan Law." *Seattle Post-Intelligencer*. January 20, 2004. Available via Westlaw.

48 Kamali, 18.

49 Emphasis added.

50 "The Role of Law in Modern Afghanistan" Roundtable Recommendations, held in Rome Italy in December 2002 by the International Development Law Organization. Emphasis added.

51 Haider, Nadya. "Islamic Legal Reform: The Case of Pakistan and Family Law" *Yale Journal of Law and Feminism*. 2000. 293.

52 From the remarks of Mr. Yadh Ben Achour, Professor of Public Law, Faculty of Legal, Political and Economic Sciences of Tunis published in the "The Role of Law in Modern Afghanistan" Roundtable Report, held in Rome Italy in December 2002 by the International Development Law Organization. The Iranian intellectual 'Abolkarim Sourush provides insights for this approach in pieces such as *Theoretical Contraction and Expansion of the Shari'a and A Theory of the Development of Religious Knowledge*, where he posits a vision of a "religious-democratic state" See Schirazi, Asghar. *The Constitution of Iran: Politics and the State in the Islamic Republic*. (London: I.B. Tauris Publishers, 1998) Trans. John O'Kane. 281.