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Direktoren:

Jürgen Basedow, Klaus J. Hopt und Reinhard Zimmermann



The Shari^ca in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law

edited by
Nadjma Yassari

Mohr Siebeck

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Preface

One of the most critical issues for the legal reconstruction in Afghanistan is the limited amount of quality research and the resulting lack of reliable data and analysis. The conflicts of the past 25 years have resulted in the collapse of institutions of higher education and a brain drain as many educated Afghans fled the country. Furthermore, the short-term nature of funding, combined with the fast-paced working environment, have left little room for reflection and severely restricted investments in research and learning.

This is a handicap calling for redress. To assist Afghan colleagues in their endeavour to reconstruct their legal system, the Max Planck Institute for Foreign Private Law and Private International Law invited the deans of the law and Shari'a faculties of the universities of Kabul, Herat, Nangarhar, and Balkh as well as legal experts from Iran, Egypt, and Syria to a conference held in Hamburg in February 2004 entitled: *The Shari'a in the Afghan Constitution and its Implications for the Legal Order: Family and Succession Law, Commercial Law and Trade*¹. The idea was to offer a forum for discussion on the interaction of law and religion. Most Islamic countries have incorporated the Shari'a or Islamic principles in their constitutions as the main or indeed the primary source of law. The implications of such a choice are manifold. So far, no general model has emerged as to how this constitutional postulate is to be translated into the legal reality in various Islamic countries. In January 2004, Afghanistan enacted a constitution where similar formulations were chosen. As a preliminary to the debates within the Afghan legal community, the speakers of the conference presented an analysis of their own systems, traced the various ways in which religion has been incorporated into law and outlined the limits and controversies that have emerged in this regard.

This book contains the papers given at the conference. We were happy to include articles from Afghan scholars living inside and outside the country, notably the articles of Dr. Ali Wardak from the University of Glamorgan (*Building a Post-War Justice System in Afghanistan*), of Bashir Munib from the University of Herat (*Law of Land Tenure and Transfer of Property in Times of War*) as well as the contribution of Mohammad Hamid Saboory, research fellow at the Max Planck Institute in Hamburg (*The Progress of Constitutionalism in Afghanistan*). In the appendices, we have included the Bonn Agreement of December 2001, the Afghan Constitutions of 1964 and 2004 in

¹ See the report of the conference, *Haars, RabelsZ* 69 (2005) 351-355.

Dari and English for comparative purposes, as well as excerpts of the Constitution of the Islamic Republic of Iran, as far as they were relevant to our discussion. As the Egyptian Constitution of 1980 is more easily available², we abstained from reproducing it here. In an effort to open a genuine discussion with the legal community in Afghanistan, all contributions have been translated into Dari, and it is hoped that this will induce a fruitful exchange on equal terms.

This book is the result of thorough and committed teamwork. I would like to thank in particular Mohammad Hamid Saboory and Dr. Winfried Schmitz from the law firm SCHMITZ Rechtsanwälte in Düsseldorf who sponsored his one-year-scholarship at the Institute; Martin Haars, Ann-Christin Maak, Ingeborg Stahl and Uda Strätling for the formatting and final review of the volume; and last but not least Valey Arya, who translated the texts into Dari. I would also like to express my gratitude to the directors of the Max Planck Institute for giving their support and assistance to the Afghanistan project. Finally, the generous financial support granted by the Foreign Office of the Federal Republic of Germany is gratefully acknowledged.

Nadjma Yassari

² See for example *Boyle, K.*, Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt, CIMEL Book Series, No. 3, 1996. The book contains a digest of key human rights judgments along with the texts of the Constitution and the Statute of the Supreme Constitutional Court. The constitution in Arabic and English is available on the website of the Egyptian Parliament www.parliament.gov.eg/EPA/ar/Index.jsp

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Abbreviations

AI	Amnesty International
AIA	Afghan Interim Administration
AICA	Act on International Commercial Arbitration of 1997, Iran
AfgCC	Afghan civil code of 1977
Art.	article(s)
Bonn Agreement	Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions of 2001
CBI	Central Bank of Iran
CC	civil code
CCP	code of civil procedure
CEDAW	United Nations Convention for the Elimination of All Forms of Discrimination Against Women
cf.	confer
ch.	chapter(s)
ComC	commercial code
comp.	compare
CRB	Corporate Registration Bureau
d.	died
DCISA	Draft Constitution of the Islamic State of Afghanistan
DIS	Danish Immigration Service
Divorce Act	Act on the Amendment of the Divorce Provisions of December 10, 1992, Iran
ed(s).	editor(s)
eg	exempli gratia [for example]
EgyptCC	Egyptian civil code of 1949
Enforcement Act	Civil Judgement Enforcement Act of 1977, Iran
etc.	et cetera
f. / ff.	following
FIDIC	International Federation of Consulting Engineers
FIPPA	Act on the Promotion and Protection of Foreign Investment, Iran
FS	Festschrift
HM	His Majesty
H.R. Principles	Human Rights Principles
ICG	International Crisis Group
ICJ	International Commission of Jurists
IDLO	International Development Law Organisation
ie	id est
IFL	International Legal Foundation
int.	international
IRI	Islamic Republic of Iran

X

Abbreviations

IRI Constitution	Constitution of the Islamic Republic of Iran of 1979
ISAF	International Security Assistance Force
J.	Journal
Jh.	Jahrhundert [century]
JVC	Joint Venture Company
LAPFI	Act for the Attraction and Protection of Foreign Investments, Iran
lit.	literally
LJOC	Law on the Jurisdiction and Organisation of the Courts of 1967, Afghanistan
MPI	Max-Planck-Institute
MPs	Members of Parliament
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
NGO	Non-Governmental-Organisation
No.	number(s)
ODI	Overseas Development Institute
OIETA	Organisation for Investment, Economic and Technical Assistance of Iran
PCM	Communist Party of Morocco
PDPA	Peoples' Democratic Party of Afghanistan
pl.	plural
POW	prisoners of war
p./pp.	pages
SCC	Supreme Constitutional Court of Egypt
sect.	section
stud.	studies
Truth Commission	Special Court of Human Rights of Afghanistan
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations
UNAMA	United Nations Assistance Mission for Afghanistan
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
WCLRF	Women and Children and Legal Research Foundation
1933 Act	Act on the Observance of the Personal Status of non-Shi'ī Iranians in the Courts of August 1, 1933

Contributors

Behrooz Akhlaghi, Dr. Prof., is Associate Professor for commercial law at the Law Faculty of the University of Tehran since 1970. He graduated from the Faculty of Law and Political Sciences of the University of Tehran in 1961 and pursued his studies at the University of Aix-en-Provence with a Doctorat d'État in private law in 1970. Since 1979 he is practising lawyer with the International Law Offices Dr. Behrooz Akhlaghi and Associates in Tehran. Akhlaghi is a member of the Iranian, the International, and the American Bar Association, as well as the International Business Law Consortium (IBLC) and the Law Association for Asia and the Pacific (Law Asia). Currently he is in charge of drafting a new commercial code for Iran.

Jürgen Basedow, Dr. iur. Dr. h.c. LL.M. (Harvard), is Professor at the Law Faculty of the University of Hamburg and since 1997 the Director of the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg. From 1987 to 1995 he was a Professor of private law, comparative law, private international law, international litigation, and international economic law at the University of Augsburg and from 1993 to 1994 he was the Dean of that faculty. He furthermore was Professor of private and private international law, and international economic law at the Free University of Berlin from 1995-1997. Basedow is a member of various governmental advisory committees.

Baudouin Dupret, Dr. LL.M., is Research Fellow at the Centre National de la Recherche Scientifique (CNRS), affiliated with the Institut Français du Proche-Orient (IFPO), Damascus, Syria. He holds a M.A. in Arabic and Islamic Sciences and a LL.M. from the Catholic University of Louvain, a G.D. in Middle Eastern Studies from the American University in Cairo and a Ph.D. in Political Sciences from the Institut d'Études Politiques de Paris (IEP). Since 2003 he holds a 'habilitation à diriger des recherches' from the IEP in Paris. Dupret has been a Research Assistant in the Centre for the Study of the Modern Arab World at the Catholic University of Louvain and a Research Fellow at the Centre for Economic, Legal and Social Research (CEDEJ) in Cairo.

Mohammad Hashim Kamali, Dr. Prof. LL.M. (London), is Professor of Islamic law and jurisprudence at the International Islamic University Malaysia in Kuala Lumpur. He studied law at the University of Kabul and completed

his LL.M. in comparative law, and his Ph.D. in Islamic and Middle Eastern law at the University of London, 1972 and 1976 respectively. Kamali served as Assistant Professor at the Institute of Islamic Studies, McGill University in Montreal, and later as a Research Associate with the Social Sciences and Humanities Research Council of Canada. From May to September 2003 he was a member of the Constitutional Review Commission of Afghanistan. At present he is Dean of the International Institute of Islamic Thought and Civilisation (ISTAC) in Kuala Lumpur.

Elaheh Kolaei, Dr., holds a Ph.D. in international relations from the Tarbiat Modarres University of Tehran. She has been the Director General of Educational Affairs at the University of Tehran from 1997-2000. Until 2000, when she was elected to the Iranian Parliament as the representative of Tehran, she has been Professor at the Faculty of Law and Political Sciences of Tehran University. In 2004, Dr. Kolaei resigned from her Parliamentary seat. She is a member of the Council for Planning for Women Affairs at the Ministry of Education, Research and Technology and the Commission for National Security and Foreign Policy and a member of the scientific board in the Faculty of Law and Political Sciences.

Bashir Ahmad Munib, is heading the Department of *tafsīr* and *hadith* at the University of Herat. He graduated from the Shari'ah Faculty of the University of Herat in 1996 specialising in law and jurisprudence. From 1997 to 2004 Munib was teaching at the Shari'ah Faculty.

Mohammad Rasekh, Dr. LL.M. (LSE), is a Fellow at the Department of Law, London School of Economics and Political Sciences (LSE). He holds a LL.B., from the Faculty of Law of the University of Tehran, a LL.M. from LSE and a Ph.D. from the Faculty of Law of the University of Manchester. He has furthermore studied for several years at the Islamic Seminary in Tehran. He held the position of an Assistant Professor at the Faculty of Law at the University of Shahid Beheshti from 1998-99. He has recently joined the Iranian Bar Association.

Mohammad Hamid Saboory, is a law graduate from the University of Kabul, Afghanistan. In 2004 he was a Visiting Researcher at the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg with a scholarship from the law firm SCHMITZ Rechtsanwälte in Düsseldorf.

Irene Schneider, Dr. Prof., is Professor for Islamic studies at the University of Göttingen. Until 2003, she was Project Director of the special research unit 'deviation and integration'. Her research centres on Islamic legal history, women in Islam, reconstruction of early Islamic history and socio-politics

in Islamic countries. She studied and worked at the German centres of Oriental studies in Freiburg, Tübingen and Cologne.

Adel Omar Sherif, Dr., is Deputy Chief Justice at the Supreme Constitutional Court of Egypt since December 2002. He holds a Ph.D. in Constitutional Law from the Universities of Cairo and Ain Shams and an Advanced Studies Diploma in Public and Administrative Law. Between 1980 and 1992 he served in various positions within the judicial section and other departments of the Council of the State (Egypt's system for administrative judiciary). Since 1992 Justice Sherif has been a Visiting Fellow at various Human Rights Law Centre as well as Visiting Professor at the Faculty of Law of McGill University.

Nahid Shid is a practising lawyer in Tehran. A specialist of social security, insurance issues and pension claims, she is engaged in research and counselling of women rights. She is an adviser to the family courts in matters of maintenance and compensation claims for divorcees and the Head of the Family and Women Association in Iran. Shid has been involved in the enactment of the laws concerning the adaptation of the amount of dower to the inflation rate, the insurance for housewives and the compensation claims of women divorced on the initiative of their husbands.

Ali Wardak, Dr., is a reader in criminology at the University of Glamorgan, U.K. He holds a B.A. in law and jurisprudence, an M.A. in sociology and wrote his Ph.D. thesis in the field of criminology. His main teaching interests include criminological theory, comparative criminology, and social exclusion and crime. He has published papers and reports in the areas of law, politics and ethnicity in Afghanistan, and is a member of the academic board of the Institute for Afghan Studies, USA. Wardak has furthermore been a Consultant for the British Overseas Development Institute (ODI).

Nadjma Yassari, Dr. iur., LL.M. (SOAS), is the Head of the Department for the Laws of Islamic Countries at the Max Planck Institute for Foreign Private Law and Private International Law in Hamburg. She holds a LL.M. from the School of Oriental and African Studies of the University of London, and a Ph.D. from the University of Innsbruck. Her main field of research is national and international family and succession laws of Islamic countries.

Part I: Sharī'a in Afghanistan

Introduction

After 25 years of civil war, religious dictatorship and foreign occupation peace is slowly coming back to Afghanistan. It is a fragile peace perhaps, a peace that has to be conquered after a complete destruction of civil order and institutions. Given the mutual distrust in society that has resulted from the absence of reliable institutions during a whole generation the re-establishment of such institutions and of a legal order that is basically approved by the population is a Herculean labour. The promulgation of the constitution of Afghanistan in January 2004 by the *Loya Jirga* gives evidence of a growing belief of the political elite of Afghanistan that time has come for a reinstatement of law as an order of peace. In fact, a peaceful coexistence of people of different cultural, linguistic, and ethnic origin would appear inconceivable if not in a legal framework that defines clear responsibilities and areas of freedom. The new constitution of Afghanistan is to be seen as a first step in that direction.

In a country that is fairly heterogeneous in many respects the profession of the Islamic religion by almost 100% of the population is a common element which helps to generate a national identity. It is therefore no surprise that Art. 1 Constitution 2004 proclaims Afghanistan an Islamic Republic and that Art. 2 declares the 'sacred religion of Islam' to be the religion of Afghanistan. Given the country's troublesome experience under the Taliban regime, however, the profession of the Islamic character of the state might also be interpreted as a conservation of some influence of fundamentalist ideas in post-war Afghanistan. On the other hand it is well known that the constitutions of other fairly western-minded Islamic states such as Tunisia make an equal claim to Islam which after all must be considered ambivalent for legal purposes.

After a first reading of the new constitution of Afghanistan it appears doubtful, whether other provisions provide more clarity. It is true that under Art. 3, 'no law may be contrary to the beliefs and provisions of the sacred religion of Islam'. This provision might seem to confer a certain veto power to Islam and the religious establishment. But like many old texts the *Qur'ān* is liable to numerous different interpretations, and it could be argued that laws adopted under the new constitution are not contrary to Islam as long as they can be reconciled with one of those interpretations. Art. 130 and 131 Constitution 2004 also support the view that the effect of religious laws is of subsidiary, ie minor significance. Under Art. 130 the court shall follow the provisions of the *ḥanafī* jurisprudence only where no provisions exist in the constitution or the laws for a case under consideration, and a similar subsidiary role is accorded to *shī'ī* jurisprudence in Art. 131.

It is not the purpose of these introductory remarks to go into further details. Whatever arguments could be made, it would seem, however, that the constitution is ambivalent and paves the way for different interpretations relating to the role of the *Shari'ah*. This observation puts the burden on the shoulders of the future institutions designed to shape the legal system of Afghanistan, in particular of the legislature and of the judiciary. The courts' decision on the greater or lesser significance of *Shari'ah* will probably depend, inter alia, on the existence of appropriate provisions in the law of the state dealing with typical conflict situations of contemporary life. The more lacunae exist in state law, the more frequent will be the recourse to the subsidiary rules of *Shari'ah*. In this respect it is not difficult to foresee that judges will discover important gaps of the legal system in the near future. The civil code which is at least technically still in force shows influence of the French code civil in matters relating to the law of obligations and property, but basically reflects Islamic law and ḥanafī jurisprudence in respect of personal status. The discrimination of women which is characteristic for many rules of Islamic law in the field of family and succession will sooner or later and probably sooner run counter to the prohibition of all kinds of discrimination on the basis of gender laid down in Art. 2 of the Universal Declaration of Human Rights. It should be added that the Universal Declaration is specifically referred to in the second recital of the preamble of the new constitution as being respected by the people of Afghanistan.

A modernisation of civil law would therefore appear to be urgently required. This is equally true for the commercial code which is essentially a translation of the Ottoman commercial code of 1850. The experience of many transition countries shows that the process of modernisation cannot be entirely left to legislation. It is rather a step-by-step modernisation carried out by the courts and the legislator which allows the legal system to adjust to changes of society. One of the most important tools in this process is the existence of a legal press, in particular a collection of court reports and law journals which enable lawyers and the general public to take note of, and reflect the development of the law as evidenced by the judgements of the courts.

Afghanistan is embarking on the stony road which leads from the rule of force to the rule of law. Due to the great differences in culture, economic development and religion, Western law such as that of the Federal Republic of Germany can hardly be recommended as an appropriate model to follow. The particular tensions that arise between forms of modern life and religious law can best be studied in countries that have experienced a similar evolution. That is why it is important to hear the voices of scholars and legal professionals from Islamic countries such as Egypt, Syria, or Iran and further experts of Islamic law who can share that experience with their Afghanistan colleagues. Our role in this debate is that of an honest broker.

Jürgen Basedow

The Progress of Constitutionalism in Afghanistan

MOHAMMAD HAMID SABOORY

- A. Introduction
- B. Constitutional Law in Afghanistan
 - I. The Constitution of 1923
 - II. The Constitution of 1931
 - III. The Constitution of 1964
 - IV. The Constitution of 1978
 - V. The Constitution of 1980
 - VI. The Constitutions of 1987 and 1990
 - VII. The Constitution of 1992
 - VIII. The reign of the Taliban 1996-2001
 - IX. The 2004 Constitution
- C. Conclusion

A. Introduction

The theory of constitutionalism was introduced into the Afghan society with the promulgation of the first Afghan constitution in 1923. Since Afghanistan has an Islamic and traditional society, the implementation of constitutionalism represented a great challenge. The juxtaposition of the rule of Islam, traditions, statutory laws and other elements challenged its legitimacy, and these factors have always been a test for any constitution promulgated in Afghanistan. All constitutions with the exception of the Constitution of 1964 were promulgated in eras of revolution and uprising. The lack of public consultation and participation reduced the support of the people and affected the impact of the constitution. This led to a situation of instability and injustice in the country. This paper examines the constitutional developments in Afghanistan since 1923. However, as not all aspects of the constitutional process can be considered here¹, the focus will be on the place of Islam, traditions, and the integration of secular law into the legal system in the various constitutions.

¹ See for a detailed account of the seven constitutions of Afghanistan *Yassari/Saboory, Sharia en nationaal recht in Afghanistan*, in: *Sharia en nationaal recht in twaalf moslimlanden, Otto et al.* (eds.) (2006, forthcoming).

B. Constitutional Law in Afghanistan

I. The Constitution of 1923

The first Afghan constitution in 1923 was based on King Amanullah's modernisation policy. The constitution was approved by the Great Assembly, the *Loya Jirga*, in April 1923. A plethora of reform edicts on administrative and educational affairs called *nizāmnāmas*² followed the promulgation of the constitution. Islam was recognised as the official religion. Social institutions, industries and economical infrastructure and a catalogue of basic rights were introduced³. The judiciary was to be independent, and the creation of judicial structures was defined as the most significant step for the enforcement of law (Art. 53). A special high court for military and civil trials was established as an independent body on a temporary basis (Art. 55). Elementary education became compulsory for every citizen (Art. 68).

It must be noted that tribalism and Islam are the two major influences determining the social and cultural characteristics of Afghan society. Islam has always strongly influenced the social and cultural life of the Afghans⁴. However, tradition has had a stronger impact in some parts of Afghanistan than religion. Even though some of these traditions are not in accordance with Islamic principles, they have become part of the lifestyle of parts of the population. Soon after the promulgation of the constitution tribal revolts were mounted against the reforms undertaken by the King. The religious establishment also contended the implementation of the constitution, especially the intended educational program of Amanullah. The tribal revolt and the religious opposition forced Amanullah to reconvene another Loya Jirga in January 1925 to discuss some of the articles of the Constitution. The bone of contention was in particular Art. 2 Constitution 1923, because it did not mention explicitly the *ḥanafī* school as the predominant one⁵. Although the provision of Art. 21

² See generally for a history of the judiciary in Afghanistan *Wakili Popalzai Durani*, *Dār al-qāḍā' dar afqānestān* (1990). *Nizāmnāmas* are the first legal documents or written laws in Afghanistan, dating back to 1919. More than 51 *nizāmnāmas* were published by January 1929, according to the latest report of the Ministry of Justice 75 *nizāmnāmas* were enacted in total, some of which are lost today due to the destruction of the legal archives during the wars in Afghanistan.

³ Freedom of religious practice for the followers of other religions (Art. 2), delegation of some of the authorities to the ministers (Art. 6), individual liberty (Art. 9), abolishment of the principles of slavery (Art. 10), freedom of press (Art. 11), right to education (Art. 14), equality of rights and duties (Art. 16), prohibition of forced labour (Art. 22).

⁴ *Kamali*, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (1985) 1-18; *Amin*, *Law, Reform and Revolution in Afghanistan: Implications for Central Asia and the Islamic World* (1992) 40.

⁵ Art. 2 Constitution 1923 read: 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 that they do not disturb the public peace. The article, as amended on January 28, 1925, read: The religion of Afghanistan is the sacred religion of Islam and its official

Constitution 1923 strengthened the position of Islamic law by stating that all cases and disputes should be decided according to the principles of *Shari'ah*, the religious leaders argued that the adoption of the ḥanafī school would be desirable, as it excludes other unorthodox variations of Islam. They further argued that just as the Iranian constitution had made a reference to the *shī'ī* school, a similar reference should be made to the ḥanafī school in the Afghan constitution. Amanullah emphasised that the adoption of such restrictive terms would undermine the fundamental rights of followers of other religions and would challenge the national unity of Afghanistan. The consultation however, did not breach the gulf between the parties: the religious establishment pursued its policy against Amanullah, and Amanullah continued his modernisation efforts.

The religious issue, its position within the constitution and its interpretation, remained a critical point. The government was accused by the opposing powers of enacting laws contrary to the principles of the *Shari'ah*. This was, however, not true since the main source of the laws were Islamic principles. For example, the general criminal code that was enacted in 1927 classified crimes and their punishments according to the principles of the ḥanafī school of law. The religious establishment did not accept Amanullah's interference in what they considered to be 'God's business'. They felt their position as sole interpreters of the *Shari'ah* in danger and did not want to lose their influence and power. They especially disliked the potential 'undue' rights that the new laws might give to women.

Amanullah can be seen as the first reformer and progressive leader of Afghanistan, to be mentioned in one breath with Atatürk of Turkey or Reza Shah of Iran. His legacy is the establishment of the basic legal structure, the promulgation of individual freedoms and the foundations for Afghanistan's move towards the rule of law.

II. The Constitution of 1931

On October 31, 1931 the second constitution of Afghanistan was promulgated. Due to the rise of internal unrest and opposition to the reform policy undertaken by Amanullah, considerable attention was given to the rule of the *Shari'ah* in the next Afghan Constitution of 1931. Many *nizāmnāmas* were amended after the ratification of the 1931 Constitution, the expression 'nizāmnāmas' itself was changed to '*usūlnāma*'.⁶ The 1931 Constitution with minor amend-

religious rite is the sublime ḥanafī rite. 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. Hindus and Jews must pay special tax and wear distinctive clothing.

⁶ After 1929 the laws in Afghanistan were labelled *usūlnāmas*; 69 *usūlnāmas* published from 1933 to 1964 could be retraced, see *Wakili Popalzai Durani* (note 2) 623-626. According to recent reports of the Ministry of Justice the actual number of *usūlnāmas* is however 98.

ments endured for 33 years. The new King, Nadir Shah, endeavoured to appease the religious establishment and adopted a conservative policy. He annulled all secular legislations of Amanullah and strengthened the enforcement of Islamic law through religious courts.

Art. 1 Constitution 1931 proclaimed the Sharī'a as the law of the land. As a reaction to the 1923 Constitution, Art. 1 attributed to the ḥanafī school the supremacy over all other schools. Moreover, all court cases were to be solved in the light of the ḥanafī school of jurisprudence. The position of religious minorities such as Hindus, Sikhs and Jews and the followers of other schools of Islam, in particular the Shī'ī, was not clearly defined, as Art. 1 only guaranteed them protection as long as public peace was not disturbed by their religious practice. The 1931 Constitution provided a complicated theory of religious freedom and was not free of contradictions. According to Art. 9 all persons residing in Afghanistan were considered Afghan subjects without any discrimination of religion or creed. Art. 10 strengthened this position by entitling all Afghan nationals to enjoy their legitimate right in religious rituals. Furthermore, the provision of Art. 22 gave religious minorities the right to religious education. This did not correspond with Art. 1. One could argue that the provision of Art. 9 included the shī'ī residents of Afghanistan. Art. 75, however, contradicted the provision of Art. 9, 13 and 22, since it stated that the ministers should be Muslim and Afghan citizens. This created problems as regards the political rights of Afghan citizens and was discriminatory. On the one hand, Art. 75 provided for Muslim ministers, excluding followers of other religions, on the other hand, it provided that they should be Afghan citizens. In fact, this article considered non-Muslims as Afghan subjects without political rights. The 1931 Constitution was ambiguous: on the one hand, it was based on religious and traditional values and Nadir Shah had adopted an exceedingly conciliatory stance to demands of the religious and tribal establishment, on the other, it was modern and demanded all laws to be within its framework. The main difference between the first two constitutions of Afghanistan lies in the position that was officially awarded to Islam and to democratic features. There are no sources indicating that either constitution was debated in any Loya Jirga or that any public consultation was sought before their promulgation.

During the years of Nadir Shah's rule, statutes and acts dealing with the administration of government, civil, criminal and commercial affairs were enacted. They were based on Islamic and customary law, but the influence of Western theories was also visible. They benefited from comparative studies of the legal systems of Turkey, Egypt, Germany and France and their legal practice. The Commercial Code of 1965 and later the Civil Code of 1977 were the results of such influence.

From 1931 to 1964 the need to develop the legal sector, to unify the legal structure, to increase the knowledge and training of members of the courts and judges, and to establish institutions of higher education such as the faculty of

law, was felt strongly. These reforms had to be based on a conciliatory approach to provide a common ground for the requirements of all societal groups: traditionalists, conservatives, and moderates. However, the lack of education, the spreading of corruption, the underdevelopment, and the autonomy of tribal leaders led Zahir Shah, who had been King since 1933, to introduce new reforms and strengthen his authority in all parts of the country.

III. The Constitution of 1964

In March 1963, Zahir Shah appointed a committee composed of seven members to draft a new constitution. He aimed to remove discriminatory provisions, to mobilise the governmental apparatus, to centralise the authority of the government, to reform the judiciary, and to promote education. The Constitutional Committee assisted by a French adviser, Louis Fouger, presented the first draft to the 455-member Loya Jirga (including four female members) that convened in Kabul in September 1964. The new constitution was ratified on September 20, 1964 and promulgated by the King on October 1, 1964⁷.

This time a wide range of public consultation and participation preceded the promulgation of the third Afghan constitution. A constitutional monarchy was introduced. The executive, legislative, and judicial branches were separated and members of the royal family were excluded from political office. Art. 8 Constitution 1964 provided for the King to be a follower of the ḥanafī school of law. Although Zahir Shah kept considerable power as the head of the state (Art. 9), a Supreme Court was established and the judiciary was declared independent from the legislative and executive powers (Art. 97).

The constitutional organs adopted measures to unify and consolidate the existing disparate laws and the unspecified judicial organisation. New laws were introduced to unify the judicial practice, organisation, jurisdiction and in particular the procedure of the courts that had been mainly regulated through Shariʿa courts and/or the traditional tribal dispute resolution mechanisms. Furthermore all laws were published in a governmental publication, the so-called *rasmī ǧarīda* [Official Gazette]⁸. This collection has remained the only reliable source of law in Afghanistan.

Under the new constitution, Islam and the ḥanafī school of law retained considerable power: the King had to be a Muslim and follower of the ḥanafī rite (Art. 8). The other members of the government, members of the two houses of the parliament and other key administrative positions were not under that obligation. According to Art. 64 the parliament was required not to enact any laws which were contradictory to the principles of Shariʿa and the values embodied

⁷ *Evans, Afghanistan: A Short History of Its People and Politics* (2002) 120.

⁸ A complete list of the Official Gazettes is available at <www.idlo.int/afghanlaws/index.htm>.

in the constitution. The jurisdiction for the settlement of all disputes, including those over property and family matters, which until then were under the jurisdiction of Shari'ah courts, was transferred to governmental courts (Art. 98).

However, the 1964 Constitution remained stuck between its own provisions: on the one hand, priority was afforded to Shari'ah law; on the other hand, Art. 69 potentially recognised the supremacy of statutory law by stating that the provisions of the hanafi school of jurisprudence should only be considered where no statutory law could be found, thus establishing for the first time an order of priority in favour of statutory law over the Shari'ah.

The equality clause was yet another example of the complexity of the 1964 Constitution. Art. 25 provided that all Afghan citizens without discrimination or preference should have equal rights and obligations before the law. This provision did not specifically mention women. Some scholars interpreted it in this way in order to provide equal rights for women. The constitution, however, did not contain any other provision to support the case of equal rights between men and women, thereby leaving the followers of equality on shaky ground.

Some provisions of the 1964 Constitution contained democratic elements: Art. 32 allowed for the establishment of political parties and Art. 31 provided for freedom of press. The provisions of these two rights facilitated the introduction of new ideologies such as communism and Islamism and theoretically at least encouraged the establishment of political parties. Practically however, unfortunately, no party law was ever passed. Although the establishment of political parties could have moved the country toward a more representative government where the minorities could participate equally in the democratic process, in practice the opposite happened: two strong opponents to reforms were created – conservative Islamism and hard-line communism. They used the new freedoms to publish and spread their ideological stands and recruit followers.

The coexistence between Islamic law and an expanding body of modern, statutory laws continued. This duality also characterised legal education. In 1968 the Supreme Court opened a new judicial training centre in Kabul. The aim of this program was to redress the existing imbalance in the educational background of the law graduates of the religious schools and the students of the faculty of law and the faculty of Shari'ah of Kabul university. The graduates of the religious schools were not versed in modern law, and graduates of the modern law faculty had poor knowledge of the Shari'ah⁹. Unfortunately, the lack of sufficiently educated staff within these two faculties and non-conformity of the educational curriculum made it very difficult for any reform to take effect in this context.

The 1964 Constitution can be said to be the second step in the secularisation process of the Afghan legal system after Amanullah's failed attempt in the

⁹ Kamali (note 4) 42-44.

1920s. In this era new ideologies such as Marxism were introduced; communism expanded slowly in the government and other parts of the country as did the support of the Soviet Union and their intervention in the internal affairs of Afghanistan. This movement ignored completely the Islamic and traditional character of Afghan society.

The freedom to establish political parties turned out to be a threat to the monarchy, and in 1973 Zahir Shah's rule ended in a coup staged by his cousin Daud Khan.

IV. The Constitution of 1978

Daud Khan proclaimed Afghanistan a republic and introduced a new era of reforms. Until the promulgation of a new constitution in 1978 Daud Khan ruled by governmental decrees. Decree No. 1¹⁰ amended the 1964 Constitution; all powers of the King outlined in the 1964 Constitution were transferred to the President of the Republic of Afghanistan. De facto, the country was ruled by an unelected government and by the army. In March 1976, Daud issued a decree by which he assigned a commission composed of 20 members including two women to prepare a draft for a new constitution. The draft was published in January 1977 and distributed throughout the country for public discussion. In February 1977, the new constitution of Afghanistan was approved by the Loya Jirga and signed by President Daud on February 24, 1977¹¹. Some authors contest that the Loya Jirga that had convened to debate the draft was representative of the population, but according to the Chairman of the Loya Jirga of 1977, Azizullah Wasifi, it was a democratic and representative body that debated the provisions of the 1977 Constitution. The representatives expressed their views, criticised some of the provisions and rejected others¹².

The 1977 Constitution introduced many changes. In particular, the three prominent features of this constitution were Islam, nationalism and socialism¹³. It went a step further towards secularisation and the integration of statutory law and Shari'c law. According to Art. 64 Constitution 1977 no law shall be repugnant to the basic principles of the sacred religion of Islam, the republican order, and other values embodied in the constitution. Moreover, Art. 99 Constitution 1977 indicated that the courts should apply the basic principles of Islam and ḥanafī jurisdiction where no provision existed in the constitution or in the state

¹⁰ Decree No. 1 Speech of President Daud on the occasion of the establishment of the republican government in Afghanistan: Official Gazette No. 245 of July 28, 1973.

¹¹ See *Akhwān*, Tārīkh-e shafāhī-e afqānestān 1900-1992 (2002).

¹² *Akhwān* (note 11).

¹³ Art. 22 Constitution 1977: The religion of Afghanistan is the sacred religion of Islam. Those citizens who are not followers of Islam shall be free to perform their religious rites within the limits determined by the laws relating to public decency and public peace.

laws. Reference to Islam was similarly made in the preamble and in other provisions of the 1977 Constitution. Art. 77 required the president to be Muslim and Art. 80 required him to swear to protect the basic principles of Islam and respect the constitution and other laws of Afghanistan.

The 1977 Constitution was regarded as the logical progression of the three previous constitutions and was significantly different from its predecessors. This bolstered its credibility. Unprecedented features were the adherence for the first time to the Charter of the UN and the Universal Declaration of Human Rights, the proclamation of Afghanistan as a republic, the reference to gender equality, and the right to vote for all Afghans over 18. Finally a one-party system was declared, which was justified as a reflection of the social and political immaturity of the people¹⁴.

Another significant achievement of that time was the enactment of a civil code. The Civil Code of 1977 blends the principles of Sharī'a with secular law. These two elements together created a more rational and comprehensive approach to reform the legal system and keep the original source, the Sharī'a. In 1976, a new code of civil procedure was enacted, instituting a comprehensive organisation of the judiciary. The courts were divided into two categories, general courts and special courts. Special courts were given powers to adjudicate exclusively in areas such as taxation, expropriation, disputes arising from general and municipal elections, and commercial, industrial disputes, press and smuggling offences and disputes between the individual and the administration. However, the Sharī'a courts remained as courts of general jurisdiction since they retained their powers to adjudicate in all other areas which were not specifically assigned to the specific courts.

V. The Constitution of 1980

Despite its many positive aspects the 1977 Constitution was never fully implemented due to the collapse of the Daud regime just one year after its promulgation. Afghanistan entered into its fourth and final secularisation process after the overthrow of the republican regime and the seizure of power by the communist party in 1978. The first two years before the ratification of the Provisional Constitution of 1980 were characterised by the internal conflicts of two fractions of the communist party and the elimination of many individuals who opposed the regime.

The first declaration of the Revolutionary Council which effectively ruled the country after 1978 amended the 1977 Constitution and announced that all administrative affairs of the government would be regulated by decrees¹⁵.

¹⁴ Art. 12, 20, 27, 29, and 40 Constitution 1977.

¹⁵ Historical Decree of the Revolutionary Military Council of the Democratic Republic of Afghanistan: Official Gazette No. 396 of May 6, 1978.

Furthermore, the Revolutionary Council decided to replace the green strip of the Afghan flag, representing Islam, with a full red flag to match the new communist spirit¹⁶. It transferred the authorities of the Supreme Court to a newly established organ called the Supreme Judicial Council, which was headed by the Minister of Justice and the Attorney General, and remained accountable only to the Revolutionary Council¹⁷.

In April 1980 the communist government promulgated its provisional constitution. Art. 5 of that constitution declared that the sacred religion of Islam would be respected, observed, and protected, without making it a source of law or the official religion of the state. The freedom to perform religious ritual was guaranteed to all Muslims. Religion was not to be used as a tool for anti-national, defamatory or ethnic propaganda that would run counter to the interests of the new Democratic Republic of Afghanistan.

The Provisional Constitution of 1980 introduced two unprecedented features to the Afghan legal landscape: firstly, the Special Revolutionary Court (Art. 54) and secondly, the Institute for Legal and Scientific Research and Legislative Affairs¹⁸. The Special Revolutionary Courts were established as specialised penal courts to deal with crimes against the national security and the territorial integrity of the country (Art. 2 of the Act Establishing the Special Revolutionary Courts). This was dictated in the strong desire to serve the policies of the government to guard the country against opposition groups and to implement policies without fear of resistance. The Institute for Legal and Scientific Research and Legislative Affairs was declared the supreme legislative organ of the government and was authorised to draft and scrutinise all laws, decrees and regulations in accordance with the principles and necessities of the Democratic Republic of Afghanistan and to present them to the heads of the Revolutionary Council.

The communist government undertook a number of other reforms to introduce new Soviet-style institutions. In fact these reforms changed the administrative and legal structure introduced by previous governments entirely and consolidated the authority of several administrative institutions while reducing the total number of interim administrative bodies. However, all these changes did not improve the efficiency of the legal institutions, nor did they strengthen state power in the remote areas of the country. The integration of Marxist ideology into the legal structure and communist rule engendered a broad sense of distrust towards the government and its legitimacy.

¹⁶ Decree No. 4 of the Revolutionary Council: Official Gazette No. 409 of October 18, 1978. The old black, red and green national flag was, however, restored soon after this disputed decision to appease public opinion.

¹⁷ Decree No. 3 of the Revolutionary Council of the Democratic Republic of Afghanistan Abrogating the 1977 Constitution: Official Gazette No. 398 of May 28, 1978.

¹⁸ Official Gazette No. 483 of June 6, 1981; Act on the Special Revolutionary Courts: Official Gazette No. 449 of April 20, 1980.

The inconsistency of features of the provisional constitution with Islamic principles made it necessary for the government to convene a Loya Jirga. Karmal, who was the head of the communist government, held a Loya Jirga on April 23, 1985, allegedly attended by some 1800 representatives from all the provinces. However, the real number of attendees seems to have been around 600, and the Loya Jirga failed to assemble an authentic representative body. This was followed by elections in August 1985 and another Loya Jirga in September, which did not achieve their purpose, namely to tone down the level of hostility against the reforms of the communist government.

Karmal's politics failed. Even his introducing non-communists to the government and the creation of a national reconciliation commission and yet another commission to draft a new constitution¹⁹ did not bring about the popular support he had hoped for. His government and its Soviet-style administration widely contradicted the principles of Islam and Afghan tradition; it merely enhanced the level of violence and did not appease the Islamic opposition. The communist party and its supporters abroad had little credibility and it seemed obvious that the communist government had to change its policies dramatically if it wanted to stay in power.

VI. The Constitutions of 1987 and 1990

In 1985 Karmal was replaced by Najibullah. In 1987 Afghanistan was renamed the 'Republic of Afghanistan', its former title. A new constitution was promulgated: Islam and nationalism were back, and in the constitution communist terminology was removed. The deletion of the communist terminology was meant to strengthen the role of Islam in the new constitution, even though it can be described as a mere symbolic act by the government. While the new constitution provided for a multi-party system, the law on political parties banned any parties opposed to the communist party²⁰. In 1988, the government liberalised the law on political parties, allowing parties to form as long as they were not in contradiction to the provisions of the 1987 Constitution and had their headquarters in Kabul. Moreover, a nationally elected parliament that would designate a Prime Minister and a President elected by the Loya Jirga was endorsed. The 1987 Constitution provided full control over the executive, legislative and judicial powers by the President²¹. A Constitutional Council was established as

¹⁹ *Ewans* (note 7) 165.

²⁰ The Peoples' Democratic Party of Afghanistan (PDPA) was created in January 1965. It was known as the *khalq*-party and was founded by Noor Mohammad Tarakai. The PDPA was eventually split in two parties since its leaders Tarakai and Kamal fought over the direction the party should take. Whereas Tarakai became head of the *khalq*-fraction, Karmal established the *parcham*-fraction in 1967.

²¹ Art. 71, 75 Constitution 1987.

the supreme legislative institution for the interpretation and assessment of conformity of Afghan laws and regulations with the constitution and with international standards and treaties (Art. 146 Constitution 1987).

Attention was also given to Islam. According to Art. 2 Constitution 1987 the sacred religion of Islam was the religion of Afghanistan and no law should run counter to the principles of the sacred religion of Islam and other values enshrined in the constitution. The 1987 Constitution integrated some of the provisions of the Constitutions of 1964 and 1977, but preserved also some of the characteristics of the Provisional Constitution of 1980. The 1987 Constitution allotted an even more prominent place to Islam than the 1964 Constitution had done. The President and his wife were to be born of Afghan parents and had to be Muslims (Art. 73 Constitution 1987). This provision is identical with Art. 77 Constitution 1977. The last indication of the Soviet influence in the Afghan constitution was obliterated when the red star and the book were removed from the Afghan flag (Art. 9 Constitution 1987) to match people's taste and feelings.

After only three years Najibullah convened a Loya Jirga to promulgate a new, more Islamic constitution. The resulting Constitution of 1990 removed the last vestiges of communism from the constitution by modifying some of the articles, in an effort to secure public support for the government. It also declared Afghanistan an 'Islamic state'. The Special Revolutionary Courts were abolished to give full authority to the judiciary. The Chief Justice was still accountable to the President and bound to report to him. In 1991 an act allowing for public referenda was passed²². For the first time in the legal history of Afghanistan, the government banned the execution of the death penalty, except in five cases (Art. 1 of the Act Limiting the Death Sentence)²³. The 1990 Constitution provided for the first time for institutionalised representation at the local level and for some devolution of administrative control of these local bodies. By creating a corresponding system between the provincial courts and the central courts in Kabul, the 1987 and 1990 Constitutions undoubtedly further fostered the incipient state power structure.

In his last effort to stop the ongoing fighting, Najibullah sought to convince his opponents to join the government under a national reconciliation plan. His plans failed. The Soviet withdrawal from Afghanistan, the lack of support for the communist regime, and finally the pressure of the United Nations led Najibullah to give up power to the *muğāhedīn* in 1992.

²² The Law on Referendum and Plebiscite: Official Gazette No. 734 of February 3, 1991.

²³ Official Gazette No. 763 of March 7, 1992.

VII. The Constitution of 1992

In 1992 the opposition groups arrived in Kabul and proclaimed the establishment of the 'Islamic State of Afghanistan'. This entity may have been 'Islamic', but it was hardly a state, and it certainly did not rule Afghanistan – not even the capital Kabul²⁴.

Afghanistan now suffered great under the uncertainty regarding the applicable law; the constitutions of the previous regimes were not annulled, but their validity was very doubtful, since the muğāhedīn did not issue any decrees to identify the sources of law. Thus, Islamic law and customary law were applied as the only certain sources of law, especially in the remote areas of the country, where people had no access to state courts and state-enacted law was completely unknown.

Although the muğāhedīn prepared a draft constitution, it was never promulgated. This draft, called the Draft Constitution of the Islamic State of Afghanistan²⁵ consisted of 88 articles. The position of Islam was highlighted; the words 'Islam' and 'Sharī'a' were repeatedly mentioned to emphasize their position. Art. 2 DCISA stated that the legal system of the Islamic State of Afghanistan was to be based on the Holy *Qur'ān*. Art. 3 DCISA indicated that all political, social, and economic laws would have to conform to the principles of Islam and the injunctions of the Holy *Qur'ān* and *Sunna*. Art. 5 and 7 DCISA proclaimed Islam as the supreme authority ruling all private and public aspects of life. Art. 7 DCISA declared Islam the official religion of the country and the ḥanafī school of law as its official creed, leaving no space for the intervention of secular or state law²⁶. Contrary to all previous constitutions, Art. 8 DCISA provided that the government would institute special programmes for the development of the Arabic language which is the language of the *Qur'ān* and the means of communication in the Islamic world. The sacred phrase 'God is Great' and 'There is no God but Allah and Mohammad is his Messenger' was inscribed on the Afghan flag (Art. 11 DCISA and the 1993 Decree No. 263²⁷).

Like the communist government and its Revolutionary Council the muğāhedīn government established the so-called Leadership Council which was considered the highest manifestation of authority in the country (Art. 12 DCISA). The duties and authorities of the King as enshrined in Art. 8 Constitution 1964 and those of the President listed in Art. 78 Constitution 1977 were transferred to the President of the Islamic State of Afghanistan (Art. 18 DCISA). Art. 34 DCISA considered the judiciary a permanent organ of the

²⁴ *Rubin, The Fragmentation of Afghanistan—State Formation and Collapse in the International System*² (2002) 272.

²⁵ Hereafter abbreviated DCISA.

²⁶ Art. 1, 2, 3, 5, and 7 DCISA.

²⁷ Decree No. 263 on the Amendment of Art. 1-8 of the Law of Flag and State Emblem: Official Gazette No. 767 of August 22, 1993.