

The Durability of Constitutional Solutions to Religious Conflicts in Divided Societies: Lessons from the Constitutional History of Afghanistan

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This Article explores constitutional solutions to the conflict over defining the role of Islam and the sharia in Afghanistan's many constitutions. It focuses on the durability of particular religious constitutional arrangements that survived the replacement of a constitutional text. The Article explains how constitutional provisions that define the role of religion (Islam) in Afghan constitutions have endured through various iterations of the formal constitutional text. Building on recent work by Asli Bâli and Hana Lerner, we argue that constitutional solutions to designating the role of Islam in Afghanistan have survived, because they were implicitly deferred from the constitutional arena to the ordinary political process, a deferred order that appeared difficult to reverse. We also draw on scholarship that describes "constitutional stickiness." We highlight that constitutional solutions to the conflict over the role of Islam and the sharia have frequently "stuck" during constitutional makeovers—although at times arbitrarily—illustrating the endurance of constitutional provisions defining the role of Islam and the sharia.

This Article offers two major contributions. First, it provides a complete and theoretically informed history of constitutional solutions to the challenge of designating the role of Islam and the sharia in Afghanistan's many constitutions. Second, it adds a crucial case study to the literature on constitutional survival, specifically to the underdeveloped scholarship on the durability of constitutional solutions to religious conflicts in religiously divided societies.

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I. INTRODUCTION

Defining the role of religion and religious laws in constitutions of religiously divided societies like Afghanistan has always been a challenging task.² In such societies, there are deep disagreements on the particular vision of the state-religion relations (state neutrality towards religion, formal separation of state religion, weak religious establishment, or strong religious establishment),³ and what constraints religion should put on state power. These disagreements create problems, particularly during the drafting of formal written constitutions. Under certain circumstances, as occurred during the drafting of the 1993 *mujahidin* constitutions of Afghanistan, disagreements on the religious character of the state and the proper role of religious laws can derail a constitution-making process altogether.⁴

Like many religiously divided societies, in Afghanistan common allegiance to religion (Islam) masks enormously deep division about basic issues of religious belief, social morality, and social organization.⁵ Specifically, constitutional negotiations that attempted to resolve religious conflicts in Afghanistan have always been plagued by fierce debates. Afghanistan's most successful constitutions have adopted strategies of constitutional ambiguity, ambivalence and avoidance—essentially avoiding entrenching a particular vision of the state-religion relations within the text of the constitution—in order to allow the political system greater flexibility in future decision-making on state-religion relations.⁶ The deferred order had in turn arguably

² A society is religiously divided if it satisfies two key conditions. First, the society inhabits more than one religious group. Second, religious disagreements among these various groups form the basis of political fragmentation. *See generally* Asli Bâli & Hana Lerner, *Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L. L. J. 101, 178 (2016).

³ For different models of state-religion relations, *see* Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW* (Tom Ginsburg & Rosalind Dixon, eds., 2001).

⁴ *See generally* Shamshad Pasarlay, *Islam and the Sharia in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective* 3 *INDO. J. INT'L. & COMP. L.* 183 (2016).

⁵ *See e.g.*, VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION* (1967); *see also* *AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN* (Nile Green, ed., 2016).

⁶ *See* Shamshad Pasarlay, *Constitutional Incrementalism in a Religiously Divided Society Afghanistan*, *Asian Journal of Comparative Law* (Forthcoming 2018).

appeared hard to reverse, which has led to the durability of constitutional provisions that define the status of religion and religious law in subsequent constitutions.

Constitutional scholars have only recently begun empirical studies of the endurance of formal modern national constitutions. Zachary Elkins, Tom Ginsburg, and James Melton have assessed the survival of formal written constitutions by examining the effects of different factors on the endurance or mortality of written constitutions as a whole.⁷ They suggest that longer-lived constitutions appear to have the following three basic features: (1) they emerge through an open participatory process—a process that involves the public; (2) they appear to be specific—referring to the level of detail and scope of coverage in formal written constitutions—meaning that the more detailed constitutions are, the longer they tend to live; and (3) longer-lived constitutions tend to be flexible, providing “reasonable” mechanisms for amendment or binding reinterpretation.⁸ In an important recent work, Asli Bâli and Hana Lerner note that the literature on the endurance of formal written constitutions mostly focuses on durability of constitutions in their entirety rather than focusing on the longevity of particular constitutional arrangements—such as constitutional choices to resolve religious conflicts, which often endure after the death of formal constitutions.⁹

Bâli and Lerner argue that constitutional arrangements that tend to resolve religious conflicts endure longer because of the following reasons: first, they endure because they are produced through a top-down process, “whether imposed by external actors” or through a non-representative process initiated by a dominant actor during the constitutional moment.¹⁰ The imposed order may then produce “a degree of path dependent durability even as the underlying

⁷ See generally ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

⁸ *Id.* At 51.

⁹ Asli Bâli & Hana Lerner, *Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT’L. L. J. 101, 178 (2016).

¹⁰ *Id.* at 178–179.

balance of power between groups divided along inter-religious or intra-religious lines shift[s].”¹¹ Second, constitutional provisions that define the role of religion endure because they are deferred, and because it is hard to reverse a deferred constitutional order.¹² Third, context matters; constitution making in the context of state building—either as a result of decolonization or in a post-conflict transition context—might result in more durable constitutional arrangements compared to constitution making processes during the founding moment of a polity.¹³ Although most of such constitutions evolved over time, the original constitutional formulations that define or defer on the questions of the role of religion and religious law have “proven relatively durable.”¹⁴

This Article primarily builds on Bâli and Lerner’s points on the durability of constitutional solutions to religious conflict. It explores the durability of constitutional provisions that attempt to resolve religious (Islam) conflicts in Afghanistan’s various constitutions. It first finds that, as a descriptive matter, constitutional provisions relating to the status of Islam and Islamic law have survived in Afghanistan, even when formal written constitutions have been completely replaced. At certain times, even ideologically incompatible constitutions have retained earlier constitutional choices that define the role of Islam. The Article will then explore why the makers of subsequent Afghan constitutions have opted to maintain constitutional provisions relating to the status of Islam in earlier Afghan constitutions.

It is hard to know how to score the durability of constitutional solutions to religious conflicts in Afghanistan on Bâli and Lerner’s first and third findings. On their second finding, however, constitutional solutions to the complex problem of defining a role for religion and religious law in Afghanistan’s constitutions appear considerably efficient: constitutional solutions to religious

¹¹ *Id.* at 179.

¹² *Id.* at 179–180.

¹³ *Id.* at 180.

¹⁴ *Id.*

conflicts have endured in Afghanistan because they were deferred and because the deferred order was hard to alter. More specifically, constitution-makers in Afghanistan have managed to develop ambiguous and ambivalent formulas to define the role of Islam that do not seem to entrench a particular vision of the state-religion relationship clearly. All factions to a constitutional bargain arguably found the language acceptable even though (and perhaps because) it was open to multiple interpretations and thus left to another time and another institution the question of what role Islam was supposed to play. Knowing that such ambiguous constitutional formulas have been effective and found acceptable by a broad cross-section of Afghanistan's religiously divided society, subsequent constitutional makers have opted to retain the deferred constitutional order on the proper role of Islam and Islamic law.

Further, the Article suggests that constitutional solutions to religious conflicts in Afghanistan have endured as a matter of what Ozan Varol calls "constitutional stickiness."¹⁵ Varol argues that both constitutional status quo and starting point determine the durability of the constitutions as the former exert historical weight and the latter constrain future choices in specific and systemic ways.¹⁶ As a result, the existing constitutional formations "often depend, quite arbitrarily, on the historical starting point, rather than a rational [and exhaustive] assessment of alternatives."¹⁷ In reality, comparatively trivial events in a country's early constitutional history can have an huge impact, while "more dramatic events that happen later—such as a revolution [.....]—are much less consequential."¹⁸ In this way, Varol argues, constitutional provisions adopted at the initial drafting period "create path dependence stickiness"¹⁹—leading to the durability of particular constitutional solutions. As this Article illustrates, the constitutional stickiness theory provides

¹⁵ See generally Ozan O. Varol, *Constitutional Stickiness*, 49 UNIV. CALIF. DAVIS L. REV 899 (2016).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 899–900.

¹⁹ *Id.*

an effective explanation for why earlier constitutional provisions defining Islam and the *sharia* have endured in Afghanistan.

The Article also posits that constitutional solutions to religious conflicts in Afghanistan have not only endured, but they have also been successful. In fact, constitutional deferrals in this respect have been remarkably effective. Although they have not helped develop a consensus on the questions of Islam and Islamic law to date, deferrals on the questions of Islam have avoided conflict, and they have promoted a peaceful coexistence among Afghanistan's religiously divided and mutually hostile religious communities.

Part II of this Article defines durability and "stickiness" as we use the terms. Part III describes Afghanistan's constitutional history (1923-2004), exploring the durability of constitutional solutions to religious questions in Afghanistan's many constitutions. Part III shows that although Afghanistan has seen ten different constitutions in a century, constitutional provisions defining the role of Islam and the *sharia* have survived through many constitutions, even when these constitutions have been completely replaced in regular intervals. Part IV explores that constitution-makers in Afghanistan have maintained constitutional provisions that attempted to resolve religious conflicts because these provisions were vague and the people found them acceptable. Part IV will further explore how on many occasions, Afghan governments have refused to resolve the deferred order to entrench a particular vision of the state-religion relations, thus leading to the durability of such provisions into the indefinite future. Finally, part V will conclude by highlighting some of the broader lessons we might draw from the durability of constitutional solution to the role of religion in Afghanistan.

II. DEFINING DURABILITY AND CONSTITUTIONAL STICKINESS

We borrow our definition of durability from Bâli and Lerner. They define durability not as “success,”²⁰ nor stability—in a way that the actual text of constitutional provisions would remain unchanged.²¹ Instead, Bâli and Lerner define durability as the degree to which the arrangements made at the constitution drafting stage prove sustainable over subsequent constitutional transformations.²² So, for instance, we consider durable the many Afghan constitutions’ provision requiring courts to apply *sharia* law in the absence of state law. These provisions are durable not because the exact language of the provision proved stable over successive constitutional makeovers, but because constitution-makers retained the original constitutional bargain in subsequent constitutions. Indeed, the language of this clause changed from one constitution to another. For example, the 1923 Constitution required courts to apply “*sharia*” while the 1931 Constitution required courts to apply “*Hanafi fiqh*.”²³ In these provisions what is important is that the original bargain remained stable—that is—courts were required to apply a form of Islamic *sharia* in the absence of state legislation.

Furthermore, Bâli and Lerner consider a sustained and durable constitutional bargain that attempts to resolve religious conflicts to be “*successful*” only if it facilitated peaceful coexistence among religiously divided communities.²⁴ As such, we conclude that constitutional solutions to religious questions in Afghanistan (at least from the 1931 Constitution onwards) have not only been durable but also successful. Religious constitutional choice made during early constitutional drafting have not only endured but also facilitated peaceful coexistence between

²⁰ Bali & Lerner, *supra* note 6, at 178.

²¹ *Id.*

²² *Id.*

²³ NEZAM NAMA-YE ASSASI-YE DAWLAT-I ALIA-YE AFGHANISTAN [FUNDAMENTAL PRINCIPLES OF THE EXALTED STATE OF AFGHANISTAN] (Constitution of 1923), art. 21, (1303) [1923]; OŞUL-I ASSASI-YE DAWLAT-I ALIA-YE AFGHANISTAN [FUNDAMENTAL PRINCIPLES OF THE EXALTED STATE OF AFGHANISTAN] (Constitution of 1931), art. 88, (1310) [1931].

²⁴ Bali & Lerner, *supra* note 6, at 178.

Afghanistan's deeply divided and mutually distrustful religious communities—leading to the success of constitutional provisions that define the role of Islam and the *sharia*.

Similarly, by the stickiness of constitutional provisions defining the complex role of Islam and the *sharia*, we mean the stickiness of the original constitutional bargain—not that the actual text of the constitution remains unchanged or largely stable. Instead, we use this term to refer to the degree to which the bargains struck during constitution drafting stick, prove stable and remain unchanged during subsequent constitutional makeovers. Therefore, we consider that the repugnancy clauses (the requirement that state laws shall not contradict Islam) in Afghan constitutions have stuck as a matter of constitutional stickiness, even when the actual texts of these clauses have changed over time and (the constitutional text) proved unstable. As this Article shows, the stickiness of the repugnancy clauses in Afghanistan provides evidence to support Ozan Varol's claim that constitutional status quos often exert substantial influence on subsequent constitutional directions that might in turn lead to constitutional stickiness.²⁵ This has played out clearly in the survival of constitutional provisions that define the role of Islam and its relations with the state in Afghanistan.

III. CONSTITUTIONAL SOLUTIONS TO RELIGIOUS CONFLICTS IN AFGHANISTAN (1923-2004)

A religiously divided society can be divided along inter-religious or intra-religious lines.²⁶ Both types of divisions often make reaching agreement on religious questions considerably hard during constitution making processes. In inter-religious divisions, disagreements on religious issues occur between communities who subscribe to different religions.²⁷ For example, the conflicts between the Jewish majority and non-Jewish minority in Israel and the Muslim-

²⁵ Varol, *supra* note 12, at 899.

²⁶ Bali & Lerner, *supra* note 6, at 116.

²⁷ *Id.*

Christian and *Sunni-Shia* divisions in Lebanon have an inter-religious dimension.²⁸ Intra-religious divisions appear when communities who adhere to the same religion understand and/or interpret their shared religion differently.²⁹ For instance, in Muslim-majority countries, such as Afghanistan, Turkey, Pakistan, Tunisia, Egypt, and Indonesia, the main split over religious issues is between Muslims who define themselves as “secular-liberal” and Muslims who consider themselves as “religious-conservative.”³⁰ Both communities follow the same religion, but they understand that shared religion differently.

In Afghanistan, the conflict over the role of religion has mostly an intra-religious character; it is a debate not only between the secular-liberals and the religious-conservatives, but also between the religious modernists and the traditionalists.³¹ There is no unified approach to Islam among the people.³² Some Afghan Muslims define themselves as religious “modernists,” others define themselves as the “*ulama*.”³³ The traditionalist *ulama* believe that religious scholars trained in medieval methods of legal interpretation have a monopoly on the interpretation of God’s commands (*sharia* law).³⁴ By contrast, modernists believe that literate, pious Muslims have the ability to interpret God’s commands using a far less formalistic methodology.³⁵ Inevitably, modernists have developed different substantive understandings of Islamic law and of the nature of the state that should be established to apply it.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ OLIVER ROY, *ISLAM AND RESISTANCE IN AFGHANISTAN* 30 (1990); ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* (1995).

³² Green, *supra* note 3; *see also* Ashraf Ghani, *Islam and State-Building in a Tribal Society Afghanistan: 1880-1891*, 12 *MODERN ASIAN STUD.* 269, 270–277 (1978).

³³ *See generally* ROY, *supra* note 26; *see also* OLESEN, *supra* note 26.

³⁴ For a discussion of the evolution of modernism and of the difference between traditionalists and modernists in the Egyptian context, *see* CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT*, Chapters 4 through 6 (2006). The Egyptian modernists that Lombardi discusses would be studied by Afghans and would influence the Afghan Islamist modernists.

³⁵ *Id.*

In addition, there is a sharp *Sunni* and *Shia* division in Afghanistan. The majority of the Afghans are *Sunni* Muslims who ally themselves with the teachings of the *Hanafi* School of *sharia*.³⁶ There is, however, a large number of *Shias* from the Twelve *Shia* Sects, also called *Jafari Shias*.³⁷ Furthermore, there are some communities who follow a rival sect of *Shi'ism*—*Ismaili Shi'ism*.³⁸ Members of different sects of Islam look to rival religious texts and authorities for guidance. They often have different views about the morality of a particular private deed or legitimacy of a particular government action. Even within a single sect, religious authorities are not organized in a hierarchical fashion.³⁹ Islamic doctrine teaches that different scholars might reach different conclusions on many different questions of religious law; it is to be expected that even within a single sect, different scholars might teach a different approach to Islam. Within any given sect, individuals have considerable freedom to select for themselves the scholar that they would follow. Therefore, different *Hanafi Sunni* clans might look to different *Hanafi* scholars for guidance. The same is true among *Jafari Shia* clans.

These intra-religious and inter-religious divisions have always plagued constitutional negotiations in Afghanistan. Afghan constitution-makers have found it difficult to balance secular and religious interests as well as the *Sunni-Shia* divide in constitutions (at least in the second half of the twentieth century).⁴⁰ One way to prevent conflict has been to avoid entrenching a particular vision of the state-religion relations in constitutions by utilizing constitutional deferral. Drafters of constitutions in Afghanistan have managed to employ ambiguous formulas that did not seem clearly to resolve the question of the proper role of Islam

³⁶ ROY, *supra* note 26, at 30.

³⁷ See David B. Edwards, *The Evolution of Shi'i Political Dissent in Afghanistan*, in *SHI'ISM AND SOCIAL PROTEST* (Nikki R. Keddie & Juan R. I. Cole eds., 1986); GREGORIAN, *supra* note 3; OLESEN *supra* note 26, at 53.

³⁸ ROY, *supra* note 26, at 30; GREGORIAN, *supra* note 3, at 38.

³⁹ Ghani, *supra* note 27, at 272.

⁴⁰ See Pasarlay, *supra* note 2; see also Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory*, chapter 1 and 2 (June 10, 2016) (Unpublished Dissertation, University of Washington) (on file with authors).

and the *sharia* in the state.⁴¹ All factions to a constitutional bargain found the language concerning religious questions acceptable even though (and perhaps because) it was open to multiple interpretations and thus left to another time and another institution the question of what types of Islam the state should follow.⁴² This strategy has proved to be remarkably successful in avoiding conflicts along these religious divisions. Even today, these solutions have been retained.

The deferred constitutional orders concerning religious issues have proved to be acceptable to a broad cross-section of Afghanistan divided people. As a result, subsequent constitution makers have chosen to maintain them and have been reluctant to alter them. Moreover, the ruling elites have not attempted to resolve the deferred constitutional orders to concretize a particular vision of the state-religion relations and the proper role of Islam and the *sharia* because of lack of consensus.

Constitution-makers in Afghanistan have retained a wide range of constitutional provisions that attempt calm religious conflicts, but this Article focuses on only some key such constitutional provisions. These provisions include Islam as the state religion (the Islamic establishment clauses); repugnancy clauses (the requirement that state law should not contradict the basics of Islam); the application of *sharia* in the absence of state laws by courts; provisions requiring the head of state to be Muslim, protector of the basics of Islam, and to take an oath; and provisions that require high ranking state officials (such as ministers and justices of the supreme court) to be Muslim.

A. *Islam and the Sharia in Afghanistan's First (1923) Written Constitution*

Afghanistan did not have a written constitution until the first quarter of the twentieth

⁴¹ Nathan J. Brown, *Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani, and Iraqi Constitutional Experiments*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST WITH SPECIAL REFERENCES TO TURKEY, IRAQ, IRAN AND AFGHANISTAN 72 (Said Amir Arjomand, ed., 2008).

⁴² *Id.*

century. The country adopted its first written constitution in 1923, during the reign of Amir Amanullah Khan (1919-1929).⁴³ A legislative council, under the supervision of the *Hai'at-i Tamiz* (High Religious Committee), prepared the first draft of the Constitution.⁴⁴ King Amanullah then presented the draft for adoption by a *Loya Jirga* of 872 members (which served as Afghanistan's constitutional convention).⁴⁵ The *Loya Jirga* adopted the constitution in April 1923.⁴⁶

The first Afghan Constitution (1923) declared Islam as the state religion and provided protection for non-Muslims to practice their religious rites.⁴⁷ This Constitution did not formalize any specific state *madhhab* (official sectarian)—that accordingly became the subject of fierce objection by religiously conservative groups of the Afghan society.⁴⁸ Before the adoption of the first written Constitution, the *Hanafi sharia* played a dominant role in Afghanistan—it was the supreme law of the land, and the monarch had to be the follower of this school, for example.⁴⁹ King Amanullah himself during the drafting of the first Constitution argued that the state would not make the *Hanafi* school the official *madhhab* because doing so would discriminate against

⁴³ Said Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 Drake, L. Rev. 944, 945 (2005); Mohammad Hasan Kakar, *Constitutional History of Afghanistan*, ENCYCLOPEDIA IRANICA (1992), available at <http://www.iranicaonline.org/articles/constitutional-history-of-afghanistan>; Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, 5 J. PERSIANATE. STUD. 205, 210 (2012).

⁴⁴ See LEON B. POUILLADA, REFORM AND REBELLION IN AFGHANISTAN, 1919–1929: KING AMANULLAH'S FAILURE TO MODERNIZE A TRIBAL SOCIETY, 155–157 (1973).

⁴⁵ MOHAMMAD ALAM FAYZAD, JARGAH HAI BOZURG-I MILLI AFGHANISTAN (LOYA JARGAH HA): JARGAH HAI NAMNEHAD TAHT-I TASALOT-I KAMONEST HA WA RUS HA [AFGHANISTAN'S MAJOR JIRGAS: SYMBOLIC JIRGAS UNDER THE CONTROL OF THE COMMUNISTS AND THE SOVIETS] 50 (1368) [1989].

⁴⁶ MOHAMMAD TAHIR BORGAI, DA AFGHANISTAN LOMRI ASSASI QANUN TA YAWA KATANAH [AN ANALYSIS OF THE FIRST CONSTITUTION OF AFGHANISTAN] 4 (1374) [1995].

⁴⁷ AFGHAN CONST. (1923), *supra* note 19, art. 2.

⁴⁸ SENZIL NAWID, RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN, 1919–29: KING AMAN-ALLAH AND THE AFGHAN ULAMA 110 (1999).

⁴⁹ See generally Amin Tarzi, *Islam, Shari'a, and State Building under 'Abd al-Rahman Khan*, in AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN (Nile Green, ed., 2016); see also Amin Tarzi, *The Judicial State: Evolution and Centralization of Courts in Afghanistan, 1883, 1896* (2003) (unpublished PhD Dissertation, Department of Middle East Studies, New York University) (on file with the author).

the followers of other *madhhabs* (the *Shias*).⁵⁰ The first Constitution also introduced a repugnancy clause (the requirement that state laws shall not be repugnant to Islam). This Constitution stated that the legislature should consider the Islamic *sharia* while making laws.⁵¹ The High Religious Committee would make sure that this happened in practice.⁵²

The 1923 Constitution further required the king to protect the sacred religion of Islam,⁵³ and it contained provisions for courts to apply “Islamic *sharia* and principles of civil and criminal laws” when dealing with cases under their consideration.⁵⁴ This language offered no particular school of Islamic *fiqh* (jurisprudence).

The 1923 Constitution of Afghanistan did not appeal much to Afghanistan’s powerful groups, the tribes, and the traditional *ulama*—the class of people schooled in Islamic scriptures, theology, and medieval methods of legal interpretation—who viewed the Constitution directed at their marginalization.⁵⁵ They forced King Amanullah Khan to amend the Constitution in line with their views and commitments. The King, in response, convened a *Loya Jirga* in 1924 to consider amendments to the 1923 Constitution.⁵⁶ In the 1924 *Loya Jirga*, Islam became the center of the ideological debates, both within the *ulama* (traditionalists vs. modernists), and between the *ulama* and the King.⁵⁷ The *ulama* criticized the Constitution as being un-Islamic and demanded numerous amendments that would Islamize the Constitution.⁵⁸

In the 1924 *Loya Jirga*, approximately five amendments (Articles 2, 9, 24, 25 and 42) were made to the Constitution. Importantly, Article 2 was amended to make *Hanafi* school the official

⁵⁰ GHULAM MOHAMMAD KATIB, RUDAD-I LOYA JIRGA-YE DAR AL-SULTANAH [NARRATIVES OF THE LOYA JIRGA OF THE KINGDOM] 151 (1313) [1924].

⁵¹ AFGHAN. CONST. (1923), art. 72, *supra* note 19.

⁵² NAWID *supra* note 43, at 79–80.

⁵³ AFGHAN. CONST. (1923), art. 5, *supra* note 19.

⁵⁴ *Id.* art. 21.

⁵⁵ See generally OLESEN, *supra* note 26; NAWID *supra* note 43.

⁵⁶ Kakar (1992), *supra* note 38.

⁵⁷ NAWID *supra* note 43, at 110.

⁵⁸ Kakar (1992), *supra* note 38.

madhhab of the state and required the followers of other religions to wear specific, identifying clothing and pay the Islamic tax.⁵⁹ Article 9 was amended to place a religious limit on the right to liberty.⁶⁰ Article 24 was amended to exempt punishments prescribed by *sharia* from the prohibition against torture.⁶¹ These amendments gave the *Hanafi* School a dominant position—a position that it enjoyed under Amir Abdul Rahman Khan.

Indeed, the 1923 Constitution as adopted made a number of clear-cut decisions about the role of Islam and the *sharia* to entrench a particular form of state-religion relations. It clearly tried to lead to the development of “secular law-making and gradually provide for the separation of secular from canonical jurisprudence.”⁶² These arrangements ultimately put the 1923 Constitution at odds with Afghanistan’s powerful *Hanafi ulama* who rebelled against the Constitution.⁶³ When amended, they conformed to the demands of this group and remained in force until abrogated by another revolt in 1929.⁶⁴

The 1923 Constitution laid down the basis for some religious constitutional bargains—Islam as the state religion (Islamic establishment clause), official *madhhab*, repugnancy clause, the application of *sharia* in courts where there are no provisions in state laws, and the requirement for the monarch to be Muslim—which appeared enduring in the subsequent Afghan constitutions.

B. *Islam and the Sharia in the 1931 Constitution of Afghanistan*

The second constitution of Afghanistan was adopted in 1931 during the reign of Nadir Shah

⁵⁹ AFGHAN. CONST. (1923), art. 2 (as amended), *supra* note 19.

⁶⁰ *Id.* art. 9 (as amended).

⁶¹ *Id.* art. 9 (as amended).

⁶² OLESEN, *supra* note 26, at 121.

⁶³ AMIN SAIKAL, AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 86–87 (2004).

⁶⁴ *See generally* POULLADA, *supra* note 39.

(1929-1933).⁶⁵ When Nadir Shah came to power, one of his most important policies was that the government should adhere to the principles of *sharia* and shall govern the state through the participation of the public (the tribal aristocrats indeed).⁶⁶ While the first constitution of Afghanistan was adopted in a spirit of reform, the 1931 Constitution was more cautious and took a very conservative and conciliatory position abrogating the reformist statutes passed under the first constitution during the reign of Amanullah Khan.⁶⁷ The failure of Amanullah and the first Afghan constitution offered important lessons that a secular constitution might be doomed to fail, especially if it does not conform to the Afghans' understanding of Islam and the *sharia*. As such, the 1931 constitution took a very careful approach to appease tribal aristocrats and the religious establishments (mainly the *ulama*) who had opposed King Amanullah and his constitution and had helped Nadir Shah come to power.⁶⁸

There is little evidence about how the 1931 Constitution was made.⁶⁹ The substance of the 1931 Constitution, however, clearly illustrates that the traditional *Sunni ulama* and the tribal notables were either consulted or had direct influence over the constitution drafting process.⁷⁰ The 1931 Constitution thus “institutionalized the power of the religious establishment,” a majority of which professed the *Hanafi madhhab*.⁷¹ Nadir Shah promised not to infringe on the domain of the religious establishment (as opposed to King Amanullah and his constitution).⁷² In return, the *ulama*, utilizing their overwhelming influence over the tribal leadership, would give

⁶⁵ Kakar (1992), *supra* note 38.

⁶⁶ NIGHAT MEHROZE CHISHTI, CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN 56 (1998).

⁶⁷ Mohammad Hashim Kamali, *Islam and Its Sharia in the Afghan Constitution-2004 with Special Reference to Personal Law*, in THE SHARIA IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN, AND EGYPT – IMPLICATIONS FOR PRIVATE LAW 24 (Nadjma Yassari ed., 2005).

⁶⁸ See generally GREGORIAN, *supra* note 3; WILLIAM KERR FRASER TYTLER, AFGHANISTAN: A STUDY OF POLITICAL DEVELOPMENT IN CENTRAL ASIA (1950).

⁶⁹ Tarzi (2012), *supra* note 38, at 215.

⁷⁰ *Id.*

⁷¹ GREGORIAN, *supra* note 3, at 340.

⁷² Tarzi (2012), *supra* note 38, at 215.

their blessing and support for Mohammad Nadir to rule the country in peace.⁷³

The 1931 Constitution thus gave a particular attention to Islam and the *Hanafi* School, albeit in vague and ambivalent terms.⁷⁴ Having maintained the religious constitutional bargains under the 1923 Constitution, the 1931 Constitution contained more Islamic provisions than its predecessor that in fact helped it last for more than three decades. For instance, it declared Islam as the official religion of the state and the *Hanafi* School as its official *madhhab*.⁷⁵ Likewise, it allowed the “followers of other religions such as Hindus and Jews who reside in Afghanistan religious freedom provided that they do not disturb public peace and order.”⁷⁶ The makers of this Constitution also maintained the repugnancy clause of its predecessor, requiring legislation to create laws not contradictory to the provisions of Islam.⁷⁷ Like its predecessor, Nadir Shah appointed a religious body to review the Islamicity of state laws—a *Jamiyyat-i Ulama* (Society of *Ulama*) reviewed laws for compliance with Islam and the *sharia*.⁷⁸

The 1931 Constitution further required the king to be Muslim follower of the *Hanafi madhhab* and to act in accordance with the provisions of *sharia*, *Hanafi madhhab*, and the basic principles of Afghan government.⁷⁹ The Constitution also required the ministers to be Muslim, otherwise, they could not be appointed as a minister.⁸⁰ Further, the king and members of *Shura* (the legislative body) were required to take an oath before assuming office—maintaining the bargain under the earlier Constitution.⁸¹ In terms of the applicable laws in courts, the

⁷³ *Id.*

⁷⁴ See generally AFGHAN CONST. (1931), *supra* note, 19.

⁷⁵ *Id.* art. 1.

⁷⁶ *Id.*

⁷⁷ *Id.* art. 65.

⁷⁸ See MOHAMMAD ALI, PROGRESSIVE AFGHANISTAN 190 (1933); see also GREGORIAN, *supra* note 3 at, 299 (1967); OLESEN, *supra* note 26, at 186.

⁷⁹ AFGHAN CONST. (1931), art. 1 & 5; *supra* note, 19.

⁸⁰ *Id.* art. 75.

⁸¹ *Id.* arts. 6, 36 & 37.

Constitution recognized the *Hanafi* School of jurisprudence as the governing source of law.⁸² Thus, although the language of several religious constitutional provisions changed, the original constitutional bargains basically struck under the 1924 *Loya Jirga* that amended the 1923 Constitution remained stable.

C. *Islam and the Sharia in the 1964 Constitution*

The 1931 Constitution remained in force until 1963. During this time, Afghan society had changed and the power dynamic was shifting from the traditional religious *ulama* to the new educated elites.⁸³ While the 1931 Constitution had partly confirmed the influence of the traditional power groups in the Afghan society, the general economic development and the expansion of the domains of the state led to the consolidation of new urban groups who ultimately asserted their claims to share political power through constitutional reform.⁸⁴ Asta Olesen notes, “[t]he ideological paradigm (tribal and classic Islamic) on which the 1931 Constitution implicitly rested were thus challenged and the discourse on the future shape of the Afghan state and society was dominated by various sections of the new Afghan elite,” culminating in the formation of new constitutions in 1964,⁸⁵ 1977, 1987 and draft *Sunni* and *Shia mujahidin* constitutions of 1993.

In response to this social and political development, King Zahir Shah (1933-1973), son of King Nadir Shah, adopted the 1964 Constitution.⁸⁶ The third constitution of Afghanistan attempted to accommodate the Afghan state and the Constitution to the changing socioeconomic

⁸² *Id.* art. 88.

⁸³ *See generally* Mohammad Hasan Kakar, *The Fall of the Afghan Monarchy in 1973*, 9 INT’L J. OF MIDDLE EAST STUD. 195 (1978); THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2010); LOUIS DUPREE, *AFGHANISTAN* (1973); HAFIZULLAH EMADI, *STATE, REVOLUTION, AND SUPERPOWERS IN AFGHANISTAN* (1990).

⁸⁴ OLESEN, *supra* note 26, at 199.

⁸⁵ *Id.*

⁸⁶ *See generally* SAYED QASSEM RESHTYA, *AFGHANISTAN—THE MAKING OF THE 1964 CONSTITUTION: MEMOIRS OF SAYED QASSEM RISHTYA, FORMER SENIOR GOVERNMENT MINISTER* (2005).

structure of the society, meaning to provide a legal framework for the government in accordance with notions of legitimacy of power among the new educated middle class, who were far more liberal and forward-looking, not the traditional *ulama*.⁸⁷ Zahir Shah first appointed a 7 member constitutional drafting commission (most of whom were the urban educated elites) that prepared the first draft of the constitution.⁸⁸ Then, the King appointed a larger constitutional advisory commission that reviewed the Drafting Committee's draft.⁸⁹ In March 1963, Zahir Shah convened a Constitutional *Loya Jirga* that ratified the constitution in 1964.⁹⁰

The 1964 Constitution, widely known as “the finest in the Muslim world,”⁹¹ initiated a conciliatory approach and considered all societal groups: traditionalists, conservatives, and the moderates.⁹² Unlike the previous constitutions, there was a wide range of public consultation, deliberation, and participation before the adoption of this Constitution.⁹³ Accordingly, the Constitution introduced a constitutional monarchy, for the first time separated the executive, legislative, and the judiciary and excluded the royal family from occupying a political office.⁹⁴ Although the King had considerable power, a Supreme Court was established and, for the first time in Afghan history, the judiciary was declared independent from the legislative and executive branches.⁹⁵

Considering a broader level of public participation and deliberation as compared to the earlier Afghan constitutions, a remarkable degree of social and political changes, and the rise of

⁸⁷ OLESEN, *supra* note 26, at 206.

⁸⁸ DUPREE, *supra* note 78, at 565; RESHTYA, *supra* note 81, at 11; MIR MOHAMMAD SEDIQ FARHANG, AFGHANISTAN DAR PANJ QARN-I ĀKIR [AFGHANISTAN IN THE LAST FIVE CENTURIES] 486–487 (1371) [1992].

⁸⁹ DUPREE, *supra* note 78, at 566; FARHANG, *supra* note 83, at 488.

⁹⁰ DUPREE, *supra* note 78, at 568–570

⁹¹ *Id.* at 565.

⁹² Mohammad Hamid Saboory, *The Progress of Constitutionalism in Afghanistan* in THE SHARIA IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW 9 (Nadjma Yassari, ed., 2005).

⁹³ DUPREE, *supra* note 78, at 560-570

⁹⁴ QANUN-I ASSASI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN], art. 24, OFFICIAL GAZETTE No. 12, (1343) [1964].

⁹⁵ *Id.* art. 97.

some liberal and democratic movements,⁹⁶ one could suspect that the 1964 Constitution would abandon commitments to Islam and the *Hanafi sharia*. However, the makers of the 1964 Constitution maintained almost all (except the official *madhhab*) constitutional provisions defining the status of Islam and the *sharia*.⁹⁷ While there was difference in the language, the religious constitutional bargains in the previous two constitutions were maintained in the 1964 Constitution.

The 1964 Constitution thus declared Islam as the state religion.⁹⁸ It also provided that “religious rites performed by the state shall be according to the provisions of *Hanafi* School,”⁹⁹ thus not making the *Hanafi* School the official *madhhab*. The king had to be the follower of *Hanafi* School.¹⁰⁰ The Constitution also maintained the repugnancy clause and required the legislature not to enact laws contradictory to the “basics of Islam and other values embodied in the Constitution.”¹⁰¹ Although this language differs from the previous repugnancy clauses, the original constitutional bargain—that the state should legislate in line with Islam—stuck and remained stable.

Moreover, as under the earlier constitutions, *Hanafi sharia* was made residual, applicable only where no state law existed.¹⁰² In other words, courts would only consider the general principles of the *Hanafi* School of jurisprudence when no statutory law could be found. Despite the opposition of the traditional *Hanafi ulama* (who complained why state law is prioritized) to

⁹⁶ See generally HAFIZULLAH EMADI, DYNAMICS OF POLITICAL DEVELOPMENT IN AFGHANISTAN: THE BRITISH, RUSSIAN, AND AMERICAN INVASIONS (2010).

⁹⁷ See AFGHAN CONST. (1964), *supra* note 89.

⁹⁸ *Id.* art. 1.

⁹⁹ *Id.* art. 2.

¹⁰⁰ *Id.* art. 2.

¹⁰¹ *Id.* art. 64.

¹⁰² *Id.* art. 102.

this provision of the Constitution,¹⁰³ the drafters of the subsequent Afghan constitutions would maintain this provision.¹⁰⁴

The 1964 Constitution also retained some Islamic provisions regarding the king: the king had to be Muslim; he had to protect the principles of the sacred religion of Islam,¹⁰⁵ and he was required to take an oath before assuming office.¹⁰⁶ The 1964 Constitution, for the first time, required that the principle of adherence to the basics of Islam should not be subject to any amendment.¹⁰⁷ This provision would stick since then.

D. Islam and the Sharia in the 1977 Constitution

The 1964 Constitution of Afghanistan remained in force until 1973. In 1973 Daoud Khan, former prime minister (1953-1963) and cousin of Zahir Shah, staged a coup that overthrew the Afghan monarchy and replaced it with a revolutionary republican system of government.¹⁰⁸ President Daoud Khan adopted the next Afghan constitution in 1977.¹⁰⁹ The 1977 Constitution was ideological and contained three prominent features: Islam, nationalism, and socialism.¹¹⁰

While President Daoud had criticized the 1964 Constitution as pseudo-democratic, the alternative he had offered was drafted in a non-representative fashion and was explicitly autocratic.¹¹¹ It transplanted into Afghanistan an authoritarian model of governance that provided for a presidential system of government within the framework of a single-party system.¹¹² It ignored the interests of important political groups. As a result, important political factions, such

¹⁰³ DUPREE, *supra* note 78, at 579.

¹⁰⁴ *See generally* Tarzi, *supra* note 38.

¹⁰⁵ AFGHAN CONST. (1964), *supra* note 89, arts. 7, 8.

¹⁰⁶ *Id.* art. 15.

¹⁰⁷ *Id.* art. 120 (1).

¹⁰⁸ *See generally* Kakar (1978), *The Fall of the Afghan Monarchy in 1973*, *supra* note 78.

¹⁰⁹ Kakar, (1992), *supra* note 38.

¹¹⁰ Saboory, *supra* note 87, at 11.

¹¹¹ M. S. Agwami, *The Saur Revolution and after*, in AFGHANISTAN IN CRISIS 1–18, 3 (K. P. Misra ed., 1981).

¹¹² *See generally* QANUN-I ASSASI-YE DAWLAT-I JAMHIRI-YE AFGHANISTAN [CONSTITUTION OF THE REPUBLICAN STATE OF AFGHANISTAN], art. 1, OFFICIAL GAZETTE NO. 360 (1356) [1977].

as the Afghan communists (the Peoples Democratic Party of Afghanistan) and the Islamists, refused to play by the rules established under the 1977 Constitution.¹¹³ Both of these groups conspired to overthrow Daoud and replace his Constitution.¹¹⁴ The Peoples Democratic Party of Afghanistan (PDPA) was the first to take power. In 1978, the PDPA staged a coup that overthrew President Daoud and abrogated the 1977 Constitution.¹¹⁵ The 1977 Constitution thus became the shortest-lived constitution in Afghanistan surviving for less than a year.

Daoud was “a man of secular outlook whose support came from the communists” and who was considerably hostile to the Islamists that had emerged in the 1960s.¹¹⁶ Thus, one could suspect that his constitution would not commit to Islam and the *sharia* to the same degree as the previous three Afghan constitutions. However, the makers of the 1977 Constitution maintained almost all provisions that dealt with Islam and the *sharia* under the previous Afghan constitutions—specifically those under the 1964 Constitution. For instance, the 1977 Constitution declared Islam as the state religion.¹¹⁷ It adopted quite similar provisions as existed in the 1964 Constitution in terms of protecting the religious rights of minorities;¹¹⁸ repugnancy clause (no mechanism introduced to enforce it);¹¹⁹ and non-amenability of principle of adherence to the basics of Islam.¹²⁰

Furthermore, the 1977 Constitution instructed courts, like the earlier constitutions, to apply the general principles of the *Hanafi* School of *sharia*—but only when there was no applicable provision in the constitution or statutory law of the state.¹²¹ Equally important was the provision

¹¹³ Pasarlay (2016), Making the 2004 Constitution of Afghanistan, *supra* note 35, chapter 2.

¹¹⁴ *Id.*

¹¹⁵ THOMAS TAYLOR HAMMOND, RED FLAG OVER AFGHANISTAN: THE COMMUNIST COUP, THE SOVIET INVASION, AND THE CONSEQUENCES (1984); CHISHTI, *supra* note 61, at 146.

¹¹⁶ ROY, *supra* note 26, at 74.

¹¹⁷ AFGHAN CONST. (1977), *supra* note 107, art. 2.

¹¹⁸ *Id.* art. 22.

¹¹⁹ *Id.* art. 64.

¹²⁰ *Id.* art. 121.

¹²¹ *Id.* art. 99.

that required the president to be Muslim (no mention of being *Hanafi*) and swear to protect the basic principles of Islam.¹²² All of these provisions existed under the previous Afghan constitutions.

E. Islam and the Sharia in 1980, 1987 and 1990 Communist Constitutions

The ideological Constitution of 1977 was never fully implemented because of the collapse of Daoud Khan's regime just one year after the promulgation of the Constitution. In 1978, the PDPA (the communist party) staged a coup that overthrew Daoud Khan.¹²³ Upon taking power, the PDPA leader and President of Afghanistan, Nur Mohammad Taraki, did not adopt a constitution. As time passed, discontent grew with the regime, and frequent rebellions weakened the PDPA government.¹²⁴ Desperate, Taraki turned increasingly to the Soviet Union for support.¹²⁵ In 1979, however, Taraki was replaced by Hafizullah Amin, who indicated that under him the PDPA government might begin to distance itself from the Soviets.¹²⁶ Hafizullah Amin also initiated a plan to draft a constitution for the country, one that was never realized.¹²⁷

The Soviet Union, however, invaded Afghanistan in December 1979, removing Amin, and bringing the *Parcham* faction of the PDPA to power.¹²⁸ In 1980, with the support of the Soviet army, which continued to occupy the country, *Parcham* leader, Babrak Karmal, promulgated an interim constitution based on Marxist principles.¹²⁹ The expressed aim of the interim constitution was to guide the Afghans in the creation of a society of human beings free from exploitation by

¹²² *Id.* art. 77.

¹²³ See generally HAMMOND, *supra* note 110.

¹²⁴ See generally ROY *supra* note 26; OLESEN *supra* note 26.

¹²⁵ Louis Dupree, *Red Flag over Hindu Kush, Part I: Leftist Movement in Afghanistan*, American University Field Staff Reports, Asia No. 21. (1980).

¹²⁶ BARFIELD, *supra* note 78, at 233–234.

¹²⁷ DECREE NO. 5 OF HAFIZULLAH AMIN, PRESIDENT OF AFGHANISTAN AND PRESIDENT OF THE REVOLUTIONARY COUNCIL OF THE PEOPLES DEMOCRATIC PARTY OF AFGHANISTAN, ON THE APPOINTMENT OF THE CONSTITUTIONAL DRAFTING COMMISSION, OFFICIAL GAZETTE NO. 436 (1358) [1979].

¹²⁸ HAMMOND, *supra* note 110, at 49–53.

¹²⁹ Kakar (1992), *supra* note 38.

one another.¹³⁰ The PDPA, which represented itself as the party of the working class, was recognized as the guiding and driving force of society and of the state.¹³¹

This interim constitution did not have any significant provisions that defined the role of Islam and the *sharia*; therefore, constitutional solutions to religious conflicts were suspended for the brief period that it was in effect. The Interim Constitution of 1980 contained only two Islamic provisions. Article 5 of the Constitution declared that the sacred religion of Islam would be respected, observed, and protected in Afghanistan; and the Constitution guaranteed freedom to perform religious rites to all religions including Islam. Likewise, the Constitution declared that religion was not to be used for “anti-government and anti-people propaganda” that would oppose the interests of the new Democratic Republic of Afghanistan.¹³² Another Islamic provision was adopted with regard to the laws applicable in the court. The Constitution expressly gave priority to the statutory laws and provided that when the laws are not explicit, courts could refer to provisions of *sharia* and principles of democratic legality and justice to resolve a case.¹³³

The Soviet invasion and the inconsistency of the Marxist provisions of the 1980 Interim Constitution with Islamic principles soon resulted in widespread distrust of the government and its legitimacy.¹³⁴ Babrak Karmal, the president of the communist regime, tried several times to tone down the level of hostility by convening *Loya Jirgas* or even drafting a new constitution, but his effort failed and the range of distrust and dissatisfaction increased.¹³⁵ Finally, in 1987,

¹³⁰ HAMMOND, *supra* note 110, at 49–53.

¹³¹ *See generally* OŞUL-I ASSASI-YE JAMHURI-YE DEMOKRATIK-I AFGHANISTAN [FUNDAMENTAL PRINCIPLES OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN/ INTERIM CONSTITUTION, OFFICIAL GAZETTE NO. 450 (1359) [1980].

¹³² *Id.* art. 5.

¹³³ *Id.* art. 56.

¹³⁴ Saboory, *supra* note 87, at 12, 13.

¹³⁵ MARTIN EWANS, AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS 165 (2001); Saboory, *Supra* note 87, at 14, 15.

when the Soviet Union announced that it would withdraw from Afghanistan, Najibullah Ahmadzai replaced Karmal as the president of the state.¹³⁶

President Najibullah introduced significant amendments to the Interim Constitution in order to Islamize it.¹³⁷ He also appointed a constitutional drafting commission to prepare a first draft of a permanent constitution that would be more Islamic than the existing interim constitution.¹³⁸ The Drafting Commission tried to draft a constitution that would establish revised economic and political rules that the majority of Afghans, including the armed opposition (the *mujahidin*), might be willing to accept. The Drafting Commission prepared a first draft of a new constitution in 1987 and a constitutional *Loya Jirga* adopted it in the same year.¹³⁹

The 1987 Constitution brought Islam back, and the communist terminologies were removed from the constitutional scene.¹⁴⁰ The makers of the 1987 Constitution maintained the Islamic provisions of the earlier Afghan constitutions—specifically those that had survived for a longer time since their inception. The Constitution declared Islam as the state religion,¹⁴¹ provided that no laws could be contradictory to the basics of the sacred religion of Islam and other values in the Constitution.¹⁴² It further stated that the followers of other religions are free to practice their religious rites;¹⁴³ and it declared that if no explicit provision existed in the constitution and laws of the state, courts should apply the provisions of Islamic *sharia* (without specifying a particular

¹³⁶ SAIKAL, *supra* note 58, at 199.

¹³⁷ DECREE OF THE REVOLUTIONARY COUNCIL OF DEMOCRATIC REPUBLIC OF AFGHANISTAN ON THE AMENDMENT OF THE FUNDAMENTAL PRINCIPLES OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN, OFFICIAL GAZETTE NO. 656 (1366) [1987].

¹³⁸ DECREE OF THE REVOLUTIONARY COUNCIL OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN ON THE ENLARGEMENT OF THE CONSTITUTIONAL DRAFTING COMMISSION OF THE DEMOCRATIC REPUBLIC OF AFGHANISTAN, OFFICIAL GAZETTE NO. 642 (1366) [1987].

¹³⁹ Kakar (1992), *supra* note 38.

¹⁴⁰ Saboory, *supra* note 87, at 14, 15.

¹⁴¹ QANUN-I ASSASI-YE JAMHURI-YE AFGHANISTAN [CONSTITUTION OF THE REPUBLIC OF AFGHANISTAN], OFFICIAL GAZETTE NO. 660, art. 2 (1366) [1987].

¹⁴² *Id.*

¹⁴³ *Id.* art. 40.

school).¹⁴⁴ In addition, the president and his wife were required to be born of Afghan parents and to be Muslim;¹⁴⁵ and finally, the Constitution required the president to take an oath after being elected by a *Loya Jirga*.¹⁴⁶

The Constitution of 1987 was quickly amended in 1990 after the Soviets withdrew their troops from Afghanistan.¹⁴⁷ In order to Islamize the Constitution and make it acceptable to the *mujahidin* groups who were fiercely fighting the Kabul government, President Najibullah made significant changes to the 1987 Constitution. In a major change, the 1990 Constitution declared Afghanistan as an “Islamic republic” rather than a “republic.”¹⁴⁸ But the *mujahidin* groups continued their resistance to overthrow Najibullah’s government.¹⁴⁹

After conquering Kabul in 1992, the new interim *mujahidin* government suspended the 1990 Constitution, declared an “Islamic Republic,” and drafted a new *Sunni sharia* law influenced constitution.¹⁵⁰ However, fighting broke out between the elements of the new government in 1992 and civil war destroyed the government and prevented the draft *mujahidin* Constitution to be adopted.¹⁵¹ The Afghan *Shia mujahidin* parties also prepared a draft constitution that failed to be adopted.¹⁵² Although these drafts were adopted by parties with opposing ideological commitments, they would maintain the previous constitutions’ provisions defining the role of Islam and the *sharia* and their relationship with the state.

¹⁴⁴ *Id.* art. 112.

¹⁴⁵ *Id.* art. 73.

¹⁴⁶ *Id.* art. 74.

¹⁴⁷ PRESIDENTIAL DECREE NO. 314 OF THE PRESIDENT OF THE REPUBLIC OF AFGHANISTAN ON THE FORMATION OF THE CONSTITUTIONAL AMENDMENT COMMISSION, OFFICIAL GAZETTE NO. 719 (1369) [1990].

¹⁴⁸ QANUN-I ASSASI-YE JAMHURI-YE AFGHANISTAN [CONSTITUTION OF THE REPUBLIC OF AFGHANISTAN], OFFICIAL GAZETTE NO. 728, art. 1 (1369) [1990].

¹⁴⁹ LARRY P. GOODSON, AFGHANISTAN’S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 69–74 (2001).

¹⁵⁰ Pasaerlay (2016), Making the 2004 Constitution of Afghanistan, *supra* note 35, chapter 2.

¹⁵¹ *Id.*

¹⁵² *Id.*

F. *Islam and the Sharia in the 1993 Sunni Mujahidin Draft Constitution*

The Afghan *mujahidin* grew out of the modern “Islamists” movement that had emerged around Kabul University in the 1960s.¹⁵³ They were not the traditional “*ulama*,” but rather considered themselves as Islamic intellectuals who were trained in the state educational system.¹⁵⁴ Their leaders had studied in al-Azhar University in Egypt where they came under the influence of the Egyptian Muslim Brotherhood.¹⁵⁵ “Islamism” is the brand of modern political Islamic fundamentalism which claims to recreate a true Islamic society, not simply by imposing *sharia* law but by first establishing an Islamic state through political action.¹⁵⁶ The Islamists saw Islam not as a mere religion, as most other movements did in Afghanistan, but as a political ideology that should be integrated into all aspects of society (politics, law, economy, social justice, education and foreign policy).¹⁵⁷

Since their emergence in the second half of the twentieth century, the Afghan Islamist Movement (the Islamic intellectuals) opposed other Afghan movements and constitutions for religious reasons.¹⁵⁸ Thus, one could have reasonably suspected that their constitution would not contain Islam and the *sharia* in the same way that was defined in the earlier constitutions of Afghanistan.

However, the *mujahidin* draft constitution surprisingly did retain constitutional provisions that defined the role of Islam and the *sharia*. Although the language differed, the basic constitutional bargains remained unchanged. It has to be noted that the draft *mujahidin*

¹⁵³ ROY, *supra* note 26, at 69.

¹⁵⁴ *Id.* at 69; BARFIELD, *supra* note 78, at 213.

¹⁵⁵ *Id.*

¹⁵⁶ OLIVER ROY, ISLAMIC RADICALISM IN AFGHANISTAN AND PAKISTAN 4 (Writtenet Paper No. 06/2001), available at <http://www.refworld.org/pdfid/3c6a3f7d2.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ *See generally* ROY, *supra* note 26.

constitution added numerous provisions that further entrenched Islam and the *sharia*.¹⁵⁹ In fact, it established a highly centralized “Islamic state” governed only by *Hanafi sharia*.¹⁶⁰ Article 2 of the draft stated that the order of the Islamic state of Afghanistan shall be erected on the basis of the *Qur’anic* text—there is no command except for God.¹⁶¹ Article 3 declared Islam the religion of the state.¹⁶² It recognized the *Hanafi* School as the only official *madhhab* of the state.¹⁶³ Also, the president of the Islamic state had to be male and the follower of the *Hanafi* School.¹⁶⁴ Furthermore, under Article 5, the Islamic *sharia* was considered to be the only (*Yagana*) source of legislation,¹⁶⁵ provisions that also appeared in the past Afghan constitutions.

The new provisions that defined the role of Islam and the *sharia* included the following. Article 8 stated that the right of the people to political, social, cultural and economical self-determination should be secured by the elected assembly in accordance with the provisions of the Islamic *sharia*.¹⁶⁶ Article 9 of the draft made it the duty of all Afghans against each other and the duty of state against the citizens to order for the performance of the good and prohibit the evil.¹⁶⁷ Training of the Muslim children and Muslim families, establishing an Islamic society, securing the unity of the Muslim nation and the spreading of Islamic sciences and education was the duty of the Islamic state under the draft constitution.¹⁶⁸

¹⁵⁹ For a complete discussion of the role of Islam and the *Sharia* in the *Sunni mujahidin* draft constitution, see Pasarlay, *supra* note 2.

¹⁶⁰ DRAFT OF THE CONSTITUTION OF THE ISLAMIC STATE OF AFGHANISTAN, art 1, in 1 DA AFGHANISTAN NAWAI ASSASI QANUN: LA TASWIDA TAR TAWSHI [1 THE NEW CONSTITUTION OF AFGHANISTAN: FROM DRAFTING TO PROMULGATION] THE SECRETARIAT OF THE CONSTITUTIONAL COMMISSION] (1382) [2004].

¹⁶¹ *Id.* art 2.

¹⁶² *Id.* art 3.

¹⁶³ *Id.* art 3.

¹⁶⁴ *Id.* art 52.

¹⁶⁵ *Id.* art 5.

¹⁶⁶ *Id.* art 8.

¹⁶⁷ *Id.* art 9.

¹⁶⁸ *Id.* art 10.

In addition, the scope of each fundamental right (such as the right to freedom of speech and the right to liberty) was subject to the provisions of Islamic *Hanafi sharia*.¹⁶⁹ The draft also subjected the financial and economic policies of the state to the provisions of the Islamic *sharia*.¹⁷⁰ Finally, it subjected the foreign policy of the state to the provisions of the Islamic *sharia*.¹⁷¹ In short, besides adding a number of new provisions defining the role of Islam and the *sharia*, the *mujahidin* draft constitution maintained key Islamic provisions that, by the 1990s, had endured for more than 70 years in Afghanistan's constitutional history.

G. *Islam and the Sharia in the 1993 Shia Draft Constitution of Afghanistan*

A rival constitution, drafted by leaders of the *Shia mujahidin* parties, also retained key provisions that dealt with Islam and the *sharia* in Afghanistan's previous constitutions. The *Shia* draft constitution created a federal republic governed by both *Hanafi* and *Jafari fiqh*. It declared Islam as the religion of the state and recognized two official *madhhabs*, the *Jafari* and the *Hanafi* schools.¹⁷² Article 8 of the draft stated that laws and regulations of the state should contradict neither *Hanafi* nor *Jafari fiqh* (repugnancy clause).¹⁷³ The state was obliged to prepare the grounds for religious education on the basis of the official *madhhabs* of the state.¹⁷⁴ The draft further established a council of jurists (*Majlis-i Fuqaha*) and empowered it to review the compliance of laws with both *Hanafi* and *Jafari fiqh*.¹⁷⁵ The Council included both *Hanafi* and *Jafari ulama*.¹⁷⁶

¹⁶⁹ *Id.* arts. 17–36.

¹⁷⁰ *Id.* arts. 88–100.

¹⁷¹ *Id.* arts. 101–109.

¹⁷² DRAFT CONSTITUTION OF THE FEDERAL ISLAMIC REPUBLIC OF AFGHANISTAN art. 8, in SARWAR DANISH, MOTON-I KAMIL-I QAWANIN-I ASSASI AFGHANISTAN [COMPLETE TEXTS OF THE CONSTITUTIONS OF AFGHANISTAN] (1374) [1995].

¹⁷³ *Id.*

¹⁷⁴ *Id.* arts. 147–159.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Despite retaining the Islamic establishment clause and the repugnancy clause, the *Shia* draft constitution also retained provisions that required the head of the state to be Muslim. Although the draft did not have a “head of state” as under other Afghan constitutions, it introduced a “Federal High Council” that functioned as the executive.¹⁷⁷ The draft stated that members of this Federal High Council should be Muslim and follower of either the *Hanafi* or the *Jafari* schools of Islamic *sharia*.¹⁷⁸ In addition, similar to previous Afghan constitutions, all high-ranking state officials were required to be Muslim.

The *Shia* draft constitution represents a unique model of constitutionalism in Afghanistan—one that had never been tested. It tried to combine different elements from the *Hanafi* and the *Jafari* School of Islamic *fiqh*. In addition to this uniqueness, the *Shia* draft maintained almost every previous constitutional provision that defined the role of Islam and the *sharia* in Afghanistan.

H. *Islam and the Sharia in the Taliban Constitution*

In 1994, the emergence of the Taliban movement ended the fractured rule of the *mujahidin* parties.¹⁷⁹ The leaders of most *Sunni mujahidin* parties had been influenced by modernist religious movements in Egypt, movements that taught a form of *Sunni* Islam that rejected the medieval tradition and its different *madhhabs*.¹⁸⁰ The *mujahidin* were modernist Islamists who carried the banner of Islam and combated secularism and then communism in Afghanistan.¹⁸¹ They sought a contemporary political interpretation of Islam using a far less formalistic

¹⁷⁷ *Id.* arts. 160–182.

¹⁷⁸ *Id.*

¹⁷⁹ See generally BARFIELD, *supra* note 78, at 255–263.

¹⁸⁰ ROY, *supra* note 26, at 69; OLESEN, *supra* note 26, at 229.

¹⁸¹ See BARFIELD, *supra* note 78, at 255–263.

methodology.¹⁸² Educationally they tilted towards al-Azhar University in Egypt where they have been strongly influenced by the political orientation of the Muslim Brotherhood.¹⁸³

By contrast, the students who formed the Taliban had studied under teachers who were associated with the so-called Deobandi religious movement.¹⁸⁴ The Deobandi School, the second Islamic university to be created in the Muslim world after al-Azhar in Egypt, was founded in the late 19th century at the height of colonial rule in the Delhi region of northern India.¹⁸⁵ The Deobandi school was devoted to a reformed version of medieval *Hanafi* law and was characterized by its “fundamentalist interpretation of [*Hanafi*] Islam,” its opposition to *ijtihad*, modernist departures from medieval interpretations of God’s law, its injunctions against any role for women in society, and its “opposition to feudal and tribal structures.”¹⁸⁶ Thus, one might have doubted that Taliban would retain the previous constitutions’ provisions that defined the role of Islam in Afghanistan; however, their constitution retained almost all religious provisions that defined the role of Islam under previous Afghan constitutions.

Upon taking power, the Taliban did not adopt and promulgate a constitution, claiming that the *Qur’an* was all the constitution they needed.¹⁸⁷ In 1998, however, the Taliban began drafting a constitution. For this purpose, a number of religious scholars, mostly trained in the Deobandi *madrastas* (schools) on the Afghan-Pakistani frontier, gathered to prepare the first draft of a constitution. Together they reviewed constitutions of previous governments and drafted the Taliban Constitution—officially titled, Order of the Islamic Emirate of Afghanistan.¹⁸⁸ But before the Taliban could adopt their constitution, they were ousted from power. The approval of

¹⁸² See ANGELO RASANAYAGAM, *AFGHANISTAN: A MODERN HISTORY* (2003).

¹⁸³ BARFIELD, *supra* note 78, at 255–263.

¹⁸⁴ See e.g., BARFIELD, *supra* note 78, at 259–64.

¹⁸⁵ See generally BARBARA D. METCALF, *ISLAMIC REVIVAL IN BRITISH INDIA: DEOBAND, 1860–1900* (1982).

¹⁸⁶ RASANAYAGAM, *supra* note 177, at 143–44.

¹⁸⁷ See generally, NEMAT NAJUMI, *THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION* (2002).

¹⁸⁸ *Id.*

the constitution came in July 2005 (four years after the Taliban's collapse) at a meeting of the Supreme Council of the Islamic Emirate, the Taliban's executive branch.¹⁸⁹

It must be noted from the outset that the Taliban constitution is remarkably similar to the 1993 *Sunni mujahidin* draft constitution. It is striking because the Taliban and the *mujahidin* are considerably opposed groups. They vigorously fought each other in the 1990s.¹⁹⁰ Despite the sharp difference in the ideological ammunition of the two movements, the text of the Taliban constitution retained the provisions that dealt with Islam and the *sharia* in the previous Afghan constitutions—specifically in the *mujahidin* draft constitution. It represents a typical case of the endurance of constitutional solutions to religious conflicts as well as the stickiness of constitutional provisions.

The Taliban constitution thus declared Islam as the state religion,¹⁹¹ and the *Hanafi* School as its official *madhhab*.¹⁹² It also established a unified Islamic “Emirate” based on God's orders—sovereignty thus belonged to God and the state was responsible for implementing God's orders.¹⁹³ Article 5 stated that the *sharia* of Islam is the only source of legislation.¹⁹⁴ The head of the Islamic Emirate, the *Amir al-Mominin* (the commander of the faithful), had to be born to Afghan parents, a male Muslim, and a follower of the *Hanafi madhhab*.¹⁹⁵ The prime minister also had to be a male *Hanafi* Muslim.¹⁹⁶ Finally, like the *Sunni mujahidin* draft constitution, the Taliban constitution subjected the Islamic Emirate's financial, economic, and foreign affairs to

¹⁸⁹ *Id.*

¹⁹⁰ See generally AHMAD RASHID, *TALIBAN, MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2010); JYOTINDRA NATH DIXIT, *AN AFGHAN DIARY: ZAHIR SHAH TO TALIBAN* (2000); GOODSON, *supra* note 144; NOJUMI, *supra* note 182.

¹⁹¹ DASTOR-I EMARAT-I ISLAMI-YE AFGHANISTAN [ORDER OF THE ISLAMIC EMIRATE OF AFGHANISTAN, TALIBAN CONSTITUTION] art. 3 (1383) [2005].

¹⁹² *Id.* art. 4.

¹⁹³ *Id.* art. 1.

¹⁹⁴ *Id.* art. 5.

¹⁹⁵ *Id.* art. 53.

¹⁹⁶ *Id.* art. 62.

the limitations of the Islamic *sharia*—albeit one that was influenced by the Taliban’s Deobandi interpretation of Islam.

I. Islam and the Sharia in the 2004 Constitution of Afghanistan

With a rich experience of adoption and death of constitutions in the twentieth century, the fall of the Taliban government in late 2001 gave Afghanistan another opportunity to draft its first constitution of the twenty-first century. A massive international involvement in state building efforts in Afghanistan encouraged the drafting of the new constitution (adopted in 2004).¹⁹⁷ The drafting of the 2004 Constitution received a considerable degree of international assistance.¹⁹⁸ These international and transnational influences encouraged the drafters to limit the role of Islam and to adopt a democracy and rights friendly constitution.¹⁹⁹ Foreign diplomats had warned the Afghan leadership that the international community, particularly the U.S., would find it difficult to support Afghanistan if *sharia* law were imposed and basic rights were not protected.²⁰⁰ At times, international assistance was subjected to Afghanistan adopting a constitution that did not contain Islamic provisions as existed under most of the previous Afghan constitution.²⁰¹ Therefore, for all practical reasons, it appeared that the makers of the 2004 Constitution and their international allies would not maintain constitutional provisions that dealt with Islam under previous Afghan constitutions.

¹⁹⁷ See generally J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557 (2007).

¹⁹⁸ Barnett Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEMOCRACY 5 (2004); see also Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2004).

¹⁹⁹ See Feldman, *supra* note 193, at 867 (arguing, “the association of Islam with Iran in American minds was deep and continuing, and no one wanted to be known as the politician or the party who made the world safe for Islamic fundamentalism.” This, Feldman argues, translated into a commanding force to exert pressure on the constitutional processes in Iraq and Afghanistan so as to keep Islam “at bay” and encourage secular democracy. U.S. Senators were concerned with “provisions that pronounce Islam as ... a basic source of law and alternatively urged the specification of other sources of law, namely the principles of democracy, pluralism, rule of law and individual human rights.”

²⁰⁰ *Id.*; see also ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* 147 (2016).

²⁰¹ Rubin, *supra* note 193, at 5.

However, the 2004 Constitution stuck to constitutional provisions under earlier Afghan constitutions. Like all previous constitutions, it defined Afghanistan as an “Islamic republic” and declared Islam as state religion, without specifying any particular *madhhab* as official.²⁰² Similarly, a vague repugnancy clause was adopted: “no law shall be contradictory to the beliefs and tenets of the sacred religion of Islam.”²⁰³ Although this language is different than repugnancy clauses in other Afghan constitutions, the basic premise has stuck and remains stable. At the same time, some Afghan scholars have interpreted “the provisions and tenets of Islam” to mean the “basics of Islam” as under previous constitutions.²⁰⁴

Moreover, under Article 130 of the Constitution, courts apply the provisions of the constitution and other laws, if there is no provision in the constitution and other laws, then, courts apply the provisions of *Hanafi fiqh*.²⁰⁵ The 2004 Constitution formally recognizes the application of *Shia* religious doctrines in cases where there is no provision in the constitution and other laws, and the parties to the dispute are the followers of the *Shia* school.²⁰⁶ Finally, the 2004 Constitution maintained the religious constitutional arrangements requiring the head of the state to be Muslim and take oath before assuming office.²⁰⁷

In short, despite a massive change in the way this 2004 Constitution was written and ratified, the makers of the Constitution maintained key constitutional provisions that dealt with Islam under previous Afghan constitutions. This means that constitutional provisions defining the role of Islam in Afghan constitutions endured for almost a century despite the replacement of ten different constitutions in Afghanistan and, at times, after dramatic social and political changes.

²⁰² QANUN-I ASSASI-YE JAMHURI-YE ISLAMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] OFFICIAL GAZETTE NO. 818, art. 2 (1382) [2004].

²⁰³ *Id.* art. 3

²⁰⁴ SARWAR DANISH, HŪQUQ-I ASSASI AFGHANISTAN [CONSTITUTIONAL LAW OF AFGHANISTAN] (2nd ed. 1392) [2013].

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²⁰⁶ AFGHAN CONST. (2004), *supra* note 197, art. 131.

²⁰⁷ *Id.* arts. 62, 63.

IV. EXPLAINING DURABILITY IN THE AFGHAN CONTEXT

The previous section showed, as a descriptive matter, that constitutional provisions defining the status of religion and religious law and the various relationships they created with the state in Afghanistan's various constitutions have endured despite the replacement of a formal written constitution. This section will explore why the makers of subsequent Afghan constitutions retained the earlier constitutions' solutions to religious conflict. We find that constitution makers in Afghanistan have retained such constitutional arrangements because they were deferred, and because the constitution makers found it hard to reverse a deferred constitutional order. Constitutional deferral on the proper role of Islam and the *sharia* created an order that appeared acceptable to a broad cross-section of Afghanistan's divided people. In essence, deferral successfully facilitated coexistence out of deep religious division, and constitution makers did not risk conflict by reversing a deferred order.

Moreover, constitutional solutions to religious conflict in Afghanistan have endured as a matter of "constitutional stickiness."²⁰⁸ Ozan Varol has argued that the constitutional status quo exerts significant historical weight and the constitutional starting points constrain future choices in specific and systemic ways.²⁰⁹ The existing constitutional configurations therefore often depend, quite arbitrarily, on the historical starting point, rather than a rational assessment of all alternatives.²¹⁰ As we will show below, the theory of constitutional stickiness can help explain the endurance of religious constitutional provisions in Afghanistan's many constitutions.

A. *Constitutional Deferral and the Survival of Religious Constitutional Provisions*

Rosalind Dixon and Tom Ginsburg note that in designing constitutions, constitutional drafters often face constraints that cause them to defer decision-making on important questions

²⁰⁸ See generally Varol, *supra* note 12, at 899.

²⁰⁹ *Id.*

²¹⁰ *Id.*

of constitutional design. Drafters do so to promote agreement and avoid decision and error costs.²¹¹ Deferral, as Dixon and Ginsburg describe it, is a conscious decision by constitution makers “not to decide” a controversial question of constitutional design, thus leaving it to be decided through the process of ordinary politics by ordinary institutions, namely the legislature and the judiciary.²¹² Deferral comes in various forms. The first is to explicitly identify an important constitutional issue and to state that it is to be resolved by the legislature after the constitution is ratified (this takes place through using a “by-law clause” in the text of the constitution).²¹³ Another common form of deferral is implicit constitutional deferral. In this case, the drafters of constitutions deliberately use unclear or ambiguous language to describe a structural rule or a constitutional right, thereby requiring in practice that the rule be interpreted in the future by institutions entrusted by the constitution with the power to interpret the constitution and resolve the ambiguity.²¹⁴

Theorists of constitutional deferral argue that an “optimal” level of constitutional deferral might contribute to constitutional stability and help constitutions survive in their entirety.²¹⁵ Asli Bâli and Hana Lerner have further found that, in religiously divided societies, constitutional deferral might help promote the durability of particular constitutional arrangements (such as constitutional solutions to religious conflicts) that survive the replacement of a constitutional

²¹¹ Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L. J. CONST. L. 636 (2011); see also Mark Tushnet, *Constitution-making: An Introduction* 91 TEX. L. REV. 1983 (2013); MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, ‘ABEYANCES’ AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT (2012).

²¹² Dixon & Ginsburg, *supra* note 206.

²¹³ *Id.* at 643–46.

²¹⁴ *Id.*

²¹⁵ See generally *id.*; see also Clark B. Lombardi, *The Constitution as an Agreement to Agree: The Social and Political Foundations and (Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Dennis Galligan & Mila Versteeg eds., 2013).

text.²¹⁶ The endurance of constitutional solutions to the conflict over the role of Islam and the *sharia* in Afghanistan provides evidence to support Bâli and Lerner's conclusion.

Constitutional provisions defining the role of Islam and the *sharia* in Afghanistan have always been considerably vague (deferred implicitly). Specifically, constitutional negotiations in Afghanistan have always been plagued by fierce debates on the relationship between Islam and the state. When the constitutional texts had been written, constitution makers have managed to develop ambiguous formulas that did not seem clearly to resolve the question and entrench a particular vision of the state-religion relations.²¹⁷ All factions to a constitutional bargain apparently found the language acceptable even though (and perhaps because) it was open to multiple interpretations and thus left to another time and another institution the question of the relationship between the state and religion.²¹⁸ Apparently, a broad cross-section of Afghanistan's elites and population alike have found the language acceptable who chose to work under the system to influence Islam's interpretation in line with their views and commitments.²¹⁹

For instance, the 1931 Constitution deferred on the question of whether the state should respect Islam—primarily through the mechanism of leaving references to the role of Islam in the state extremely vague. Article 65 of the 1931 Constitution included an ambiguous sentence that seemed to leave the question of state law's Islamicness in the hands of the *Jamiyyat-i Ulama* (Society of *Ulama*). This Article stated that the state shall not “enact laws that are contradictory to provisions of Islam [احكام دين مبین اسلام].”²²⁰ It did not clarify whether the state was required to legislate not in contradiction to the “provisions of Islam” according to the *Hanafi* School of *sharia* or some/all other schools of Islamic *sharia*. Or whether state law shall not contradict

²¹⁶ Bâli & Lerner, *supra* note 4, at 178.

²¹⁷ Brown, *supra* note 36, at 72.

²¹⁸ *Id.*

²¹⁹ See generally Pasarlay, *supra* note 35, chapter 2.

²²⁰ See AFGHAN. CONST (1931), *supra* note 19, art 65.

“modernist” Islam or “traditionalist” Islam. In addition, the 1931 Constitution declared *Hanafi* School as the official *madhhab* of the people and the state, and it required the King to be the follower of *Hanafi* School.²²¹ However, the repugnancy clause did not explicitly require the King to legislate in accordance with *Hanafi* Islam. As the King, he would be a *Hanafi* Muslim, but he had the right to legislate in line with other schools of Islamic *sharia* if that would promote his power or public interest. In addition, a body of traditional *Hanafi ulama*—the *Jamiyyat-i Ulama*—was given the authority to examine state laws for compliance with the “provisions of Islam.”²²² The conservative *Hanafi ulama* may have thought that they would make sure through Islamic review that the state legislated in line with *Hanafi* Islam. In this way, both the King and the *ulama* found the scheme acceptable, which promoted peaceful coexistence for more than three decades.

Moreover, almost all Afghan constitutions, except the 1980 Interim Communist Constitution, declare “Islam” as the religion of the state. This type of provision makes sense given that almost all Afghans are Muslims. However, Afghans deeply disagree about what Islam and Islamic law mean.²²³ There is no unified approach to Islam among the Afghans.²²⁴ The majority of the Afghans are *Sunni* Muslims.²²⁵ There is, however, a large number of *Shias* from the Twelve *Shia* Sects, also called *Jafari Shia*,²²⁶ plus some communities who followed a rival sect of *Shi’ism*—*Ismaili Shi’ism*.²²⁷ With this division, constitutional references to “Islam” and “Islamic law” in vague language, and without further detail on the type of Islam described, has proved to be

²²¹ *Id.* art 1.

²²² GREGORIAN, *supra* note 3, at 299; OLESEN, *supra* 26, at 186; MOHAMMAD ALI, *supra* note 73, at 191.

²²³ See generally Green, *supra* note 3.

²²⁴ Ghani, *supra* note 27, at 270–276.

²²⁵ ROY, *supra* note 26, at 30.

²²⁶ GREGORIAN, *supra* note 3, at 38; OLESEN, *supra* note 26, at 53.

²²⁷ GREGORIAN, *supra* note 3, at 38.

acceptable to a wide range of Afghanistan's divided people and has it has endured for nearly a century.

Finally, another enduring constitutional provision deals with the application of "Islamic *sharia*" by courts in cases where the state has not legislated. This provision does not clarify the form of Islamic *sharia* (*Hanafi*, or *Jafary*, modernist or traditionalist, for example) courts must apply. It is indeed open to multiple interpretations, and thus leaves the clarification of the form of the *sharia* to the courts. This vague formulation has been the main reason that the provision has endured throughout the constitutional history of Afghanistan because the people have found it acceptable. It is highly likely that mentioning *Hanafi sharia* only would have angered the *Shia* population (as it did during the drafting of the *Sunni mujahidin* constitution).²²⁸ In the same way, mentioning the *Shia* school would have angered the *Hanafis*.

In short, the evidence presented here supports Bâli and Lerner's claim that constitutional solutions to religious conflicts endure because they are deferred and because it is difficult to reverse a deferred order. However, the Afghanistan's constitutional experience does not score well on Bâli and Lerner's first finding—that is—constitutional solutions to religious conflicts survive because they are imposed by a top-down constitutional formula. The durability of some solutions adopted through a top-down process pales in comparison to those that had been deferred. For instance, the *Hanafi sharia* as the supreme law of the land, and the *Hanafi* School as the only official *madhhab* of the state, imposed by Amir Abdul Rahman Khan,²²⁹ did not endure longer. The first written Afghan Constitution abandoned both provisions while the second Constitution re-integrated them. They disappeared from the constitutional scene in the second half of the twentieth century. They reappeared in Afghanistan's *Sunni* Islamist draft constitutions only to die in the 2004 Constitution of Afghanistan again. The problem is that mentioning *Hanafi*

²²⁸ See Pasarlay, *supra* note 2.

²²⁹ See generally Tarzi (2016), *supra* note 44.

sharia as the only source of legislation or as the official *madhhab* of the state is too clear-cut that offends the *Shias* and endangers a peaceful coexistence among Afghanistan's religiously divided people.

B. Constitutional Stickiness and the Survival of Religious Constitutional Provisions

This Article further maintains that constitutional solutions to religious conflicts in Afghanistan's many constitutions have endured consistent with the theory of constitutional stickiness. Under this theory, constitutional provisions stick because the costs of constitutional change are high.²³⁰ The constitutional status quo thus exerts significant historical weight and the constitutional starting points constrain future choices.²³¹ The existing constitutional configurations therefore often depend, quite arbitrarily, on the historical starting point, rather than a rational assessment of all alternatives.²³² As to the endurance of constitutional solutions to the role of religion and religious law in Afghan constitutions, constitutional stickiness clearly plays out.

Constitutional provisions dealing with Islam and the *sharia* in the Afghan constitutions have stuck because the costs of drafting, negotiating and adopting a new set of constitutional provisions defining the role of religion in a different (and clearer) way appeared to have been too high. Almost all Afghan constitutions have been drafted and adopted in the wake of regime changes and in shorter periods of time, thus limiting the options of constitution-makers to negotiate a new constitutional order defining the state and religion relations differently. Even when the ruling elites of Afghanistan at certain times were in a position to impose constitutional solutions to religious questions in a way that secured their interests, they chose to stick to the existing constitutional order. This is so because, as a result of constitutional stickiness, these

²³⁰ Varol, *supra* note 12, at 917.

²³¹ *Id.* at 899.

²³² *Id.*

increasingly disadvantageous (to the ruling group) constitutional provisions had become increasingly difficult to alter because of their historical weight and advantage (Afghanistan's divided people apparently accepted them and chose to live with them).

For instance, the application of the *Hanafi sharia* by courts in the absence of state law in Afghanistan has stuck although there had been other useful alternatives—such as the application of other “moderate” schools of Islamic *sharia* or the non-application of Islamic *sharia* in such cases that would give the state more discretion. The application by courts of only the *Hanafi sharia* has a long pedigree in Afghan history, and it has thus obtained an historical advantage. The makers of the Afghan constitutions have been reluctant to change the status quo because doing so could arguably spark conflict and unrest.

Similarly, the requirement that state laws should conform to the basics of “Islam” has stuck throughout the constitutional history of Afghanistan. Historically, roughly all Afghan rulers (including rulers who did not adopt a formal written constitution) stuck to this requirement.²³³ The requirement has thus been hard to alter because of time constraints and has achieved significant historical advantage—the divided people of Afghanistan found it acceptable—leading to its stickiness, and Afghan constitutions, except the 1980 interim constitution, chose to keep it.

C. Will Constitutional Solutions to Religious Questions in Afghanistan Endure Going forward?

Afghanistan's flawed system for electing presidents and resolving electoral disputes led recently to a political crisis that nearly split the country.²³⁴ The immediate crisis was resolved through a special power sharing agreement between the two leading candidates, a National Unity

²³³ See NAWID, *supra* note 43, at 9–10.

²³⁴ Shamshad Pasarlay, Mohammad Qadamshah, & Clark B. Lombardi, *Reforming the Afghan Electoral System: The Current Debate and its implications for the Plans to Amend the Afghan Constitution*, ICONNECT: BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (May 8, 2015), available at <http://www.iconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-constitution/>

Government led by both Ashraf Ghani and Abdullah Abdullah (Ashraf Ghani was recognized as the president of Afghanistan and Abdullah Abdullah as its CEO).²³⁵ As part of the Agreement, the candidates agreed to arrange for the sitting in the near future of a *Loya Jirga*—an institution that can serve as a constitutional amending convention.²³⁶ Empowered to make significant changes to the constitution, the sitting of this *Loya Jirga* will present Afghanistan with a significant opportunity to debate alternative proposals for constitutional reform and embrace reforms that have a good chance to improve the efficiency and legitimacy of Afghan governments going forward.

Since the adoption of the 2004 Constitution, there have been significant debates in Afghanistan on clarifying the role of Islam in the state (attempting to clarify the ambiguous relationship between Islam and the state).²³⁷ Some have proposed that the amending of the Constitution under the National Unity Government Agreement provides a chance to debate these questions.²³⁸ Moreover, the Taliban, who have been fighting the Afghan government and the 2004 Constitution since their ousting in 2001, have now shown interest in peace negotiations in Afghanistan. However, they have put changes to the 2004 Constitution at the forefront of their agenda in any peace talks.²³⁹ The Taliban label the current Constitution as “produced in the shadow of the B-52 warplane.”²⁴⁰ A new constitution must, in their view, “not contain a single article or paragraph that is against the Islamic principles, national interest and Afghan

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See, e.g., SANA NIKPI, TAGHEER WA TADEEL-I QANUN ASSASI [CHANGING AND AMENDING THE CONSTITUTION] (2016), available at <http://farasu.net/?p=1871>; KABUL PRESS, PICHIDAGI WA TANAQUZAT DAR QANUN ASSASI AFGHANISTAN [COMPLEXITIES AND CONTRADICTIONS IN THE CONSTITUTION OF AFGHANISTAN] (2009), available at <http://kabulmobile.com/article3390.html>.

²³⁸ KABUL PRESS, *supra* note 232.

²³⁹ SEAN KANE, TALKING WITH THE TALIBAN: SHOULD THE AFGHAN CONSTITUTION BE POINT OF NEGOTIATIONS, USIP, SPECIAL REPORT: 356, 2 (2015); THOMAS RUTTING, QATAR, ISLAMABAD, CHANTILLY, ASHGABAD: TALEBAN TALKS SEASON AGAIN?, AFGHANISTAN ANALYSTS NETWORK (2012), available at <https://www.afghanistan-analysts.org/qatar-islamabad-chantilly-ashgabad-taleban-talks-season-again-amended/>

²⁴⁰ KANE, *supra* note 234, at 2; RUTTING, *supra* 234.

traditions.”²⁴¹ Although it is not clear exactly what the Taliban want to change in the Afghan Constitution, it is clear that they reject the current Afghan Constitution for religious reasons.

Therefore, one interesting question is whether constitutional solutions to religious questions can survive the prospect of this significant set of constitutional amendments under the National Unity Government Agreement as well as the opposition from the Taliban on the Islamicness of the Constitution.

We predict that constitutional provisions defining the role of Islam and the *sharia* will survive Afghanistan’s proposed constitutional reform (if it takes place at all) and endure into the indefinite future. Although constitutional solutions to religious questions have prevented conflict in Afghanistan, they have not facilitated consensus in favor of a particular constitutional vision of the state-religion relations. Moreover, the Afghan government has cleverly avoided adopting a clear position on these vague provisions dealing with the role of Islam and the *sharia*. At times, governmental practice has sent competing signals over the implementation and interpretation of these vague religious clauses, refusing to concretize a particular practice.

As an example, in 2006 an Afghan court sentenced Abdul Rahman to the death penalty for rejecting Islam and converting to Christianity.²⁴² Abdul Rahman had made the conversion 16 years before his conviction, when he was working as a medical aid officer for a Christian relief organization in Pakistan caring for Afghan refugees.²⁴³ When he returned to Afghanistan to settle a custody dispute for his daughters, he was arrested after his family denounced him to the police.²⁴⁴ When questioned in court, Abdul Rahman identified himself as a Christian.²⁴⁵ Consequently, the court sentenced him to death for apostasy under *Hanafi fiqh* (Article 130 of

²⁴¹ RUTTING, *supra* 234.

²⁴² Mandana Knust & Rassekh Asfshar, *The Case of an Afghan Apostate-The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 593 (A. Von. Bogdandy & R. Wolfrum eds., 2006).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

the Constitution authorizes the application of *Hanafi fiqh* when there is no state law on particular issues, such as apostasy).²⁴⁶ However, high-ranking state officials and dignitaries called for Abdul Rahman's release, reminding Afghanistan of its duty under international human rights treaties and the Constitution to respect Abdul Rahman's right to freedom of religion.²⁴⁷ Finally, under pressure from Afghan civil society and the international community, the indictment was rejected on procedural grounds.²⁴⁸

Similarly, in 2007, a primary court in Balkh Province sentenced Sayed Parwiz Kambakhsh to death on blasphemy charges under Article 130 of the Constitution.²⁴⁹ Kambakhsh was accused of distributing newspaper articles that allegedly were offensive to the religion of Islam and the Prophet Mohammad.²⁵⁰ The people in Balkh Province demanded the death penalty for Kambakhsh, and the Balkh primary court did end up imposing a death sentence.²⁵¹ On appeal, Kambakhsh changed his venue from Balkh to Kabul, and the Kabul Court of Appeals reduced the sentence to ten years imprisonment under the same Article 130 of the Constitution.²⁵² Unsatisfied, many Afghans and members of the civil society condemned the decision and held protests in Kabul in support of Kambakhsh, citing his constitutionally guaranteed right to freedom of speech, freedom of the press, and freedom of religion.²⁵³ Finally, under pressure from civil society and the international community, President Karzai ordered Kambakhsh's release.²⁵⁴

These two cases demonstrate that Afghans are still divided over critical ideological

²⁴⁶ AFGHAN CONST. (2004), *supra* note 197, art. 130.

²⁴⁷ Knust & Asfshar, *supra* note 237, at 593.

²⁴⁸ *Id.*

²⁴⁹ Decision of the Kabul Appeals Court on the Case Concerning Insult to the Holy Religion of Islam and the Holy Prophet (SAW), Decision No. 580 (2007).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ KABUL PRESS, KARZAI INTERVENES IN CASE OF PARWIZ KAMBAKSH (2008), *available at* <http://www.wluml.org/node/4390>.

²⁵⁴ KABUL PRESS, PARWIZ KAMBAKSH RELEASED FROM PRISON (September 2009), *available at* <http://kabulpress.org/my/spip.php?article4013>.

questions, such as the role of religion and liberal rights. Up to the present, there has never been a predictable decision on these kinds of questions. In the examples cited, the government did not answer questions on the role Islam plays in the state, arguably because the people are deeply divided on these questions. Instead, the government has relied on procedural grounds to find a way to prevent persecution. The fact that this is happening illustrates that ideological issues remain problematic and divisive, and it also shows that the government is willing to leave things as they are because to do otherwise would likely provoke unrest.

Therefore, the experience of Afghanistan indicates that the durability of constitutional solutions to religious conflicts depends not only on the constitution makers' choice to avoid entrenching a particular vision of the state-religion relations within the constitution, but it also depends to some extent on the government's willingness to keep the deferred order in the absence of agreement—refusing to concretize a particular vision through constitutional interpretation or judicial review. Concretizing a particular practice through constitutional interpretation might risk conflict and challenge the durability of such constitutional provisions.

As long as the Taliban's views are concerned, the 2004 Constitution and the 2005 Taliban constitution do not differ significantly in terms of the role that they describe for Islam and Islamic law.²⁵⁵ In a point of commonality, both documents recognize Islam as the state religion and require that no law should conflict with its tenets and beliefs (although the two documents provide different language in describing the repugnancy clauses).²⁵⁶ With the exception of the communist-era 1980 constitution, all Afghan constitutions have had a similar repugnancy clause.

The biggest points of divergence between the Afghan Constitution and the Taliban constitution relate to the political systems they establish. These significant divergences cover the status of the head of state, the structure and separation of powers in the government, and sources

²⁵⁵ For a comparison of the 2004 Constitution and the Taliban Order, see KANE, *supra* note 234.

²⁵⁶ KANE, *supra* note 234, at 9.

of legislation.²⁵⁷ The Afghan constitution establishes a democratic system of government in which a popularly elected president is the head of state and government. The Taliban constitution, by contrast, proclaims Afghanistan as an Islamic Emirate under the leadership of Mullah Mohammad Omar, the self-designated *Amir al-Mominin* (Commander of the Faithful).²⁵⁸ The Taliban constitution does not describe how the *Amir al-Mominin* is selected or how long an individual may serve in this role.

The legislative and judicial branches of the two systems differ significantly. The Afghan Constitution establishes a bicameral National Assembly in which the lower house is directly elected and the upper house consists of a mix of indirectly elected and presidentially appointed senators.²⁵⁹ The Taliban constitution, by contrast, establishes a single chamber Islamic Council as the highest legislative organ, whose members are appointed by the *Amir al-Mominin* based on their familiarity with the principles of *jihad* and *sharia*. The assembly and the council do have similar functions, such as approval of laws, the state budget, and treaties. Both the 2004 Afghan Constitution and the Taliban constitution recognize the judiciary as an independent branch of government with comparable duties and functions. However, under the Afghan constitution, the Supreme Court reviews laws for their compatibility with the Constitution.²⁶⁰ The Taliban constitution gives this responsibility to the Islamic Council, blurring the separation of powers between the legislature and the judiciary.²⁶¹

In these areas that the Taliban constitution and the 2004 Constitution differ might arguably consist the Taliban's points of negotiations. On constitutional provisions that define the status of religion and religious laws, both documents are considerably similar and might not comprise the

²⁵⁷ *Id.* at 8.

²⁵⁸ *Id.* at 8–9.

²⁵⁹ AFGHAN CONST. (2004), *supra* note 197, arts 83 & 83.

²⁶⁰ *Id.* art 121.

²⁶¹ KANE, *supra* note 234, at 9.

Taliban's negotiation points.

More importantly, constitutional solutions to religious conflicts under the 2004 Constitution of Afghanistan might survive the Taliban's pressure simply because they are un-amendable.²⁶² Article 149 of the 2004 Constitution states that the principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.²⁶³ For all these reasons, we predict that constitutional provisions that define the role of religion and religious law in the state, which have endured for almost a century, might endure into the indefinite future.

V. CONCLUSION

This Article showed that constitutional solutions to religious conflicts in Afghanistan have endured for almost a century, and they might possibly endure into the indefinite future. Subsequent constitution makers in Afghanistan have retained earlier constitutional solutions to religious conflicts because they were vaguely defined that deferred the questions of state-religion relations to the ordinary political process. Moreover, constitutional solutions to religious questions in Afghanistan have often stuck because they had achieved a considerable historical advantage and because the cost of negotiating an alternative religious constitutional arrangement had been considerably high.

Moreover, by a strategy of constitutional deferral, the most successful Afghan constitutions have mitigated intense conflict over the role of religion and religious law and their relationship with the state. In this respect, they have adopted strategies of constitutional ambiguity, ambivalence and avoidance that did not seem clearly to resolve the question and entrench a particular vision of the relations between religion and the state. These strategies further allowed the political system greater flexibility in future decision-making on religion-state relations. More

²⁶² AFGHAN CONST. (2004), *supra* note 197, art. 149.

²⁶³ *Id.*

importantly, deferral on the questions of religion in Afghanistan successfully avoided conflict; although constitutional deferrals in this respect did not help develop consensus, they promoted a peaceful coexistence among Afghanistan's religiously divided people.

The Afghan experience shows that the success and durability of any constitutional solution to religious conflicts depends not only on constitutional deferrals but also on governmental practice. It is important that governmental practice (through constitutional interpretation or judicial review) does not attempt to resolve the deferred constitutional order defining the state-religion relations in the absence of agreement. Resolving deferrals on questions of religion in religiously divided society too soon might carry the risk of conflict and endanger a peaceful coexistence among religiously divided people.

In short, we learn from the experience of Afghanistan that in societies where common allegiance to religion masks enormously deep divisions about basic issues of religious belief, social morality and social organization, it is important to create constitutional regimes that does not entrench a particular vision of the state-religion relations but leave room for ongoing negotiations of religious questions in the future. Constitutional deferral and incremental constitution making are useful tool in creating such constitutional regimes—tools that in turn lead to the durability of constitutional solutions to religious conflicts and a peaceful coexistence among the divided people.