RENEWAL AND REFORM FOR A POST-KARZAI AFGHANISTAN: A CRITICAL APPRAISAL OF THE 2004 CONSTITUTION

*Daud AbdulFattah Batchelor**

Abstract: With elections being held in May 2014 for a new president and in 2015 for National Assembly representatives, the opportunity exists then for amending the 2004 Afghan Constitution. The necessity exists for amendment from different perspectives; firstly because the experience of implementation over the past 10 years has highlighted some weaknesses requiring rectification, and secondly, the Taliban, a key player in the Afghan polity, rejects it as not being sufficiently Islamic. This is partly a consequence of the occupiers imposing their will during its original crafting. The excessive powers wielded by Karzai in the executive arm and the need to provide more inclusive representation in governance of such a multi-ethnic country suggest a parliamentary system would have merits over the current presidential system. Facility is needed to ensure that any person the Afghan Human Rights Commission justly determines has committed or ordered crimes against humanity should be barred from running for any political office. Proposed election reforms would ensure a truly Independent Elections Commission, as well as synchronising expensive national and provincial elections so as to reduce election costs and security issues. To resolve current jurisdictional issues of the Supreme Court and the Independent Commission for Supervision of the Implementation of the Constitution regarding resolving constitutional issues, it is proposed that the former is provided these interpretative powers while the latter becomes a research institute, especially to enhance the understanding of what is required for Afghanistan to become an “Islamic” Republic. Specific recommendations are provided herein on what principles and features should be included in the Afghan constitution to characterise and develop it as an Islamic republic. Proposals for strengthening the role of Islamic Sharī‘ah include firstly, clarifying the role of ‘*aḥkāṁ*’ in the repugnancy clauses, sourcing rulings from other than the Hanafi madhhab, and expanding the applicability of the Sharī‘ah outside the courts to which it is currently restricted by the Constitution. A policy recommendation is made for the holding of a Constitutional Loya Jirga to deliberate upon various amendment proposals and the adoption of new clauses as an exercise in peace-building and stabilisation, especially involving the Taliban who would need to be fairly represented, protected, and have their views heard and considered in the constitutional amendment process.

Introduction

After almost 35 years of ongoing deprivations, insecurity and family losses, the Afghan people are yearning for a peaceful resolution of the current conflict, especially hoping for the Taliban and their allies to be drawn into a settlement with the United States, the Karzai government and its parliamentary opposition. The key obstacles to a settlement with the Taliban remain the continuing occupation by the United States and NATO forces, the apparently open-ended Strategic

Partnership Agreement with the US signed by President Hamid Karzai in 2012, and the Taliban's entrenched opposition to the 2004 Afghan Constitution. The Taliban have not publicly identified details of their constitutional position but they consider the current constitution is illegitimate because it was written "under the shadows of B-52 [bombers]".¹ Real peace negotiations are currently at a stalemate partly because President Karzai is insisting that acceptance of the 2004 constitution is a prerequisite for peace talks.

This is an impractical position since virtually all parties, including some Pashtun groups, acknowledge the necessity for amendments to the 2004 Constitution. Almost ten years of governance experience with this Constitution have convinced most Afghans on the need for change. Even Barnett Rubin, the United States' consultant who advised the Afghan Constitutional Review Commission in 2003 acknowledged that "the new constitution contains many obstacles to stable and effective governance."² Mohammad Hashim Kamali believes that rather than facilitating a negotiated peace between the rival factions, the Constitution "may have actually exacerbated factional rivalry and political instability in the country."³

The semi-government agency, the United States Institute of Peace, has clarified that "The [current] conflict ... is also a legitimacy crisis stemming from a system of power and patronage that feeds conflict. From this perspective, a settlement should address the concentration of powers in the presidency through incremental reform to appointments, elections, or farther-reaching changes to the structure of government over time."⁴ It could well be asked, why the Taliban should have to accept this flawed Constitution when President Karzai's government itself, due to the enormous powers provided it under the current presidential system, has "time and again demonstrated a belief that it is above the law, accountable only to the small circle of political elites that make up the core of Karzai's constituency."⁵ The benefits of government are monopolised by the Karzai regime and "divided among a small elite who are appointed through political deals based on their past roles and who act with a combination of ethnic, factional and criminal motivations."⁶

This is a telling admission since informed analysts confirm that the 2004 Constitution was steered by the United States in its favour on a number of key issues. Nathan Brown, Director of Middle Eastern Studies at George Washington University, acknowledged that compared with the constitution-making process in Iraq, in Afghanistan there "*was a far greater multilateral and facilitating role [by the United States and United Nations] but it came in ways that made the document seem less an imposed product.*"⁷ One Afghan legal professor wryly commented that "every regime in Afghanistan has had its constitution; this [is] the American's constitution."⁸

In the face of widespread opposition at the time among many delegates of

the Constitutional Loya Jirga against the powerful presidential governing system incorporated in the Constitution, President Karzai in his final speech to the Constitutional Loya Jirga on January 4, 2004, in a conciliatory fashion flagged the opportunity for amending the newly-approved constitution at a future time:

[T]he Constitution is not the Qur'an. If in five or ten years down the line we find that stability improves, proper political parties emerge, and we judge that a parliamentary system can function better, then a Loya Jirga can at a time of our choosing be convened to adopt a different system of government.⁹

Constitutions are often constructed at times of national upheaval with a wish for a new start, or to legitimise a new regime. The same could be said of the present context, which is different from 2004 in that Afghans will soon be taking control of their country from the occupying powers and will want to rectify earlier imbalances resulting from subtle external control of the constitutional drafting process and to be more inclusive by facilitating involvement of the Taliban who were previously excluded from the reconciliation process. It is hoped that a solid foundation for the renewal of civil society could then take place in Afghanistan to achieve the blessed condition of peace and harmony towards which Islam draws the Believers.

From a review of the application of the current constitution over the past nine years, a number of improvements have been identified that are proposed here as constitutional amendments.

Time for a Parliamentary System

The United States Department of Defense in its 2012 Annual Report on Afghanistan to Congress openly acknowledged that the existence of “an imbalance in the distribution of power between the three branches of government, with power concentrated in the executive branch, continues to limit effectiveness and legitimacy.”¹⁰ The reputable International Crisis Group affirmed the necessity for a constitutional transition to a parliamentary system to bring about “sustainable stability”:

It is highly unlikely that the current dispensation, which privileges presidential power over the other branches, can accommodate the varied needs of Islamist factions, women and minorities. A move to a parliamentary system is required to ensure the broadest possible access to government and enfranchisement of Afghan citizens. Constitutional change is an inevitable step toward negotiating a lasting peace with all elements of the opposition.¹¹

It appeared at the time of the Constitutional Loya Jirga that the call for a strong presidential system was a minority position championed by President Karzai¹²,

his royalist allies in the camp of former King Zahir Khan, and his United States' backer, while leader of Afghanistan's largest political grouping, former Afghan president, Burhanuddin Rabbani, among others, had called for a parliamentary system.¹³ President Karzai had warned though that he would not participate in a future government if it was based on other than a presidential system.

Even though the majority of the many new democracies worldwide since 1980 opted for presidential or semi-presidential systems, the consensus of scholars has been that presidential regimes are more inclined towards democratic breakdown than are parliamentary ones. Latin American countries that adopted presidentialism suffered high failure rates in the 1960s and 1970s and many since parliamentarianised their constitutions.¹⁴ Little support can be found for semi-presidential systems.¹⁵ Semi-presidentialism has been criticised because of its "inherent tension and unpredictability" resulting from having a dual executive which often strains government stability and efficiency. The French system is however, superior to the Russian approach adopted by most former Soviet republics. For one, Kyrgyzstan which developed into a full-blown tyranny, changed in 2010 to become a parliamentary republic.¹⁶

The majority of stable democracies in the world today appear to be parliamentary regimes.¹⁷ The dominant view of political scientists is that parliamentarianism is more likely to encourage "democratic consolidation" than is presidentialism.¹⁸ Specific weaknesses of presidential systems include firstly, the lack of parliamentarianism's safety valve - the confidence vote - allowing for removal of unpopular governments without jettisoning the constitution, and secondly, presidentialism tends to enkindle crises by aggravating the relationship between the executive and the legislature. In many developing countries (e.g. Pakistan) this has provided openings for military intervention with negative consequences to building a participatory civil society. Also, whereas parliamentarianism encourages collegial executives and multi-party coalitions, a presidential election may lead to the president's presumption of having a popular mandate while actual public support could be quite limited.¹⁹

The parliamentary system has been found to be more inclusive and provides better opportunity for diverse inputs, especially from minority groups. A study of the modern experience of governance in Iran and Pakistan as two leading Islamic republics, demonstrated conclusively that semi-presidential systems on which they were based, tend to degenerate into autocratic systems.²⁰ This is partly due to abundant historical precedences of autocratic rule by Muslim rulers. Hamid Khan, former Chairman of the Pakistan Bar Council, had assessed that a parliamentary system is more suitable than a presidential one for Pakistan.²¹ Pakistan for one has now evolved closer to the parliamentary system envisaged in its original 1973 constitution.²²

Rubin believed that nearly all Pashtun delegates in the CLJ supported presidentialism.²³ Pashtuns as a group however, need to consider the risk that a future powerful elected president under the current constitution could well be a non-Pashtun who may not provide much respect to Pashtun concerns. This risk would be reduced under a parliamentary system.

Ensure Persons Responsible for Crimes against Humanity are Barred from Public Office

Although Articles 62 and 72 of the 2004 constitution require that candidates for the positions of President and Minister, respectively “shall not have been convicted of crimes against humanity, a criminal act or deprivation of civil rights by court”, passage of the 2007 amnesty law by the National Assembly ensured that all members of parliament were provided an amnesty for any past crimes. Consequently, no future conviction is possible for known perpetrators of such crimes who sit in parliament.

A solution to this dilemma has been suggested by the International Crisis Group who proposed that the manner of barring such individuals be as follows: “an individual whom the Afghan Independent Human Rights Commission, after thorough investigation and rigorous administrative hearing, has determined committed or ordered war crimes, and who has exhausted such judicial appeals as may be available against that ruling, shall be barred from public office.” A law also needs to be passed that defines what is a “crime against humanity”, which is currently lacking despite Afghanistan’s ratification of the International Criminal Court statute.²⁴

Election Reforms

Achieving an Independent Elections Commission

The prolonged crisis which developed from President Karzai’s responses to findings by the Election Complaints Commission of widespread corruption in the 2010 parliamentary election process, including his ill-conceived February 2010 presidential decree, gave widespread concern of the abuse of presidential authority for partisan advantage.²⁵

International observers called for legislative changes at least one year prior to the 2014 presidential and 2015 parliamentary elections to ensure no recurrence of such situation. The following recommendations of the International Crisis Group to ensure a stronger base of participatory governance and hence legitimacy deserve close consideration: firstly, annul the divisive 2010 presidential decree on elections, and secondly, initiate consultations on electoral reform within the legislature with a view to adopting reforms to the electoral law that give the lower

house a measure of approval over the appointment of the Independent Elections Commission and the Electoral Complaints Commission, while clarifying the roles and responsibilities of both bodies.²⁶ These reforms could be handled as constitutional amendments.

It was the clear intention of the drafters of Article 156 of the Constitution to achieve an Elections Commission (IEC) independent of the Executive but it did not specify how the IEC would be established and function. In this respect, Pakistan with passage of its *18th Constitutional Amendment Act 2010* strengthened the impartiality of its Election Commission (ECP) by firstly, directing that the head of the ECP be chosen by a parliamentary committee equally composed of government and opposition members from three names submitted jointly by the Prime Minister and leader of the Opposition of the National Assembly, and secondly, that the ECP comprises five permanent members including its head, who are empowered together to prepare electoral rolls, to hold elections, to fill a casual vacancy, to appoint election tribunals and to appoint staff of the Election Commission.²⁷ This approach has merit for consideration as an amendment of the Afghan constitution to ensure that the IEC is also truly independent.

Synchronising Expensive Elections

Those who constructed the 2004 constitutional provisions on elections, especially the international specialist advisors, made a serious blunder in their election scheduling. Author, Scott Seward Smith, highlighted this problem:

The presidential and Wolesi Jirga terms were set at five years, the term of Provincial Councils at four years, and term of District Councils at three years. This meant that nation-wide elections would have to be held in three out of every five years. For a country emerging from conflict, where organizing elections is expensive and their political effect is politically divisive, this punishing schedule was not only impossible to implement, it was almost a recipe for constant political conflict.²⁸

Consequently, as a solution, a common term for all government entities should be considered, perhaps with each set of elections to coincide every four years. Another serious inherent weakness of the electoral calendar has been exposed:

The dates for the expiration of the presidential and lower house terms were set as May 22 and June 22 respectively, with elections needing to occur within 30 to 60 days prior to those dates. This meant that, if presidential and lower house elections were held together, which the Constitution intended, then there was only one date, April 22, on which both elections could be held together – 30 days before the expiration of the presidential term and 60 days before the expiration of the legislative term.²⁹

Consideration needs to be given then to allowing a longer period of time before expiry of the presidential and Wolesi Jirga (the lower house) terms so as to provide flexibility in setting elections dates. The critical next presidential election before the United States' anticipated troop pullout has been decided for April 5, 2014. Due to security and financial considerations this is planned to coincide with nation-wide provincial elections as well.³⁰

Clarifying Supreme Court's Power on Resolving Constitutional Ambiguities

Under the 2004 Constitution two separate institutions were provided powers to determine the application of constitutional laws – the Supreme Court (Article 121) and the newly established Independent Commission for Supervision of the Implementation of the Constitution (ICSIC; Article 156). Article 121 had provided the duty to the Supreme Court, “At the request of the Government, or courts [to] review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law”. Both institutions have their justices or members appointed by the President with endorsement required by the Wolesi Jirga. Unfortunately, due to ambiguity in the original constitutional design over which of them has the greater right to undertake judicial review, a gridlock has developed. With the President championing the role of the Supreme Court and parliament supporting the ICSIC, it has developed into an unseemly competition for power between the executive and the legislature resulting in a stalemate.

In the process leading up to acceptance and promulgation of the constitution, the idea of a “constitutional court” that was present in the Constitution Review Commission's 2003 draft, was removed³¹, apparently with the understanding that the Supreme Court would act as the supreme interpreter of the constitution. Resolution of the current impasse, which is having a detrimental impact on the rule of law in Afghanistan today³², will need to await the 2014-2015 elections and selection of a new president and legislature, or it may necessarily be delayed until the anticipated future constitutional re-arrangement to a parliamentary system. That would be the appropriate time to amend the constitution to clearly make the Supreme Court supreme in deciding constitutional issues and to ensure that judges are appointed to an *independent* Supreme Court in a free and non-partisan manner. Clear lines of authority will need to be provided between the Supreme Court and the ICSIC.³³ In the meantime, the state as a whole is ‘at risk’ because of the uncertain status of Supreme Court decisions on constitutional disputes³⁴, while at the same time due to this ambiguity there are few avenues available for individual citizens to challenge government actions or legislation.³⁵

Role of the ICSIC

There would be reason to make the ICSIC subsidiary to the Supreme Court but include in its purview the role of a research institute in line with the original proposal of Hashim Kamali, to establish:

a Shari'a and law research institute, perhaps to engage scholars and thinkers from both disciplines, a think-tank that would address issues of concern to fundamental rights, implementation of the new constitution, and democratic government through mutually supportive approaches between Shari'a and statutory law. It is not yet certain, for instance, how an Islamic republic should actually be manifested in practice and what institutional arrangements need to be made to point the country in that direction.³⁶

A similar organisation, the eight-member Council of Islamic Ideology (CII), was established in Pakistan under Article 228 of the extant 1973 Constitution with its functions specified as:

- (a) to recommend to Parliament and the Provincial Assemblies the means for enabling Muslims to order their lives in accordance with the principles of Islam as enunciated in the Qur'an and Sunnah;
- (b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to Islam;
- (c) to recommend the measures for bringing existing laws into conformity with Islam; and
- (d) to compile for the guidance of Parliament and the Provincial Assemblies, such injunctions of Islam as can be given legislative effect.

CII's precursor had been established as a research institute in 1962. The operation of the CII has had a limited application in Pakistan due to the lack of will of the executive and legislature in implementing recommendations from the CII's annual interim reports submitted to parliament. The status of the CII is currently in limbo as the law ministry considers that the institution completed its constitutional mandate in 1996 with submission of its final report.³⁷ However the institution is extant and the current CII Chairman was appointed by the government in 2010. In 2009 it had been deliberating upon important issues of women's rights, legal reform, human rights, terrorism, extremism, Islamic banking, privacy, penal, and civil laws.

It is envisaged that the ICSIC would have a more effective role than this in Afghanistan. One of its major roles could be to assess conformity of existing laws with the Shari'ah in Afghanistan under Article 3 of the Constitution. In cases where there could be a large impact on society or the economy if abruptly

promulgated (for example, bringing banking laws into conformance with the Sharī'ah), a long-term strategy for sustainability of industry and a realistic time frame for implementation would need to be developed.

Significance of Being an Islamic Republic

Given the strong attachment of Afghans to Islam it was unsurprising that the Constitutional Review Commission and the Constitutional Loya Jirga supported the naming in Article 1 of the “Islamic Republic of Afghanistan”. However, it was CRC member, Mohammad Hashim Kamali, who pointed out the major significance in using the attribute “Islamic” Republic, which would need to be elaborated upon in a future constitutional amendment. The challenge was that there was no generally recognised model of an Islamic republic anywhere to be followed.³⁸ The countries that have the greatest claim to such attribution are its two neighbours, the Islamic republics of Iran and Pakistan, which have specified Islamic provisions in their constitutions. Pakistan as a Sunni-led state has perhaps more relevance to Afghanistan. Elaboration on the relevant parts of their respective constitutions suggests the following fundamental principles and features should be included in the Afghan constitution to characterise an Islamic republic:

1. Sovereignty is vested in God while citizens act as His vicegerent with a *delegated* sovereignty applied by means of their representatives in a participatory governance system, within the constraints of the Law;
2. Islamic Law is enforced throughout the country and all citizens are treated equally before the law;
3. Law-making is conducted on the basis of consultative decision-making (*shūrā*), and agreement (*ijmā'*) in the National Assembly, with legal advice (including *ijtihad*, informed scholarly determination) provided by parliamentary-approved *fuqahā'* (jurisprudents) to help ensure alignment with Islamic Law;
4. An independent judiciary;
5. Justice, trustworthiness, transparency and accountability to citizens are essential attributes of all branches of state governance for the protection and realisation of people's welfare (*maṣlahah*); the state is committed to protect the rights of life, ownership, personal security and honour; social justice requires eradicating deprivation, and ensuring adequate food, housing, employment and health care for all;
6. Respect for human rights and liberties, with special care for women and minority groups, and encouragement of civic co-operation (*al-ta'āwun*) so as to enhance national unity;
7. Free, honest and transparent elections, organised, implemented and

- monitored by a truly independent elections commission, to elect upright representatives from electoral candidates satisfying preset qualifications;
8. Provision for an anti-corruption agency and an ombudsman (*muhtasib*) institution;
 9. Provision of school education, and the teaching of *Islamiyyat* to Muslims; together with the observance of high moral standards;
 10. Proper organisation of taxes (*zakāt*, *‘ushr*), endowments (*awqāf*) and *masājid*;
 11. Prevention of prostitution, gambling, and taking of injurious drugs and alcohol;
 12. Timely elimination of usury (*ribā*) in the economy;
 13. Timely elimination of laws repugnant to Islam.

The benefit of calling Afghanistan as an “Islamic republic” is that the state is clearly identified with Islam, as is the identity and the vision of the Afghan people of striving to establish a more fully Islamic society for the well-being of all and felicity in the next life. The features provided above would help solidify this vision and facilitate the development of strategies to achieve these objectives.

Strengthening the Role of Islamic Law (*Al-Sharī‘ah*)

One of the major red-lines that the American advisors on the Afghan constitutional process insisted must not be crossed was the avoidance of any mention of the word “Sharī‘ah” in the constitution, and they celebrated their achievement of this objective.³⁹ However, in reality, reference to the Sharī‘ah is contained in Article 3, which states that no law shall contravene the beliefs and *aḥkām* (i.e. rulings or principles) of Islam, which implies Islamic law. This was a sharp approach by the Afghan drafters of the constitution which circumvented the occupier’s prohibition. There are however today, at least two reasons to review this approach and to consider overtly mentioning “Sharī‘ah” by name in the constitution. This is because firstly, the Taliban have rejected the 2004 constitution as it does not appear Islamic enough.⁴⁰ Secondly, the ninety-nine percent support in Afghanistan for Sharī‘ah to be “the official law of the land” among survey respondents recorded in 2011 by the Pew Center of the United States is overwhelming and represented the highest among all Muslim-majority countries surveyed.⁴¹

Clarifying Application of “Aḥkām” in the Repugnancy Clause

The word “*aḥkām*” (plural of *ḥukm*, or ruling, ordinance, judgement) in Article 3 refers mainly to the Sharī‘ah⁴², however, there is a concern that its meaning and application are not clear. Citing from his experience with the parliamentary debate surrounding the Afghan *Marriage Law 1971*, Kamali pointed out that “ambiguity and absence of clear criteria to determine instances of repugnancy with Islam

could serve as a tool more readily in the hands of hard line conservatives than it can serve a reform-oriented objective”.⁴³

The Sharī‘ah itself is not restricted to rulings but is also a moral code by which Muslims live. Sharī‘ah comprises two main categories: *‘ibādāt* (devotional matters) and *mu‘āmalāt* (civil transactions). The former comprises rules which regulate the relationship of man with his Creator, whereas the latter is concerned with the relationship between man and his fellow humans. Generally, it is the Sharī‘ah laws in the sphere of *mu‘āmalāt*, which seek to regulate relations among individuals, that constitute the primary concern of government authorities and the judiciary.⁴⁴ These are justiciable and the individual can seek judicial resolution if his rights are violated by others or by the government.

To provide some guidelines in the Constitution under Article 3 to assist state law-makers avoid abrogation, it would be advised that the *ḥalāl* and *ḥarām* rulings in Ḥanafī *fiqh* (or Ja‘farī *fiqh* in case of Shī‘ites) would generally apply, particularly those with definitive (*qaṭ‘ī*) proofs from the clear injunctions (*nuṣūṣ*) of the Qur‘an and the *mutawātir* Hadith (with continuous testimony). The manner by which rulings would be deduced from other less definitive Qur‘anic verses and the *Sunnah* would involve application of progressive Ḥanafī (or Ja‘farī) *uṣūl al-Fiqh* methods. All rulings whether parliamentary legislation, presidential decrees, or departmental regulations, and whether they are perceived to be part of the Sharī‘ah or not, should also take into consideration the general principles of the *maqāṣid al-Sharī‘ah* (objectives of the Sharia) and the well-established *al-qawā‘id al-fiqhiyyah* (legal maxims). In this manner the application of Article 3 may be used as a basis of healthy adjustment and reform.⁴⁵

Sourcing from Other than the Ḥanafī Madhhab or New Ijtihād

Article 130 of the 2004 Constitution specifies the sole use of Ḥanafī *fiqh* “to rule in a way that attains justice in the best manner” for deriving court rulings in cases where there is no specific provision in either the Constitution or other of the country’s laws about a case. This high respect for Ḥanafī *fiqh* in the Constitution is no doubt a consequence allied to Mohammad Hashim Kamali’s observation as a member of the Constitutional Review Commission travelling throughout Afghanistan’s provinces in 2003 during the period of broad public consultation that there was an unmistakably strong attachment of the populace to the Ḥanafī *fiqh* school (*madhhab*; plural, *madhāhib*) – to the extent of it being “dogma” with them.⁴⁶ Imam Abū Ḥanīfa himself though had stressed that “If I have made a ruling which contradicts Allah’s book or the messenger’s Hadith, reject my ruling.”⁴⁷ Perhaps then there may on occasions be a better ruling within another *madhhab*.

Looking at further improvements in the approach taken and ruling “in the best manner”, it is perhaps time to accept Hashim Kamali’s encouragement of

using a “selection” (*takhayyur*) approach that would enable a judge to utilise the wider resources of the Sharī‘ah in all of its leading schools.⁴⁸ Consequently, it is recommended that the Constitution provide leeway for the judge to derive rulings from other *madhāhib* if Ḥanafī *fiqh* does not provide a satisfactory basis in a particular case. There is already precedence for this approach in Afghanistan since the *Afghan Civil Code 1977* had adopted parts of the Mālikī law on divorce.⁴⁹ Such an approach would also gain broader acceptance from the Afghan Shī‘a population if Ja‘farī *fiqh* could be included for consideration. Furthermore, if no suitable ruling can be found within any of the *madhāhib* then new *ijtihād* by a qualified *mujtahid* could be specifically provided for by the Constitution. Well-presented arguments supporting these views would need to be prepared and provided to future Afghan Jirga delegates considering such an amendment.

As Article 130 differs from Article 102 of the 1964 constitution in referring only to Ḥanafī *fiqh* and omitting the statement ‘of the Sharī‘at of Islam’ which appeared immediately after the citation of ‘Ḥanafī jurisprudence’, Hashim Kamali was concerned with the possible implication from this “that a direct recourse to the Holy Qur’an and the *ḥadīth* by the judge is precluded”. To ensure that judicial *ijtihād* can in future be practiced in Afghanistan, this is another argument for putting back reference to the Sharī‘ah here into an amended 2004 constitution.

Applicability of Sharī‘ah Outside of the Courts

There is a concern with Article 94 of the 2004 Constitution which restricts “Law” to only “what both houses of the National Assembly approve and the President endorses, unless this constitution states otherwise.” Consequently, Hashim Kamali believed the 2004 constitution restricted the application of Ḥanafī *fiqh* to court cases only.⁵⁰ The 2004 version differs from the counterpart 1964 Constitution Article 69⁵¹ which added that “In the area where no such law exists, the provisions of the Ḥanafī jurisprudence of the Sharī‘at of Islam shall be considered as law”. This approach had allowed recognition of the Sharī‘ah *outside* of the courts as well. As the application of Islamic law should apply in diverse fields of the life of a Muslim community, whether or not a perceived infringement is brought before a court of law, Article 94 of the 2004 Constitution is clearly deficient. This could be rectified by incorporating the missing sentence from the 1994 constitution into Article 94, together with a proposed addition at the end of the sentence, “or an alternative ruling of Islam if this can be demonstrated to achieve justice in a better manner” in line with the preceding argument regarding *takhayyur* and judicial *ijtihād*.

Provision for *Fuqahā’* to Assist Drafting of Bills

In Afghanistan either the Government or members of the National Assembly may be involved in drafting new Bills for consideration by the Legislature. All

legislation needs review to ensure it complies with the Article 3 repugnancy clause of the Constitution. Given that there is currently no pre-requisite for Executive or National Assembly members to have any basic knowledge of Shari'ah or *fiqh*, to ensure that proposed bills for legislative deliberation are in accordance with the "*aḥkām*" of Islam, it would seem appropriate to cite in the Constitution that *fuqahā'* be involved with the Proposer in drafting any new legislation. They could also review possible revisions of the original bill that may be moved in the National Assembly.⁵² The *fuqahā'* involved would likely be sourced from the Supreme Court and should in a similar manner to Supreme Court candidates in Article 117 of the constitution, be or have been popularly endorsed by the National Assembly.

Provision for *Muhtasib* (Ombudsman) Institution

In the direction of enhancing a caring Islamic environment for Afghan citizens and protecting their rights, the office of *Muhtasib* or Ombudsman should be established by a constitutional amendment as an independent institution. The traditional *Muhtasib* role in 14th century Middle Eastern Muslim countries encompassed the regulation of trade and commerce in bazaars, overseeing the standards of craftsmen and builders, and the supervision of public morals, public baths, schools, public safety and traffic regulation. This was done in conformance with Shari'ah law and public interest (*maṣlaḥah*). The institution has existed in Pakistan since its establishment by a 1983 presidential order. Its primary objective there however, is to independently investigate, redress and rectify injustices faced by the public from Federal Government departments.⁵³ This successful experience led to its expansion and the establishment of *Muhtasib* institutions at the provincial civil service level as well.

In Afghanistan, vigilance would be needed to ensure that any application of the Shari'ah role of "*amr bi al-ma'rūf wa-al-nahy 'an al-munkar*" is moderate and enlightened keeping in mind the objectives of the Shari'ah to ensure there is no repeat of the harsh and frequently unIslamic application under Taliban rule, which particularly disadvantaged women.

Resolve the Conflict of the Universal Declaration of Human Rights (UDHR) with Islamic Shari'ah

This matter can probably only be resolved at some future date when the world body, the United Nations, agrees to review the UDHR, which does not fully represent *universal* values, since no Muslim scholar was represented on the original drafting committee to provide an Islamic perspective. This deficiency should be rectified to respect Islamic civilisation and Muslims worldwide who comprise 23 per cent of the global population. On the Muslim side, articles which appear to be contrary to Islamic law could be reviewed and assessed for

compatibility with the UDHR by seeking new *ijmā'* (consensus) rulings from worldwide senior '*ulamā'* representatives.

The Constitution could also be amended to point out specific cases where men and women do not necessarily have "equal duties" such as certain responsibilities related to child-rearing (e.g. child-bearing and suckling of infants is performed only by women) as exceptions to the general rule of equality represented by Article 22.

Clarify the Consequences of No-Confidence Voting in the National Assembly

Article 92 refers to no-confidence voting by the parliament but does not specify the consequences of such a vote whether the censured minister may remain in office, resign or be terminated. This led to considerable ambiguity and tension between the executive and legislature in 2007 over the former Foreign Minister Spanta's case⁵⁴.

To elaborate and clarify the condition of no-confidence voting in the constitution it is proposed that an amendment be made to the effect that firstly, no debate or vote of no confidence be taken before seven days have elapsed from the date when the motion was submitted to the Wolesi Jirga; second, the debate and no-confidence vote are carried through not later than 30 days from the day the motion was put before the Wolesi Jirga; third, if the vote on an individual cabinet minister is passed, the minister must resign, but the president (or prime minister) may propose another member (or candidates) to the Wolesi Jirga for a vote of confidence; fourth, if the Wolesi Jirga rejects the proposal for a vote of no-confidence, the representatives who submitted it may not make the same proposal again before six months have elapsed; fifthly, a censure motion may be made instead of a no-confidence motion but if passed does not require resignation of the censured minister.

Other Constitutional Changes

Additional miscellaneous constitutional amendments of merit are proposed in Table 1.

Policy Recommendations

The recommendations for proposed constitutional amendments provided in this article should be considered by delegates to a proposed future Constitutional Loya Jirga with the strong participation of all sectors of Afghan society. The exercise of amending the constitution is a prime opportunity for peace-building by inviting previously unrepresented Taliban and *Hizb-i Islami* Hekmatyr representatives

to play a role in attending as delegates and providing their viewpoints in an inclusive environment of a specially inaugurated Constitutional Loya Jirga under Articles 149 and 150 of the 2004 Constitution. Full security guarantees need to be provided to all participants. It would be expected this Jirga would also authorise new parliamentary elections to take place within 12 months after the Jirga is held.

With the insecure current environment in Afghanistan, it is strongly hoped that with goodwill prevailing in the spirit of Islamic fraternal ties (*ukhuwwah Islamiyyah*) that the proposed Jirga and ensuing election will proceed successfully and provide a new start for renewal of the body politic in Afghanistan with the budding of sustainable long-term peace.

Table 1 Additional Miscellaneous Proposed Constitutional Amendments

Article	Topic	Wording	Proposal
Preamble		"And eventually regain Afghanistan's appropriate place in the international family;"	Delete this phrase - it is demeaning in implying Afghanistan as a country was not fit to join the international "family".
5	Defense	A conscript-based army will be developed to enhance national spiritedness and unity.	The likely benefits of such a system include: (1) inculcating a national consciousness and unity in the populace (2) avoiding reliance upon militia forces ⁵⁵ (3) redressing current bias in numbers of the military towards non-Pashtuns, and (4) reducing defence costs.
43	Education	"up to the B.A. level ... free of charge"	Add at the end, "to suitable applicants". Government revenues are insufficient to provide free tertiary education to everyone. Even wealthy countries do not do this. However, the government could provide fee-paying scholarships to those successful students who perform well in their secondary school assessments.
64	President's duties	"Appoint ... the Head of the Red Cross ..."	Change to "Red Crescent", the name used for the institution in Muslim countries; the cross is an overt symbol of Christianity.
66, 80	President's and Minister's duties	"... the Presidential [or Minister's] position shall not be used for ... religious considerations [or purposes]."	Amend to read "for ... sectarian religious considerations [or purposes]" since the Afghan state is grounded on "Islam" and the leader and officers have certain essential religious state roles to perform. It is to avoid promoting sectarian religious conflict that the article should be intended.

Notes

- * *Daud AbdulFattah Batchelor*, an Australian scholar, is Associate Fellow at IAIS Malaysia. He has a broad experience in industry, academia and international consulting covering the fields of Environmental Management, Islamic Political Science and Earth Sciences. He has been active in Muslim community organisations and is co-founder of the Islamic College of Brisbane. Daud has an MA in Islamic and Other Civilisations from ISTAC, and was presented the Longmans Award for PhD research at Universiti Malaya. He has an MSc from the Imperial College of Science and Technology, London and a Master of Engineering Science. He is currently working at assisting the Afghanistan peace process by determining how differences may be resolved to achieve a workable political framework, in the context of his current research focus on Islamic political systems.
1. Subel Bhandari, "Afghanistan Taliban Pair Pledge Tolerance", 23 December 2012, <http://www.theaustralian.com.au/news/breaking-news/taliban-seek-new-afghanistan-constitution/story-fn3dxix6-1226542483413> (accessed on 10 May 2013).
 2. Barnett Rubin, "Crafting a Constitution for Afghanistan", in Said Amir Arjomand (ed.), *Constitutional Politics in the Middle East: with special reference to Turkey, Iraq, Iran and Afghanistan* (Oxford; Portland, Oregon: Hart Publishing, 2008), 160.
 3. Mohammad Hashim Kamali, "Constitutionalism and Democracy: An Islamic Perspective", *Islam and Civilisational Renewal* (Kuala Lumpur: International Institute of Advanced Islamic Studies, October 2010), 20.
 4. Hamish Nixon, "Afghan Perspectives on Achieving Durable Peace", United States Institute of Peace, Peace Brief 94 (Washington, D.C.: 3 June 2011), 1.
 5. International Crisis Group, "Afghanistan: The Long, Hard Road to the 2014 Transition", Asia Report No. 236, 8 October 2012, 14.
 6. Nixon, 2.
 7. Nathan J. Brown, "Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani and Iraqi Constitutional Experiments" in Said Amir Arjomand (ed.), *Constitutional Politics in the Middle East: with special reference to Turkey, Iraq, Iran and Afghanistan*, (Portland, Oregon: Hart Publishing, 2008), 75. Emphasis shown.
 8. Cornelia Schneider, "Striking a Balance in Post-conflict Constitution-making: Lessons from Afghanistan for the International Community", 207. <http://www.brad.ac.uk/ssis/peace-conflict-and-development/issue-7/Striking-a-balance.pdf> (accessed on 20 May 2013).
 9. Hamid Karzai, "Address to the Closing Session of the Constitutional Loya Jirga", 4 January 2004. See www.unama-afg.org
 10. US Department of Defense, "Report on Progress Toward Security and Stability in Afghanistan", Report to Congress, December 2012, 103.
 11. ICG, 8 October 2012, 14.
 12. International Crisis Group, "Afghanistan: The Constitutional Loya Jirga", Afghanistan Briefing, 12 December 2003, 4.
 13. Paul Haven, "Afghan constitutional council embroiled in controversy, marred by angry sparring", Associated Press, 17 December 2003.

14. John M. Carey, "Presidential versus Parliamentary Government", in C. Menard and M. M. Shirley (eds.), *Handbook of New Institutional Economics* (Berlin, Dordrecht, Heidelberg, New York: Springer, 2005), 92, 112.
15. Kimberly A. McQuire, "President-Prime Minister Relations, Party Systems, and Democratic Stability in Semi-presidential Regimes: Comparing the French and Russian Models", *Texas International Law Journal*, Volume 47 (2), 2012, 430.
16. McQuire, 453.
17. McQuire, 429.
18. Diane Ethier, "Democratic Consolidation: Institutional, Economic, and External Dimensions", in 'Abdo I. Baaklini and Helen Desfosses (Eds.), *Designs for Democratic Stability: Studies in Viable Constitutionalism*, (Armonk, New York; London: M E Sharpe, 1997), 263.
19. Carey, 94.
20. Daud Batchelor, "The Political Systems of the Islamic Republic of Pakistan and the Islamic Republic of Iran", M.A. thesis submitted at the International Institute of Islamic Thought and Civilization, September 2011.
21. Hamid Khan, "Constitutional and Political History of Pakistan" (Karachi: Oxford University Press, 2001), 864-866.
22. The Pakistani system of governance may prove suitable for consideration for adoption by Afghanistan.
23. Rubin, 154.
24. ICG, 12 December 2003, 7.
25. ICG, 8 October 2012, 1; The International Crisis Group also believed "It is a near certainty that under current conditions the 2014 elections will be plagued by massive fraud."
26. International Crisis Group, "Talking about Talks: Toward a Political Settlement in Afghanistan", Asia Report No. 221, 26 March 2012, iv.
27. Shahid Hamid, Impact of the 18th Constitutional Amendment on Federation-Provinces Relations, PILDAT Briefing Paper No. 39 (Lahore: Pakistan Institute of Legislative Development and Transparency (PILDAT): July 2010), 11.
28. Scott Seward Smith, "Afghanistan's Troubled Transition: Politics, Peacekeeping, and the 2004 Presidential Election" (Boulder; London: First Forum Press, 2011), 97.
29. Scott Seward Smith, 97.
30. Kenneth Katzman, "Afghanistan: Post-Taliban Governance, Security and U.S. Policy", Congressional Research Service Report for Congress 7-5700, RL30588, 9 April 2013, 2.
31. S. A. Arjomand, "Constitutional History of Afghanistan" in *Afghanistan: A Comparative and Historical Perspective*, *Drake Law Review*, Vol. 53 (2005), 958-960. Mohammad Hashim Kamali (personal communication, 27/05/2013) cited concerns by American advisors at the time that a Constitutional Court may develop into something like the Iranian Guardian Council, which became at bastion of conservative '*ulamā*'.
32. In the face of the 2010 elections controversy, the Supreme Court had established a special tribunal to decide the issue of electoral fraud and irregularities, but its conduct reflected badly on the Supreme Court's own impartiality.
33. ICG, 8 October 2012, 14.

34. Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan" in Rainer Grote and Tilmann J. Roder (Eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (New York: Oxford Press, 2012), 677-678.
35. ICG, 8 October 2012, 13.
36. Mohammad Hashim Kamali, "Islam and its Shari'a in the Afghan Constitution 2004 with Special Reference to Personal Law", in Nadjma Yassari (Ed.) *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law* (Tubingen: Mohr Siebeck, 2005), 43.
37. Qaiser Butt, "Council of Islamic Ideology: Islamic body's fate hangs in balance" (*The Express Tribune*, 22 December 2010) <http://tribune.com.pk/story/93094/council-of-islamic-ideology-islamic-bodys-fate-hangs-in-balance/> (accessed on 22 December 2010).
38. Mohammad Hashim Kamali, "References to Islam and Women in the Afghan Constitution", *Arab Law Quarterly*, Vol. 22, (Leiden: Brill, 2008), 281-284.
39. Refer to Brown, 72.
40. Giustozzi believed that the Taliban "do not appear likely to accept the Afghan constitution even in a revised form; certainly they would demand a greater role for Islamic law..." Refer to: Antonio Giustozzi, *Empires of Mud: Wars and Warlords in Afghanistan* (New York: C. Hurst & Co. Ltd., 2009), 24-25.
41. Pew Forum, "The World's Muslims: Religion, Politics and Society" (Washington, D.C.: Pew Research Center, April 2013) <http://www.pewforum.org/Muslim/the-worlds-muslims-religion-politics-society.aspx> (accessed on 20 May 2013).
42. Kamali, 2008, 286.
43. Kamali, 2008, 287.
44. Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publication, 2008), 17.
45. Mohammad Hashim Kamali, "Afghanistan's Constitution 2004: An Islamic Perspective on Interpretation" (Washington, DC: United States Institute of Peace, 2009), 5. www.usip.org/files/ROL/a%29%20Kamali%20Paper%20English.pdf (accessed on 20 May 2013).
46. Kamali, 2005, 32.
47. Al-Fulaanee, Saalih ibn Muhammad, *Eeqaadh Himam Ulil-Absaar lil-Iqtidaa bi Sayyid al-Muhaajireen wal-Ansaar*, (Cairo: al-Muneereeyah Press, 1935), 50.
48. Kamali, 2005, 31.
49. Kamali, 2005, 32.
50. Kamali, 2005, 36.
51. This situation is re-emphasised by a second such reference in the 1994 Constitution in Article 102.
52. A similar approach has been proposed by Batchelor (2011), 76, for application in the National Assembly of Pakistan.
53. Banking Mohtasib Pakistan <http://www.bankingmohtasib.gov.pk/> (accessed on 8 May 2013).
54. Refer to Hashimzai, 679-680.
55. Nixon, 3, noted that the Taliban have indicated a preference for a conscript-based army.