

THE IMPACT OF RELIGION AND CULTURE ON THE SUPREMACY OF THE CONSTITUTION IN AFGHANISTAN¹

*Mohd Tahir Nasiri**

Abstract: Afghanistan's social composition demonstrates it to be a pluralist, multi-cultural, multi-lingual, and multi-ethnic country. The life and behaviour of its citizens are, for example, governed by more than one source of law, namely those of Islam and Afghan culture. In light of this, the current article attempts to, firstly, explain Islam as a source of law in Afghanistan and its supremacy over that country's constitution and then, secondly, apply the same logic to culture as rooted in Afghan tribal and ethnic traditions. While many cultural traditions exist in Afghanistan, this article focuses solely on the constitutionally recognised *Loya Jirga* (Great Assembly). Finally, the study suggests applicable solutions for maintaining the authority of the constitution in the presence of Islam and Afghan custom. This, it is hoped, will help Afghanistan escape its ongoing political instability and avoid the relentless downfall of governments.

Keywords: Constitution, Supremacy, Religion of Islam, Afghan culture, Tribes and Ethnicity, *Loya Jirga*.

Introduction

Afghanistan is a pluralist country, where Islam and Afghan culture have high social positions, to the extent that they have supremacy over the constitution, even forming the sources of it. Therefore, this article discusses both Islam and Afghan culture in relation to the country's constitution.

A situation under which more than one source of law controls the life and behaviour of persons in a country is called legal pluralism. Since Afghanistan is a country that possesses non-written, informal tribal and customary laws beside its formal civil and criminal codes, it is counted as a country with legal pluralism. Prior to the enactment of any national constitution, Afghans governed their affairs by reference to Islam and traditional codes of conduct; prior to Islam, adjudication relied upon traditional codes alone. To date, the latter are still widely practiced for dispute resolution by the majority of tribes in Afghanistan, especially the Pashtun. These alternative or informal legal institutions represent historical tradition and work outside formal courts. A lot

of the time, people settle their problems and disputes through these informal channels, especially regarding land matters. Citizens are able to approach their respected elders to help them arrive at resolutions without the need for long waiting periods, which formal court systems require. The difference between the formal and informal institutions of dispute resolution revolve around the latter's ability to resolve problems outside the state's control, while the former can only settle disputes within state-controlled courts. But, it should be kept in mind that, nowadays, the judiciary relies on informal dispute resolution institutions when there is a lack of official oversight within the country.²

Afghanistan's first constitution was established in 1923, followed by eight others, culminating in its most recent 2004 incarnation.³ This 2004 constitution codified the fundamental rules and regulations of the country, while also regulating the distribution of powers between different branches of government.⁴ Therefore, in general, the constitution is the basis of the legal and political systems upon which Afghanistan's government relies. This definition makes it clear that a constitution is a very important document and should be supreme over all other laws. However, Afghanistan has Islam, which should be the first body of reference in governance, as no law can clash with this religion. Therefore, it is necessary to know the origin and source of the constitution in Afghanistan.

'Source' literally means 'point of origin'. Terminologically, a source means the causes through which something comes into existence, or the place from where something emerges or is produced. For example, the source of a river is the place from which that river gets its water. Regarding the sources of the constitution of Afghanistan, this issue goes unaddressed in many studies. However, this article, by critically analysing the political, legal, and constitutional history of Afghanistan, and by interviewing several Afghan intellectuals, argues that, although there is no agreed upon source for the Afghan constitution, by convention Islam and the different customs (*'urf*) of the country play an important role therein. Every constitution and legal system applied to Afghanistan has to be compatible with these two elements. All Afghan governments, especially from the enactment of the first constitution in 1923 until today, have been careful not to breach these two things. If any ruler had attempted to disrespect these elements, especially Islam, he would not only have lost power, but his head too. This article, therefore, discusses each of these elements in turn.

Islam as a Source of Law and its Impact on the Supremacy of the Constitution

Over 99 per cent of Afghans are Muslim. Historically, the only unifying element between the various tribal and ethnic groups has been Islam, which still plays an obvious role in the life of the people. A large majority of Afghans are Sunni and follow Hanafi *fiqh*. However, a small group of Shi'a are also present, the majority of whom are Ithna 'Ashari (Twelver), with a minority of Isma'ilis, mainly in the north of the country. The traditional customs of different ethnic groups, especially the *Pashtunwali* (Pashtun customs), are still practiced alongside Islamic law. The joint practice of customary and Islamic law sometimes causes problems, disagreement, and tension. Nevertheless, the legal system of Afghanistan is deeply rooted in Islamic law overall, reflecting the nation's and its leaders' profound affiliation with the religion. Therefore, Islam has a significant role in the 2004 constitution. For example, it is the religion of the state;⁵ no law shall contravene its tenets and provisions;⁶ it is the only unifying factor within the nation; and it is the foundation and source of the legal system.⁷

Moreover, it is not only the 2004 constitution which gives a high position to Islam. Historically, from Afghanistan's foundation as a state, specifically from the time of Abdul Rahman Khan, the religion of Islam has played an important role in governing the country. Abdul Rahman Khan formed a legal system, with proper courts and proper court procedure, with the understanding that the job of government was only to implement the Law of God. He believed that the final goal of the Afghan legal system was to establish a state where the people obeyed shariah. Although during the long history of Afghanistan many other laws developed, Islamic law was placed in the highest position; every government should have Islam as its first source of law and constitution.

From 1923 until today, Islam has been an integral part of every Afghan constitution. If any government ignored it in any way, they created massive problems for themselves and the whole country, as demonstrated during the communist period. Nevertheless, deviation from tribal custom has also proven problematic. After taking power in 1919, King Amanullah Khan, while being careful to observe Islam, tried to deviate from tribal cultural practices. This ended in his exile from the country in 1929. Interestingly, this was because his deviation from tribal custom was interpreted as deviation from Islam. King Nadir Khan was aware of this sensitivity; when he took power in 1930, he did not deviate from these two elements, while also abolishing the reforms King Amanullah Khan had introduced.

The Constitution of 1964 recognised Islam as the religion of the state; all religious rituals, ceremonies, and functions of the state had to be in accordance

with Hanafi *fiqh* and only a Muslim (Afghan) could be head of state. It was also a condition within the constitution that any law passed by parliament agree with the principles and rules of Islam. Judges were required to have knowledge of both shariah and the enacted laws of the country. Based on Article 102 of the 1964 Constitution, the judiciary was first required to apply parliament-made laws; only when no parliamentary law existed would a judge use the basic principles of Hanafi *fiqh* in accordance and with the limitations of the constitution, to ensure justice was done.⁸

In 1976, Daud Khan prepared another new constitution. Although under Article 22 of this document Islam was recognised as the religion of Afghanistan, Hanafi *fiqh* went unmentioned. The constitution of Daud Khan was thought to be influenced by socialist ideas, for which he faced strong criticism from the religious community. Before this escalated into armed conflict, however, Daud Khan was overthrown by the Afghan communists.

The communist period (1978-1992) can be divided into two parts. During the first, both Islam and Afghan culture were marginalised. This resulted in an armed reaction from the whole nation, obliging a change in direction. During this second period, in 1987, the communists enacted a new constitution based on the 1976 Constitution of Daud Khan. When this also proved unpopular, they enacted another constitution in 1990. This included Islamic articles, and even declared Afghanistan to be an Islamic State. It was, however, too late: they were finally removed from power in 1992 by the Mujahidden.⁹

From 1992 to 2001, both the Mujahidden and Taliban tried to root all of Afghanistan's law in Islam. Unfortunately, however, their era marked the bloodiest period of internal fighting in Afghanistan. Moreover, their internal disunity resulted in a failure to introduce an effective Islamic system or improve the international reputation of Islam. They brought into reality the Pashto proverb, "An intelligent enemy is better than a stupid friend."¹⁰

Although, the 2004 constitution was sponsored by NATO and many other democratic and non-democratic countries, it fails to mention democracy. Rather, it describes Afghanistan as an Islamic State. For example, Article 1 states that Afghanistan is an Islamic Republic, Article 2 that the religion of Afghanistan is Islam (while also allowing the followers of other faiths to practice their religions), and Article 3 states that no law can be made that runs contrary to Islam. It is the first responsibility of the Supreme Court to uphold Islam; the second is to maintain the constitution.¹¹ Likewise, no one is allowed to form any political party whose aim is to contradict Islam.¹² The principles of obedience and adherence to the tenets of Islam, as well as any Islamic regime, cannot be amended.¹³ Article 130 specifically instructs that:

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and within the limits set by this Constitution, rule in a way that attains justice in the best manner.¹⁴

These references to Islam in the 2004 Constitution are wider than in the Constitution of 1964. The latter only required observance of the “basic principles” of Hanafi *fiqh*. The 2004 Constitution, on the other hand, although ostensibly prioritising statutory law, does so within a system in which the majority of civil and criminal laws are based on shariah. Only the laws relating to modern phenomena, such as municipal organisation, labour relations, industry, and commerce, are regulated purely by statutory law.¹⁵

The forgoing discussion makes it clear that Islam has deeply influenced the constitutions and other legal systems of Afghanistan. Since the establishment of the first constitution of Afghanistan, Islam has always been referred as a source of law and identity, except during the communist period. Even the communists, however, were finally obliged to enshrine Islam in their constitution.

Culture as a Source of Law and its Impact on the Supremacy of the Constitution

‘Urf (or *‘adah*, ‘custom’) refers to any behaviour within a community, ethnic group, or tribe that is not based on Islam. Before considering the different customs of Afghanistan, including their impact on the supremacy of the constitution, it is necessary to briefly describe the different ethnic and tribal groups populating the country.

Afghanistan’s Ethnic and Tribal Groupings

Afghanistan is a multi-cultural, multi-lingual, and multi-ethnic society. The country’s landscapes, comprising large mountains and desert terrain, have traditionally served to keep these various tribes and localities physically isolated from each other. Therefore, from the start of the twentieth century until today, one of the biggest challenges facing the various constitutions of Afghanistan has been a lack of national unity. Improving national unity has been the goal of nearly every constitution and forms the context underlying the importance of Islam, justice for all, and equality before the law within those texts.¹⁶

The population of Afghanistan comprises approximated 25 to 30 million people. A government survey done back in 1976 calculated the population to

be only 14 million. This survey, however, excluded the nomads (*kochis*), who were only estimated to comprise approximately 4 to 5 million people. Although Article 4 names and recognises several tribal groups,¹⁷ Kamali has argued that of those listed, only four (Pashtuns, Hazara, Turkomen, and Aimaq) are actually tribal. The rest, including Tajiks and Uzbeks, do not have tribal characteristics.¹⁸

Throughout the twentieth century, the Pashtun were estimated to make up between 60 and 65 per cent of the total population. Tajiks constituted 15 per cent and the Hazara 7 to 9 per cent. Other small tribal groups, like the Aimaq, Turkomen, Uzbeks, Kirghizs, Arabs, Kohistanis, Baluchs, Brahuys, Gujars, Wakhis, Noristani, Qizilbash, Jats, and Pashaie, were together estimated as making up 7 to 9 per cent of the population. Non-Muslims, like Hindus, Singhs, and others comprised less than 1 per cent.¹⁹ However, in December 2001, after the US invasion, the Northern Alliance, led by Tajiks (specifically, Burhanuddin Rabani), took power and began questioning the percentages of the various tribes. The Shi'a Hazaras, for example, claimed they made up 30 per cent of the population, while the Tajiks said their percentage was double that of the Hazaraz, namely 60 per cent. Based on these calculations, the remaining 10 per cent comprised other minority groups, including the Pashtun. Thus, a minority ethnic tribe, with the support of the US, started isolating the majority tribe. This was a new and challenging issue for the unity of the country. Kamali stated that: "the number and presence of the Pashtun was reduced during Tajik influence of the government in Afghanistan. Even though Karzai's election as a President from 2004-2012 downsized the Tajik authority and occupation of Ministries by 15-20 percent. However, a correct equilibrium had already been destroyed, and much sensitivity was brought on the tribal issues into the focus and notice of the public."²⁰

Within the above context, the 2004 Constitution needed to mention several tribes. However, although under Article 4 it recognised 17 ethnicities in Afghanistan, the list was by no means exhaustive. The recognised ethnicities, although debatable as to size, were: "Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pachaie, Nuristani, Aymaq, Arab, Kirghiz, Qizilbash, Gujar, Brahwui, and other tribes."²¹ While Pashtu and Dari were recognised as the official languages of the country, in areas where the majority speak languages other than these (like Turkmani, Uzbeki, Baluchi, Pachaie, Pamiri, and Nuristani), these languages were recognised as official third languages.²² The national anthem was also recognised by the constitution; in Pashtu, this mentions *Allahu Akbar* (God is great) and references some of the tribes.²³

The above discussion proves that tribal pluralism is accepted in Afghanistan. Every tribe has a different set of customs (or '*urf*'), which are in turn recognised as part of informal, out-of-court dispute settlement procedures. Therefore, the constitution has to be in line with accepted culture.

Culture ('Urf or 'Adah)

'Urf or 'adah can be translated as *huquqi t'amoli*, which means accepted rules that come into existence from the daily behaviour/actions of members of society independently of Islam. In turn, custom has two factors: the material, which serves the physical needs of the community, and spiritual, which refers to belief. Although dissimilarities exist, most Afghans follow the same 'urf and behave in the same way. This 'urf has existed for millennia, since at least the time of the Achaemenid Empire.²⁴ A majority of Afghans are ethnically Pashtun and follow *Pashtunwali*. Other tribes, after living alongside the Pashtun, have also adopted a similar culture.

Traditionally, 'urf has operated as law. Even today custom is still relied upon beside Islamic law. For instance, many Afghans do not completely believe or accept that the government has exceptional power over criminal cases. In criminal cases, according to custom, the family of a victim has a choice between retaliation and requesting compensation.²⁵ Apart from physical damage to people or property, these damages also extend to the honour of a group (loss of honour demands compensation). Although the government of Afghanistan does not officially accept out-of-court resolutions like this, its weakness makes it unable to implement the official justice system, especially in rural areas. Rural communities generally do not rely on governmental institutions, often reacting violently when the government interferes in matters thought to be personal.²⁶

Application of custom has both negative and positive effects. For example, on a positive note, use of custom has reduced levels of rebelliousness, anarchy, and general lawlessness, both at local as well as national levels. When governmental institutions are weak, people can take control of their own affairs. However, the negative effects of custom are apparent when it slows down the state's quest for justice, even completely paralysing it. The people of Afghanistan generally oppose official systems of justice, feeling that the central government merely wishes to impose its own power rather than keep law and order.²⁷

For more than a century, successive governments in Afghanistan tried to impose a centralised judicial system.²⁸ Although every government used a different technique, the opposition and reaction to them was the same. Importantly, each and every time changes effecting custom were introduced, they were immediately criticised as the plans and policies of foreign powers, designed to violate Afghan culture and tradition. Frequently, therefore, they resulted in rebellion, civil war, and the collapse of the regimes that had planned them. The best example of this is the resignation of King Amanullah Khan in 1929, which resulted from his desire to modernise the Afghan legal system.²⁹ These reforms, including education for all and an overhaul of family law, caused a rebellion; not

wanting to kill his own people, but also unable to carry on in a system which he was sure was not beneficial for the country, King Amanullah Khan chose exile, leaving both his government and beloved country for good.³⁰ Likewise, when the Afghan communists seized power in a bloody military coup in 1978, they issued decrees against both Islam and custom. This again provoked conflict with the people. Within just a short period of eighteen months, the Russians invaded Afghanistan to prevent the communist regime from collapsing. This invasion and the following occupation lasted more than a decade and led to bitter conflict.³¹ Likewise, when the Taliban seized power in 1996 and tried to enforce a strict interpretation of Islamic law, they also provoked hostility and antagonism by doing things that were far removed from Afghan custom, just as King Amanullah Khan and the communists had done. Although diametrically opposed to the communists,³² like them the Taliban tried to enforce a rigid legal system rooted in a foreign ideology (Wahhabism) while ignoring local Afghan *‘urf*.

The above discussion makes it clear that custom is important and has a high position within Afghanistan’s legal system, even though, officially, it goes unmentioned in the 2004 Constitution or any other legal document. However, Stanikzai believes that, “under civil law (*Qanooni Madani*) culture is mentioned and accepted in such a way, when it is not contrary to the basis of justice,” meaning custom is accepted when not contradictory to Islam.³³ In any event, no regime has prospered in Afghanistan that does not respect Afghan culture. Therefore, in summary, culture always plays a significant role in Afghan society, being arguably a source of both the country’s legal system and constitution.

***Jirga* and *Loya Jirga* as Part of Afghan Custom**

The *Jirga* and *loya jirga* are among the oldest and most important traditions of Afghanistan. *Jirga* has many meanings, including assembly, council, *majlis*, and, in some areas, *marakah*. It is a delegation of one or more persons sent by an individual, group, or tribe to request something or resolve a problem. *Jirga* has existed in Afghanistan since time immemorial. Generally, it refers to an assembly of leaders who sit in a big circle to make a collective decision regarding a problem. The *jirga* does not impose secular law, but shariah or tribal law, using the general wisdom of the tribal elders. Either side in a dispute can appeal to a higher *jirga* of more experienced tribal leaders, should they be unsatisfied with the decision of the first *jirga*. Thus, the *jirga* system of Afghanistan has many methods and formalities like that of the official legal system, and so could be regarded as a legal institution applying customary law. Until today, *jirga* govern and control the daily lives of many Afghans, particularly those living outside major cities.³⁴

The reason many Afghans, specifically those living in rural areas, use the *jirga* system relates to its reputation for being accessible, fair, effective, and more attentive to local tradition and values than the state-based judicial system, which is often accused of being slow, corruption, and inaccessible. Lastly, *jirga* can help disputing parties solve their problems in a friendly manner, so that they can live together peacefully in future.³⁵

Jirga can be arranged by any disputing party, or via the initiative of any other member of society. Its membership can extend from one person to thousands, depending on the case. *Jirga* is used not only for solving political problems, but all minor and major issues. Generally, a *jirga* is hosted by the party opposing the disputant, but sometimes arbitrators call the disputing parties to a specific place, speak to them, and try to convince them. *Jirga* decides on the basis of majority opinion, although sometimes the opinion of just one person (such as a strong religious leader or tribal head) is sufficient. Political leaders have no power over and cannot impose their political status on members of the *jirga*. If a political leader happens to be part of the *jirga*, he has to put aside his public position and sit in the circle as a member of the *jirga*. Generally, the *jirga*'s decision, if not agreeable to one of the disputing parties, is not mandatory. However, once the decision of a *jirga* is accepted by both sides, it has to be followed. If a binding decision is not upheld, the party that breaches it will be blamed by all members of the *jirga*; sometimes all members of the *jirga* will stand against the one who breaches the decision of the *jirga*. The upside of the *jirga* is that no side is considered to be the winner and the other the loser. Instead, both are winners as the problem is solved, which is considered to be to the common benefit of all. A *jirga* generally solves problems among members of a family, village, tribe, or political group. If the problem involves the whole nation, *loya jirga* plays a more important role.³⁶

The term *loya jirga* means 'grand/big assembly/council'. Customarily, the *loya jirga* is a gathering of representatives from among the heads of the Afghans, comprising the heads of the different tribes, popular religious scholars, and other influential national figures. *Loya jirga* have a special position in the history of Afghanistan. Every discussion about the legal system of Afghanistan is considered incomplete unless a *loya jirga* is involved. Generally, the *loya jirga* is held at a national level, to decide about important issues and problems facing the country. Once it decides on an issue, that decision has to be implemented. If there is any resistance against the decision, a *jirga* could implement and impose it by force. In other words, the members of the *loya jirga* must support the side that listens, obeys, and accepts their decision.³⁷

The first recorded *loya jirga* was held in 1707, under the aegis of Mirwais Khan Hotak, later on known as Mirwais Khan Nika (grandfather).³⁸ This first

loya jirga supported Mirwais Khan Nika as leader of the Afghan people, under whose leadership they were able to defeat the Iranian Safavids and lay the foundations of modern-day Afghanistan. From then on, *loya jirgas* became a regular feature of national decision making.³⁹

Overall, *loya jirga* can be divided into two types. The first is convened during times of national emergency, when the government is either very weak or is deemed to be the agent of a foreign power. In this situation, the people come together to discuss problems and decide what to do. The second type of *loya jirga* is called by the rulers or government for consultation on some urgent or important issue. Although technically two different types of *loya jirga*, the jobs, functions, and activities of these two are the same. Both decide about national issues of peace and war, including: tackling a threat to sovereignty, including an invasion; choosing the next Amir or King; enacting or approving changes to the constitution; approval and ratification of important treaties with foreign countries; and ensuring national peace and unity. However, the first type of *loya jirga*, where the people choose their own representatives, is generally more powerful and successful than the second type. This is because members of the latter are generally selected by the government, and so do not constitute real representatives of the community. They therefore have no power to either speak on behalf of the community or impose their decisions on them.

While gatherings resembling the first type of *loya jirga* began in 1707, the second type of *loya jirga* was not held until 1747, when powerful tribal leaders from the Ghilzai and Abdali tribes, in addition to those from other ethnic groups, particularly the Uzbeks, gathered at Kandahar, in the area of Sher-i-Surkh. This *loya jirga* chose Ahmad Khan Abdali as King, giving him the title Baba (Ahmad Shah Baba). Soon afterwards, Ahmad Shah Baba established an empire, from which modern-day Afghanistan evolved. From the time of Ahmad Shah Baba, the second type of *loya jirga* has been a regular means of solving difficult national crises. Out of Afghanistan's nine constitutions, six were ratified by a *loya jirga*, every one of which had a complete chapter on the *loya jirga*. If any constitution is not ratified by a *loya jirga*, it cannot be considered a constitution.⁴⁰

Since Amir Habibullah Khan in 1915, who called a *loya jirga* to discuss Afghanistan's participation in the First World War, and which persuaded him to remain neutral during that conflict, every ruler or king has called a *loya jirga* to legitimate their government and/or constitution. For instance, King Amanullah Khan called three *loya jirga*, held in February 1923, July 1924, and August 1928 respectively. Every one of these *loya jirga* was called for a different purpose, but always to legitimate a government decision.⁴¹ King Nadir Khan, for example, called a *loya jirga* in September 1930 to approve his newly established *Millie Shura* (National Council). King Nadir Khan's son, King Zahir Khan, also called

a *loya jirga* in July 1941 to advise him on the position of Afghanistan during the Second World War. As before, he was advised to stay neutral. Another *loya jirga* was called in November 1955, again by King Zahir Khan, during the premiership of Sardar Daoud Khan. This *loya jirga* was called to discuss two problems: the creation of Pakistan as the agent and inheritor of British rule in the area and to decide on the fate and destiny of Pashtunistan, a part of Afghanistan gifted to Mr Jinah by the British for the establishment of Pakistan.

After declaring himself President of Afghanistan in 1973 following a military coup, Daud Khan also called a *loya jirga* in February 1977 to request approval of dozens of issues. These included his desire to legitimise: the coup that brought him to power; his newly drafted constitution; his election as president; the creation of his newly founded national revolutionary party; his legal reforms; and the ratification of new contracts and treaties with foreign powers. When the communists took control after another coup in April 1978, they also tried to utilise the *loya jirga*. First, Babrak Karmal called a *loya jirga* in 1985, and after him Doctor Najib in 1987. Both wanted to garner support for their governments and the Russian invasion of December 1979. As both operated under the direct support and supervision of the Russians, however, neither were able to gain proper support via the *loya jirga*.⁴² The same negative result was obtained by Burhanuddin Rabbani in Herat province in 1992, when he held a *loya jirga* without the participation of any opposition under the name *Shura-e-Hal-wal-Aqd*. Wanting to illegally prolong his presidential term, his attempt to co-opt the *loya jirga* failed.⁴³ Finally, on Thursday 13 June 2002, an emergency *loya jirga* overwhelmingly re-elected Hamid Karzai as president of the Transitional Government of Afghanistan. Although the Bonn Conference had set the term of president of the Transitional Government to two years, the emergency *loya jirga* decided that Karzai and his administration could continue until they were able to complete the general election for a permanent president.⁴⁴

The 2004 Constitution, under which governments have called several *loya jirga* on different issues, describes the features of a *loya jirga* in its Chapter 6. It explains the authority and power of that institution, including the way it should be established and constructed. For example, it defines the position of the *loya jirga* and mentions that it is the highest manifestation of the will of the people of Afghanistan and has to include members of parliament and the chairmen of the provincial and district councils. The Chief Justice and other judges of the Supreme Court, all ministers, and the Attorney General can participate in the *loya jirga* but have no voting rights.⁴⁵ The *loya jirga* can be held to find solutions to important questions and problems concerning the nation as a whole, including issues of national sovereignty, territorial integrity, independence, amending the constitution, impeachment of a president, and any

other important matter involving Afghanistan.⁴⁶ In its first session, a *loya jirga* must elect from amongst its members a chairperson, deputy-chairman, secretary, and assistant secretary.⁴⁷ Similar to a parliament, the quorum of the *loya jirga* is completed with the presence of a simple majority. Its decision shall also be adopted by the presence of a simple majority, except in a situation where the text of the constitution states otherwise.⁴⁸ The public is allowed to attend and view sessions, conferences, or assemblies of the *loya jirga*, unless one fourth of its members demand secrecy and the *loya jirga* accepts that demand.⁴⁹ Immunity from criminal prosecution for expressing political opinions or voting a specific way, as applied to members of the National Assembly under Articles 101 and 102 of the 2004 Constitution, are also extended to members of a *loya jirga*.⁵⁰

Conclusion

It is an accepted fact that in some countries constitutions are supreme, but in others the parliament or people are. In Afghanistan, neither is the case. Rather, Islam and Afghan culture are supreme and counted as the sources of that country's constitution. This study examined the history and culture of Afghanistan, finding that nation to be a multi-cultural, multi-lingual, and multi-ethnic society. Apart from its constitution and legal system, the country is governed by religion and custom, making it a pluralist country, where more than one source of law controls the life and behaviour of citizens.

In the light of these findings, the author concludes that both Islam and culture have considerable impact on the supremacy of the constitution in Afghanistan. Ultimately, it is clear that any regime or political group that intends to survive in Afghanistan must respect both Islam and traditional Afghan culture, besides observing statutory law. Moreover, the government must be inclusive of all ethnic groups, in a fair, proportional, and representative manner.

Policy Recommendations

- Any discussion of constitutional supremacy in Afghanistan must accommodate Islam and traditional Afghan culture;
- Any constitution applied to Afghanistan must take into account that country's multi-cultural, multi-lingual, and multi-ethnic character, providing for the expression of those features through proper channels;
- Any Afghan government must be democratic and inclusive, able to represent all ethnic and cultural groups in a fair, proportional, and representative manner.

Notes

- * *Mohd Tahir Nasiri*, is a Ph.D candidate at Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia. This article is written under the supervision of Professor Dr Farid Sufian bin Shuaib and Associate Professor Dr Nor Hafizah Mohd Badrol Afandi.
1. This article was written prior to the events of 15 August 2021, and so does not cover the Taliban's return to power.
 2. Stephanie Ahmad and Alexander Benard, *An Introduction to the Law of Afghanistan*, (Stanford: Afghanistan Legal Education Project, 2011), 3.
 3. For detail, see: M. Tahir Nasiri, 'Application of the Doctrine of SOPs in the Current Constitution of Afghanistan,' Unpublished PhD thesis, International Islamic University Malaysia (2021), Ch. 3.
 4. *Ibid.*
 5. Constitution of Afghanistan (2004), Article 2 (paragraph 1).
 6. *Ibid.*, Article 3.
 7. Islamic law is based on the Qur'an, *Sunnah*, *ijma* (consensus), and *qiyas* (analogy). In Afghanistan, the most difficult question has been about who has the authority to decide whether a specific law is Islamic or not. Who possesses the power to decide whether a newly enacted law is compatible with Islam? The legislature? The Supreme Court? Or the Independent Commission for Supervision of the Implementation of the Constitution (ICSIC)? Should it instead be decided by an Islamic Council?
 8. *Ibid.*, 565.
 9. Nasiri, 'Application,' Ch. 3.
 10. In Pashto, *Hoshiyar Dushman tar bi 'aqle Dost bihtar dy.*
 11. Constitution of Afghanistan (2004), Articles 119 and 121.
 12. *Ibid.*, Article 35 (1).
 13. *Ibid.*, Article 149 (paragraph 1).
 14. *Ibid.*, Article 130.
 15. Mohammad Hashim Kamali, 'Reference to Islam and Women in the Afghan Constitution,' *Arab Law Quarterly* 22 no. 3 (2008): 293.
 16. *Ibid.*, 271.
 17. Constitution of Afghanistan (2004), Article 4 (paragraph 2).
 18. Mohammad Hashim Kamali, *Law in Afghanistan* (Leiden: E. J. Brill, 1985), 1-2. More detail regarding the geopolitical dynamics of Afghanistan is available in Ralph H. M. et al., *Afghanistan: Mulla, Marx and Mujahid* (Colorado: Westview Press, 2002) Ch. 3.
 19. Edat Shah Maqbil, *Geography Subject (Academic Book) for Class 12th of Schools*, Ministry of Education, Kabul Afghanistan, 1975.
 20. Kamali, 'Reference to Islam,' 273.
 21. Constitution of Afghanistan (2004), Article 4 (paragraph 2).
 22. *Ibid.*, Article 16.
 23. *Ibid.*, Article 20.
 24. The Achaemenid Empire (the first Persian Empire) was established in 550BCE

- by Cyrus the Great. It embraced the area extending from Anatolia to Egypt, to many other parts of Asia, up to the north of India.
25. Mountstuart Elphinstone, *An Account of the Kingdom of Caubul* (Oxford: Oxford University Press, 1972), 339-40.
 26. Thomas Barfield, 'Culture and Custom in Nation-Building: Law in Afghanistan,' *Maine Law Review* 60 no. 2 (2008): 348.
 27. Thomas Barfield, 'Problems in Establishing Legitimacy in Afghanistan,' *Iranian Studies* 37 no. 2 (2004): 263-293.
 28. Kamali, *Law in Afghanistan*, 4.
 29. Leon B. Poullada, *Reform and Rebellion in Afghanistan, 1919-1929: King Amanullah's Failure to Modernize a Tribal Society* (New York: Cornell University Press, 1973) 99-103.
 30. Senzil K. Nawid, *Religious Response to Social Change in Afghanistan, 1919-29: King Aman-Allah and the Afghan Ulama* (California: Mazda Publishers, 1999), 72-104.
 31. For more details, see Mohammed Hassan Kakar, *Afghanistan: The Soviet Invasion and the Afghan Response, 1979-1982* (Oakland: University of California Press, 1995); and Nancy Peabody Newell and Richard S. Newell, *The Struggle for Afghanistan* (New York: Cornell University Press, 1981), 107-28.
 32. See for more detail, see Thomas Barfield, 'An Islamic State is a State Run by Good Muslims: Religion as a Way of Life and Not an Ideology in Afghanistan,' in *Remaking Muslim Politics: Pluralism, Contestation, Democratization*, edited by Robert W. Hefner, (Princeton: Princeton University Press, 2005), 213-39.
 33. Nasrullah Stanikzai, 'Nizami Huqoqi e-Afghanistan Wa Manab'i e An,' *Storai Magazine*, (no date), 33, 74.
 34. Ahmad and Bernard, *Introduction*, 4.
 35. Ibid.
 36. The present author comes from a family that is frequently involved in solving problems via *jirga*.
 37. Ramin S. Moschtaghi, 'Constitutionalism in an Islamic Republic, The Principles of the Afghan Constitution and the Conflict Between Them,' in *Constitutionalism in Islamic Countries Between Upheaval and Continuity*, edited by Rainer Grote and Tilmann J. Order (Oxford: Oxford University Press, 2012), 683-713.
 38. Some historians claim the date of the first *loya jirga* was 1709. Primary texts, however, establish the correct date as 1707.
 39. 'The Loya Jirga,' *Afghanistan Gove Political Page*. Availabe at: <http://www.afghanland.com/history/loyajirga.html>. Accessed on: 22 July, 2014.
 40. Ibid.
 41. Ibid.
 42. 'Members of President Hamid Karzai's Cabinet,' *Afghanistan Gove Political Page*, Availabe at: <http://www.afghan-web.com/members.html>. Accessed on: 23 July, 2014.
 43. Ibid.
 44. 'The Loya Jirga.'
 45. Constitution of Afghanistan (2004), Article 110.

46. Ibid., Article 111.
47. Ibid., Article 112.
48. Ibid., Article 113.
49. Ibid., Article 114.
50. Ibid., Article 115.

Bibliography

- Ahmad, Stephanie and Alexander Benard. *An Introduction to the Law of Afghanistan*. Stanford: Afghanistan Legal Education Project, 2011.
- Barfield, Thomas. 'An Islamic State is a State Run by Good Muslims: Religion as a Way of Life and Not an Ideology in Afghanistan.' In *Remaking Muslim Politics: Pluralism, Contestation, Democratization*. Edited by Robert W. Hefner. Princeton; Oxford: Princeton University Press, 2005.
- . 'Culture and Custom in Nation-Building: Law in Afghanistan.' *Maine Law Review* 60 no.2 (2008): 348-73.
- . 'Problems in Establishing Legitimacy in Afghanistan.' *Iranian Studies* 37 no.2 (2004): 263-93,
- Constitution of Afghanistan (2004).
- Elphinstone, Mountstuart. *An Account of the Kingdom of Caubul*. Oxford: Oxford University Press, 1972.
- Kakar, Mohammed Hassan. *Afghanistan: The Soviet Invasion and the Afghan Response, 1979-1982*. Oakland: University of California Press, 1995.
- Kamali, Mohammad Hashim. 'Reference to Islam and Women in the Afghan Constitution.' *Arab Law Quarterly* 22 no. 3 (2008): 270-306.
- . *Law in Afghanistan*. Leiden: E. J. Brill, 1985.
- Maqbil, Edat Shah et al. *Geography Subject (Academic Book) for Class 12th of Schools*. Ministry of Education, Kabul Afghanistan, 1975.
- 'Members of President Hamid Karzai's Cabinet,' *Afghanistan Gove Political Page*, <http://www.afghan-web.com/members.html>.
- Moshtaghi, Ramin S. 'Constitutionalism in an Islamic Republic, The Principles of the Afghan Constitution and the Conflict Between Them.' In *Constitutionalism in Islamic: Countries Between Upheaval and Continuity*. Edited by Rainer Grote and Tilmann J. Order. Oxford: Oxford University Press, 2012.
- Nasiri, M. Tahir. "Application of the Doctrine of SOPs in the Current Constitution of Afghanistan." Unpublished PhD dissertation, International Islamic University Malaysia, 2021.
- Nasrullah Stanikzai, 'Nizami Huqoqi e-Afghanistan Wa Manab'i e An' *Storai Magazine*, (no date), 33, 74.

- Nawid, Senzil K. *Religious Response to Social Change in Afghanistan, 1919-29: King Aman-Allah and the Afghan Ulama*. California: Mazda Publishers, 1999.
- Newell, Nancy Peabody and Richard S. Newell. *The Struggle for Afghanistan*. New York: Cornell University Press, 1981.
- Poullada, Leon B. *Reform and Rebellion in Afghanistan, 1919-1929: King Amanullah's Failure to Modernize a Tribal Society*. New York: Cornell University Press, 1973.
- Ralph H. M. and Eden Naby. *Afghanistan: Mulla, Marx and Mujahid*. Colorado: Westview Press, 2002.
- 'The Loya Jirga.' *Afghanistan Gove Political Page*, <http://www.afghanland.com/history/loyajirga.html>.