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References to Islam and Women in the Afghan Constitution

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Abstract
This paper is presented in three parts and several sections. The first part consists of a stock-taking of recent developments and dynamics that have engaged President Hamid Karzai's government ever since he came to power in December 2001. A mixed picture is presented which draws attention to many problems that have impeded reconstruction efforts in the country. Some positive developments have also occurred including, for example, the introduction of a new constitution, presidential and parliamentary elections, as well as resumption of schooling for children that by mid-2006 had numbered four million throughout the country. An overview of the previous constitutions and a brief historical perspective attempt to show how leadership flaws and internal differences in the royal household plunged Afghanistan into a succession of coups, foreign invasions, and catastrophic consequences for its people. Are there any lessons to be learnt? The second part of this essay focuses on a review and analysis of the 2004 constitution with special reference to Islam, and the last part takes a similar approach to women's rights.

Keywords
Islam, Shari'a, constitution-making, women, Sunni, Shi'a, tribalism, leadership, legislation, Islamic republic

The Afghans sacrificed tremendously and were remarkably successful in their campaign against the Soviet invasion of 1979 and in the decade of war that followed, for as long as they were united in the defense of their homeland. Afterwards they lost focus, and were engaged in factionalism and power struggles among themselves that effectively turned them into agents of disunity and destruction. Sometime later came the bombing of

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the country by the United States, and the violent ousting of the Taliban in 2001, which also sowed the seeds of many of the security problems that the country has been grappling with ever since. The 2004 constitution attempted to put together the pieces of shattered order amidst a host of problems that Afghanistan was facing following 23 years of war, civil strife, and a massive refugee problem.

The social make up of Afghanistan is marked by a number of divisive factors of ethnicity, language, and tribalism that is further endorsed by its highly arid and mountainous landscape whereby the various localities and tribes are physically isolated with limited mobility and interaction between themselves. One of the major challenges of every one of the six constitutions Afghanistan has had since the early decades of the twentieth century has been to foster national unity through appeal to the best values of Islam, equality, and justice to ensure equal standing before the law for all citizens.

The 2004 constitution was formulated by way of a three-step consultative process. In the first place, a preliminary draft was prepared by a nine member Constitutional Drafting Commission, which was reviewed in the second phase by a 35-member Constitutional Review Commission (CRC), and finally ratified by the Constitutional Loya Jirga (CLJ). In his capacity as a member of the CRC, the present writer was a direct participant of this process.[1] Like most of the previous constitutions of Afghanistan, this one was also influenced by persistent conflict and the aftermath of a devastating war. These were not normal conditions by any means. Hence, the 2004 constitution may in due course warrant review and amendment, hopefully at a time when Afghanistan succeeds in its efforts to restore constitutional order, stability, and peace.

A Survey of Essential Factors

1. The most recent estimates put Afghanistan's population between 22 to 25 million. A national demographic survey of the settled population (excluding the nomads) back in 1976 put the population at 14 million. The nomads

[1] Women were represented in all the three stages of the process as I elaborate below. The Constitutional Loya Jirga finally approved the constitution, after a month of deliberation, on 4 January 2004. With the exception of the CLJ that is largely elected, members and chairpersons of both the drafting commission and the CRC were appointed by the president.

of Afghanistan (the Kochis) are estimated to be between two to three million. Sources and reporters have quoted different figures, which tended to add to uncertainty. Accurate population figures has become all the more important for Afghanistan in view of recent developments where almost every major ethnic, linguistic, and religious group has claimed higher numbers and demanded a greater role and recognition in the constitution and government.

There are six main ethnic groups in Afghanistan, namely the Pashtuns, Tajik, Hazara, Uzbek, Turkomen, and Aimaq. With the exception of Tajiks and Uzbeks who are no longer tribal, each of these groups is divided into numerous tribes and sub-tribes largely independent of one another.[2]

The collapse of the Soviet Union and the subsequent establishment in the early 1990s of three independent states of Uzbekistan, Tajikistan, and Turkmenistan in the north exposed Afghanistan to new geo-political dynamics. Since all the three new states share ethnic and linguistic identities on both sides of the border, this has become an added factor to the already complex ethnic divides of the Afghan society. Many of the Afghan ethnic groups have consequently become more assertive of their roles and their cultural and linguistic particularities.[3]

The often cited ethnic composition of Afghanistan that was known through much of the twentieth century put the Pashtuns at around 50 to 55 percent, Tajiks at 20 percent, Hazara at 10 to 15 percent, with Uzbek, Turkomen, Aimaq, and a large number of smaller ethnic groups of Baluch, Nuristani, Brahui, Pashaie, Kirghiz, Arabs, Gujars, Kohistanis, Wakhis, and Jats constituting the remaining 10 per cent. All of this was questioned following the US-assisted takeover of power by the (Tajik) Northern Alliance in December 2001. The Shi'a of Afghanistan, mainly the Hazaras, claimed that they constituted about 20 to 25 percent of the total, the Tajiks claimed their estimates at 30 to 35 percent, and the Pashtun portion of the population was put at a reduced figure of 30 to 35 percent. A minority group thus began ruling and isolating the majority, an issue that presented a new challenge to the prospects of national unity for Afghanistan. The Pashtun presence in the rank and file was downsized during the Tajik domination of the Kabul government. Although following Karzai's election in October 2004, the near

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[2] See for details on population and its component ethnic groups M. H. Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (E. J. Brill: Leiden, 1985), 4f.

[3] Details on the new set of geopolitical dynamics of Afghanistan can be found in Ralph H. Magnus and Eden Naby, *Afghanistan: Mulla, Marx and Mujahid* (Westrview Press: Colorado), 2002, Ch. 3 entitled 'Geopolitics Then and Now.'

total Tajik domination of the Ministries in Kabul was moderated to some extent, certain disequilibrium had nevertheless already touched on sensitivities and brought the ethnic issue once again into the limelight of public attention.

To rebuild the national army and police, an orderly system of taxation and a national budget have remained matters of pressing urgency for the country; notwithstanding the ongoing efforts to meet these objectives, progress has been slow and the government has been losing public support as a result. This was exacerbated by worsening security problems and the reemergence of the Taliban. The Kabul riots of March 2006 that began with a relatively minor incident of an American armoured vehicle running out of control and bashing many vehicles along its path brought about violent reaction from the Kabul crowds, and within hours, Kabul was the scene of uncontrolled violence that killed and wounded dozens of people. This episode marked the beginning of a downhill slide for the Karzai government. An aura of enthusiasm for a new future had hitherto prevailed, which then began to give way to negative sentiment and pessimism, as I elaborate below.

2. During my visit to Kabul in September 2006, I noted a fresh focus in the Kabul press that highlighted the fault-lines in the government, especially with reference to official corruption, lack of effective governance, and continued security problems. It is now public knowledge that almost nothing goes through the bureaucracy without recourse to bribery and nepotism at a time when people are grappling with a host of problems: unemployment, rising prices, lack of health care, and municipal services. The dusty streets of Kabul that were expected to be paved as far back as four years ago remain as they were. Traffic violations and municipal irregularities are a common sight in Kabul.

3. The law and order situation has not improved as acts of lawlessness by warlords and drug barons continue with impunity. There is a pressing demand to bring to justice the criminals of the war years, many of whom are, ironically, holding important government positions and have recently acquired even greater prominence in Kabul politics. During her visit to Kabul as early as in March 2002, Mary Robinson, the UN High Commissioner for Human Rights, phrased it well by saying that sustainable peace, reconstruction, and development cannot be built on a foundation of impunity. There can be no amnesty for perpetrators of war crimes, crimes against humanity, and gross violation of human rights.

The Kabul government is now seen to be almost incapable of bringing to justice the human rights abusers of the past.[4] I was surprised at the recent grant of amnesty in February 2007 by the Afghan Parliament to the former warlords and criminals of the war years, many of whom have ironically ratified this decision, as judges in their own case.

4. Except for less than one per cent Hindus, who mainly reside in urban areas, over 99 percent of Afghans are Muslims. Islam has historically been a unifying factor between the various ethnic and tribal groups and continues to play a visible role in the life of the people. The vast majority of Afghans are followers of the Hanafi school and the majority of the Shi'a are followers of the Ithna ʿAshari (twelver) school of Shiʿism, although some followers of the Ismaʿili school also reside in the north. Tribal custom, notably the *Pashtunwali* (Pashtun customary code) and other customary practices are also followed along with Islamic law, which at times causes a certain level of disharmony and tension. The basic geographical features of Afghanistan as a land-locked and highly mountainous country as well as the fiercely independent temperament of its people have historically helped keeping Afghanistan outside the colonial rule. The Soviet invasion of 1979 and the ensuing civil war also had the effect of isolating Afghanistan even further from the currents of international opinion and reform. Hence, the Islamic family law reforms of the mid-twentieth century in the Middle East, North Africa, and Pakistan had little visible impact on Afghanistan.

5. Nation-building in Afghanistan began in earnest under Amir Abdur Rahman, the so-called Iron Amir (r. 1880-1901), and continued well into the twentieth century. Combating tribalism and the divisive trends of ethnicity and language remained among the priority goals of government

[4] A three-day conference on truth seeking and reconciliation was hosted in December 2005 in Kabul by the UN High Commissioner for Human Rights with the support of UNAMA and the Afghanistan Independent Human Rights Commission. The conference was attended by representatives of civil society and local governments from all over Afghanistan. Participants urged that 'the highest priority should be given to the need to end impunity, and to the prosecution and the removal of human rights abusers from public service and other positions of authority.' United Nations General Assembly sixtieth session position paper, 'The Situation in Afghanistan and its Implications for International Peace and Security,' 7 March 2006, 8 (doc. ref: A/60/712-S/2006/145). Since then the situation of law and order in Afghanistan has become even more tenuous.

policy. Much emphasis was placed as a result on building a national army and police force to assert the authority of the central government. Afghanistan was consequently peaceful for much of the twentieth century, until the turn of events in the late 1970s changed the atmosphere to one of perennial violence.[5] Apart from the challenge of putting the pieces back together, the sheer scale of destruction, and the fact that most of Kabul and some other cities lay in ruin, faced Karzai's government with a daunting agenda of public expectations.

6. The 2004 constitution set forth a fresh agenda by declaring Afghanistan an Islamic Republic committed to building a democratic government that is also observant of the principles of Islam. The Bonn Agreement of December 2001 signed between the then rival parties in the conflict laid down the basic framework of a government 'in accordance with Islamic principles, international standards, the rule of law, and the Afghan legal traditions'. It provided for the formation of an Interim Administration that aimed at the eventual creation of a 'broad-based, multi-ethnic, and fully representative government' within a period of two years. The Bonn Agreement and the 2004 constitution laid emphasis on equal rights for women and their participation in government. Afghanistan's unprecedented exposure to the international community in the ensuing period further accentuated the need to bring gender equality and justice to the forefront of the government agenda.

In its chapter on transitional provisions, the 2004 constitution mandated the government to hold presidential and parliamentary elections within twelve months following the ratification of the new constitution. Presidential elections were consequently held in October 2004 and parliamentary elections followed a year later in September 2005. Afghanistan has a democratically elected government as a result, which is, however, not functioning due to widespread poverty and persistent security and leadership problems.

7. Afghanistan set itself the task of introducing a new constitution at a time when clouds of uncertainty were hanging over the prospects of its implementation. People were askance over the benefit of having a constitution that was not likely to be implemented, simply because the government had

[5] Some details on nation-building efforts of the nineteenth and twentieth centuries can be found in Kamali, *Law in Afghanistan*, 5f.

little enforcement power at its disposal.[6] The 2004 constitution declared the period between the promulgation of 'this constitution' and the inauguration of the National Assembly as a 'transitional period' (Art. 159). The initial Interim Administration later gave way to a 'Transitional Government' following the promulgation of the 2004 constitution. The Transitional Government also gave way in turn to 'normal constitutional order' following the presidential and parliamentary elections.

Transition (*intiqal*), which implies a passage from conflict to normality, is by nature difficult and uncertain. In Afghanistan's case, the conflict had not really ended. The country had also witnessed a transformation from a government with almost no international involvement under the Taliban, to one with a high level of international interaction and exposure. Transition generates tension, and great hopes precede equally great disappointments. Everyone is nominally ready to help, and yet the capacity to absorb it is not there yet. Just when a people hope to see the end of conflict and need time to work out their own problems, the international community sets its own momentum, marching to the tune of interests and pressures closer to home. Until the new constitution was passed, the role and function of the existing institutions such as the Supreme Court, Attorney General's office, the prison administration and so on, could not be changed. Assistance providers were faced with the difficulty of how to go about supporting and developing institutions that urgently needed reform, and programming decisions became exceedingly difficult. With the inception of a normal constitutional order, expectations were still high in the government to amend the existing laws and formulate new ones with the help of international advisors. Unforeseen problems, however, have impeded progress on many fronts.

9. Constitution making in Afghanistan had in the past been almost invariably linked to crises, coups d'état, and regime change. Afghanistan had six constitutions in the twentieth century (1923, 1931, 1964, 1976, and 1987) and an inchoate constitution introduced under President Rabbani

[6] See for an analysis of the prevailing climate of opinion during the preparatory stages of the 2004 constitution, M. H. 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), 23-45.

in 1990, which was never ratified. Every one of these was introduced by a new regime in want of legitimacy, which was somehow sought to be gained through a new constitution. The one exception to note may be the 1964 constitution, introduced under King Mohammad Zahir (r. 1933-73) in the name of modernization and reform. However, even that was preceded by a family rift between King Zahir and his powerful cousin and Prime Minister, Mohammad Daud. The 1964 constitution introduced elaborate clauses on hereditary monarchy in a direct line of descent among the male descendants of the King, thereby precluding his cousins and collaterals who had actually ruled the country under him. King Zahir's long rule was marked not by his own initiatives, but by those of his cousins who served as Prime Ministers. Modernization trickled down, paced to create the least amount of political disruption, and providing the norm under Zahir Shah's monarchy. The King's sons probably prompted him to isolate Daud by means of a new constitution. Daud was isolated and waited for nine years until he staged a military coup that toppled the monarchy and declared Afghanistan a republic. Daud's rule lasted five years, ending with the communist coup of 1978 that led to his assassination.

Although in many ways one of the most refined of all the Afghan constitutions, the 1964 constitution sowed the seeds, nevertheless, of dissension in the royal family that led to political instability and made the country prey to foreign invasion. King Zahir and Mohammad Daud were almost the exact opposites of one another in regard to their style, philosophy, and outlook. Whereas the king was known for his hedonistic lifestyle, indecision, and conservatism, Daud was an ardent nationalist that wanted change, but was also an autocrat. He spoke profusely in praise of his new republic and accused the monarchy of corruption and abuse, but his own words and acts were far apart and the five-year record of his republic proved to be a series of anti-reform measures. Daud's constitution of 1976 rolled back the democratic features of the 1964 constitution, brought about socialist-inspired changes, a one party system, concentration of power in the presidency, a truncated judiciary that was once again placed under executive control, and a unicameral parliament with a much-reduced status. He alienated the more mature political leaders and surrounded himself with young communists (such as Khalqi and Parchami) and youth leaders, who had helped him in staging his ill-considered coup. One thing that the two cousins shared between them was that neither of them inspired the Muslim masses of Afghanistan. They associated themselves with Islam to gain

support but did little to integrate Islam into the leadership style and political culture of the country. The royal family was as such unrepresentative of their people's attachment to Islam.[7]

This unfortunate pattern of inconsistency and antagonism between the rulers on the one hand, and the ruler and ruled on the other, continued even after the downfall of the monarchy in 1973, and of Daud's republic in the hands of the communists. The nearly half a century of contentious politics naturally inspired little confidence from the populace. Contradictory regimes set the pattern: from a monarchy to a pseudo-republic, to communist rule, to Islamic state, and to Taliban, each introducing a new constitution, with the exception perhaps of the Taliban who did not even believe in a constitution. A new constitution was seen as a means of gaining legitimacy mainly because it was ratified by the traditional Loya Jirga, a council of tribal leaders, landlords, and notables whose number and methods of selection were determined by the regime in power. It hardly failed to endorse the regime.

10. Civil war, the violent ousting of the Taliban by American forces, and the collapse of government preceded the 2004 constitution. The only element that was different here was the Bonn Agreement and the UN involvement, which helped to provide a modicum of legitimacy for what was to follow. As for the crisis facing Afghanistan, it was probably the most tenacious the country had ever experienced. None of the preceding constitutions were introduced in a situation of the total collapse of government, which was brought about by months of American air raids on Afghanistan during the last quarter of 2001. Yet with all the adversity Afghanistan suffered, there were signs of hope due to the people's eagerness to help restore normality to the country. People felt disillusioned with too much violence and wanted an end to the conflict. They openly supported the new government with unprecedented enthusiasm. Another factor was probably the Afghans' enduring attachment to their homeland. People kept asking questions as to whether Afghanistan would split up among its various ethnic groups and the neighbouring countries. Afghanistan has retained its unity due to the national fervor and loyalty of its people.[8]

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[7] See for a discussion of developments during the five years of Daud's presidency, Kamali, *Law in Afghanistan*, 55 f.

[8] I may recount in this connection a personal experience. While I was meeting with about 250 Pashtun elders of the Momandara district in Eastern Afghanistan in early July

11. The 23 years of war destroyed the country's economic infrastructure and provided opportunities for foreign players and their client Afghan factions to exploit the situation. The near-total collapse of the pre-war economy gradually resulted in the emergence of a 'war economy' that centered on manufacture, trading, and the smuggling of weapons and illicit drugs. Moreover, a whole generation of young people was deprived of educational opportunities and became easy prey for the warlords who provided them with an income. The 'war economy' of the post-conflict period has now given way to an even uglier variety, 'the drug economy' that struck roots due to widespread unemployment and raging poverty.

The Shi'a of Afghanistan drew support from Iran, the Taliban, and their acolytes from Pakistan, whereas the Uzbeks, Turkomen, and later the Northern Alliance drew military and financial support from their littoral states in the north. Foreign Muslim extremist groups and Al-Qaeda found a foothold in Afghanistan and began to use Afghan soil, under the Taliban, as a base for their infamous activities against other nations.

The Bonn Agreement, the formation of a new government, and a new constitution followed by two general elections raised hopes for the end of the warlord era that was seen as an obstacle to the restoration of constitutional order in the country. The appointment, however, of many of the warlords to key government positions, and then the United States' undivided attention to the 'war against terrorism' at the expense of economic reconstruction disillusioned the Afghans about the prospects of lasting peace.

2003, news broke out that the Pakistan military had made advances into Afghani territory. Elders from some of the nearby villages adjacent to Pakistan did not turn up to this prearranged meeting with the constitution commissioners. The district governor announced that there was unrest in the border areas. Many spoke about constitution-related matters and referred to the border issue. When I was leaving the area an elderly man of about 80 spoke to me saying that 'these oppressors are a stone's throw away, just across the river.' He was referring to the Pakistan military, and continued while visibly provoked, 'We have sent our boys to stop them.' The young men had taken up arms to repel the Pakistan skirmish. He added that able-bodied men from border villages had also taken positions in the mountain. I could visualize then that this was how Afghanistan defeated the soviet aggressors, not through any organized army, but through the voluntary sacrifice of these devoted tribesmen who acted on their own initiative to defend their homeland.

Constitutional References to Islam

Summary of References

The first article of the 2004 constitution proclaims Afghanistan an Islamic Republic. Article 2 declares Islam as the state religion, and Article 3 provides that in Afghanistan, there shall be no law repugnant to 'the dogma and ordinances' (*mu'taqadat wa ahkam*) of the sacred religion of Islam. Article 62 provides that the candidate for presidency must be a Muslim. It does not, however, specify gender, which would presumably allow a woman to be a candidate. Article 130 specifies the position of the Hanafi jurisprudence vis-à-vis statutory law, and Article 131 contains a similar provision regarding the Shi'a jurisprudence for the Shi'a followers of Afghanistan. Article 149 specifies that the provisions of 'this constitution' concerning Islam may not be amended. Two other substantive references to Islam occur in the context of education, and protection of the family unit respectively. Article 45 thus provides that 'the state shall devise and implement a unified educational curriculum based on the ordinances (*ahkām*) of the sacred religion of Islam and the existing Islamic schools (*madhahib-e Islami*) in Afghanistan'. Article 54 stipulates, 'the state adopts necessary measures to ensure the elimination of customary practices (*rusum*) contrary to the ordinances of the sacred religion of Islam'. With reference to education, Article 17 further specifies that 'the state shall take necessary measures for promotion of religious education, improving the conditions of mosques, madrasahs and religious centres'.

References to Islam also occur in the Preamble where the Constitutional Loya Jirga declared their 'firm faith in God Almighty… and belief in the sacred religion of Islam'. Article 63 also provided that the president and each of the cabinet Ministers must take an oath upon assuming office to 'observe and protect the ordinances of the sacred religion of Islam'.

Islamic symbols in this constitution are found at the very outset where the text begins 'in the name of God, the Beneficent, the Merciful', immediately followed by a longer supplication in Arabic 'praise be to God, the Lord of the universe and blessing be on Muhammad, the most noble of Prophets and Messengers, his family and companions'.

With reference to the composition of the national flag, it is provided: 'the national insignia is composed of *mehrāb* (arch) and *minbar* (pulpit)'. In the upper middle part of the insignia appears the sacred phrase in Arabic, 'There is no God but Allah and Muhammad is His Prophet, and God

is the Greatest' (Article 19). Furthermore, the 'country's calendar shall be based on the era of the *hijrah*, or migration of the noble Prophet. Fridays are public holidays' (Article 17).

Some of these symbols represent new additions. The long Arabic phrases that now appear in the preamble and on the national flag were not stipulated in the previous constitutions of Afghanistan (cf. Art. 4 of both the 1964 and 1931 constitutions). The 1976 constitution (Daud's constitution) even omitted the reference to *mehrāb* and *minbar* and simply specified the measurements and colour compositions of the national flag (Article 24). The 1987 constitution (Najib's constitution) did contain, on the other hand, a reference to *mehrāb* and *minbar* (Art. 9) but no other Islamic symbols were mentioned. Only the 1990 constitution (Rabbani's draft, Article 15) which aroused much opposition and failed to be ratified provided for an equivalent provision to that of the 2004 constitution on the composition of the national flag.

The 2004 constitution thus adopts a variety of measures to manifest Islam as the most visible basis of national identity, reflecting also an entrenched social reality and a source of guidance for law and government. Yet there is room for refinement to address certain ambiguities that are likely to arise. These are discussed in the following pages.

The Islamic Republic Clause

According to Article 1 of the 2004 constitution:

> Afghanistan is an Islamic republican, independent, unitary, and indivisible state (Afghanistan *dwalate jumhuri Islami-e mustaqil, wāhid wa ghayr-e qābil-e tajziya mibāshad*).

The text provides no further detail as to the nature and composition of the 'Islamic republican state' such that it is almost taken for granted that the Islamic republic is in no need of elaboration. Article 1 thus remains at once the most prominent yet altogether ambiguous feature of this constitution. A defining element of the constitution has, in other words, itself remained undefined. Elaboration of some kind for this unprecedented declaration would seem necessary as there is no generally recognized model of an Islamic republic anywhere to be followed, and Afghanistan's own constitutional precedent is also totally silent on the subject. In the face of the

somewhat varied and inconsistent constitutional changes Afghanistan has experienced, one can hardly expect to read a fuller meaning in the bare phrase 'Islamic republican state'. The 1964 constitution provided, on the other hand, for a hereditary monarchy, which was, however, abandoned and its references on this subject were set aside by the Bonn Agreement. Article 4 of the 2004 constitution adopts the equivalent provision of the 1964 constitution to declare that 'national sovereignty in Afghanistan belongs to the nation'. A question arises as to whether this provision should also have been adjusted in some way to ensure harmony with the idea of an Islamic republic. Both the 1973 constitutions of the Islamic Republic of Pakistan and its Iranian equivalent of 1979 declare sovereignty a prerogative of God Most High, but the people exercise it, according to the constitution of Pakistan, as a divine trust that is vested in the Muslim nation.

The Islamic republic clause of Article 1 was rigorously debated by the CRC. A preliminary discussion on this Article had even started earlier when the CRC debate was focused on the title of the new constitution. The initial draft that was prepared by the drafting commission had worded the title as 'Constitution of the Islamic Republic of Afghanistan', which was, however, changed after much debate, to what it reads now as 'the Constitution of Afghanistan'. The main reason for this change of nomenclature was firstly the Afghan precedent whereby none of the previous constitutions bore 'Islamic republic' in its title although most of them were Islamic. Then it was argued, initially by the present writer who was outspoken on this, that the new constitution had not addressed the subject 'Islamic republic' in any way that would justify the placement of this phrase in its title. Some CRC members, especially those who sat in both the Drafting Commission and the CRC, did have reservations about the change of name, but they acceded and the simplified title was finally adopted.

When the CRC debate moved on to Article 1, many had anticipated that a parallel change in this article would be consistent with the change of the title. An alternative proposal that was widely supported in the early stages of the debate was to declare Afghanistan a republic only. The debate continued on three successive occasions, but each time it remained inconclusive. Due to the difficulty of getting consensus in the plenary session of the CRC, a sub-committee was assigned the task of looking into this and making recommendations at a later stage. However, in view of the great sensitivity of the subject and enormous time that had already been taken

by this single article at such an early stage, it was thought that postponing it to a later occasion might ensure a better climate of understanding. The CRC comprised within its members a number of religious leaders, academic figures from within Afghanistan and the Diaspora, former cabinet ministers and judges, some leading notables within the government and outside, including eight women. It seemed that President Karzai's selection of the CRC members was partially merit-based but quite a few were political appointments of individuals who were not known for their knowledge of law and constitution. Many of the CRC members were in favour of adopting the proposed draft Article as it was. There was debate but no one really focused on the juristic consequences of the proposed Islamic republic and what it might mean for the judiciary and the legal system. The advocates of the Islamic republic played on sentiment and highlighted instead that Afghanistan had sacrificed much for Islam and fought a war of aggression for its cause. To declare the country an Islamic republic would be a fitting tribute to that sacrifice. The proposed Islamic republic was thus seen by its advocates as a political gesture that would appeal to the public sentiment. They were hardly interested in any specific measures the constitution should take if it were to give 'Islamic republic' a better institutional manifestation as a system of governance.

The Islamic identity of the constitutional order was not in doubt, for either this or indeed any of the previous constitutions of Afghanistan. This aspect, however, was not enough in itself to identify the basic contours of a new Islamic republic in the country. It seemed as if the advocates of the Islamic republic were content with symbolism and the continuation to all intents and purposes of the legal and political status quo of the 1964 constitution. Some CRC members even voiced the concern that a total silence on this matter might mean that Afghanistan follows the path of its erstwhile neighbours, Iran and Pakistan. Yet a silent but unmistakable attitude that prevailed made this hardly a viable option as reservations persisted in both cases. A persistent record of political disagreements and the prevailing awareness of foreign interference in Afghanistan's internal affairs did not favour any reference, overt or otherwise, to the Pakistani or Iranian approaches—notwithstanding the fact that both of these countries were hosts to vast numbers of Afghan refugees who had fled Afghanistan during the war years.

Iran was a Shi'a jurisdiction and some of the doctrinal overtones of its constitution on imamate and *vilayat-e-faqih* (guardianship of the jurist)

did not correspond with Sunni political thought on the caliphate. Guardianship of the jurist in the Shi'a tradition meant that the jurist represented the Imam of the Age, and it was as such grounded in a different doctrine. The climate of understanding between Afghanistan and Pakistan had, on the other hand, been frequently marred by border disputes between them. Pakistan had also wavered in finding its own bearing with the idea of the Islamic republic, especially under Musharraf's leadership, who took power through a military coup without any popular mandate. As already mentioned, while the CRC work was in progress in July 2003, there were fresh advances by the Pakistan military into the Afghan border territory, initially said to be as far in as 40 kilometers. This led to much agitation and many concluded that instead of helping Afghanistan during its difficult moments, Pakistan was taking advantage of Afghanistan's weakness. Tension was rising fast and had it not been for direct diplomacy and contact between Karzai and Musharraf, the dispute could well have relegated the constitution making exercise into a secondary matter. In light of such difficult experiences, the idea of following Pakistan on its Islamic republican track hardly seemed appealing.

The advocates of an Islamic republic persisted in keeping the draft unchanged with the additional proviso that the CLJ should decide on the matter. This was just a tactic by the hardliners, as everyone knew that once the draft opted for the Islamic republic, the CLJ would not change it, as the issue was too sensitive, and this was what actually happened. Interestingly enough though, like the CRC, the CLJ also took a dogmatic view of the Islamic republic clause and adopted it practically without debate. The Islamic republic was most likely seen as an aspect of the faith and thus an act of religious merit to adopt it went unquestioned. The CLJ did, on the other hand, engage in extensive debate concerning the functions and powers of the president and of almost every other part of the draft constitution. Neither the CRC nor the CLJ attempted to change the title of the constitution, which is designated as 'the Constitution of Afghanistan'.

Islam as the State Religion

Article 2 of the 2004 constitution reads:

> The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam. Followers of other religions are free to follow and practice their religions within the limits provided by law.

The initial draft of this Article simply declared Islam as the religion of Afghanistan without a further addition to designate it either as an official or state religion. This addition was also absent in its equivalent clause in the 1964 constitution. There was consequently much debate in the CRC as to whether a phrase such as 'the official religion' (*din-e rasmi*) or 'the state religion' (*din-e dawlat*) should precede the reference to Islam. To declare simply that 'Islam is the religion of Afghanistan' would naturally ignore the fact that other religions such as Hinduism and Sikhism were also practiced by some sections of the Afghan populace, which would in reality make those religions also the religions of Afghanistan. Thus, it was argued that the factual statement of the initial draft, which singles out Islam as the religion of Afghanistan, would be less than acceptable to the non-Muslim citizens, in addition to being somewhat discrepant with the second clause of the same article, which grants to the followers of other religions freedom to practice their own religions. However, the present writer's suggestion to add the additional words invoked opposition from some of the CRC members who said that they did not want Islam to be something only official or ceremonial. Besides, they added that the previous constitutions of Afghanistan also did not contain any such qualifications. The present writer elaborated on the juristic consequences of the two phrases at issue, especially that of the 'state religion' for ceremonial purposes by giving the following illustration: suppose a Hindu citizen of Afghanistan became Afghanistan's ambassador in India and he celebrates, as Afghan embassies usually do, the Muslim Eid of Ramadan. He would have to do it in accordance with Islamic rituals, that is, if the constitution declared Islam as the state religion of Afghanistan. The CRC members did not wish to acknowledge the explanation and my suggestion to add the necessary qualification was not taken up until the last stage, yet it was included in the final reading before the text went to the CLJ. The present wording clearly declares Islam as the state religion of the Islamic republic.[9]

A further elaboration of this article also seems advisable in order to specify the position of non-Muslim children in the state schools, and also whether the followers of other religions are entitled to establish their own schools, build new places of worship, and whether they would be entitled to land allocation and subsidies from the government. Although the fiqh (Islamic law) manuals provide some instructions of relevance to

[9] Further details on state religion in the various constitutions of Afghanistan can be found in Kamali, *Law in Afghanistan*, 35 f.

these questions, they tend to be inconsistent in the various madhhabs and are therefore likely to give rise to more questions, hence the need for further elaboration and clarity over contentious issues involving the rights of the religious minorities in the country.

The Repugnancy Clause

Almost all of the constitutions of Afghanistan, with the exception of that of 1980 (introduced under the communist rule of Karmal) contained a repugnancy clause to say that statutory legislation may not contravene the basic principles of Islam. The 2004 constitution followed this precedent and provided:

> In Afghanistan, there shall be no law repugnant to the beliefs and ordinances of the sacred religion of Islam (*mokhālif-e mactaqadat wa akām-e din-e moqaddas-e Islam*…) (Art. 3).

The 1964 constitution contained a similar clause to the effect that legislation may not contravene 'the basic principles of the sacred religion of Islam' (Art. 64). The 2004 constitution instead adopted the phrase 'beliefs and ordinances' of the sacred religion of Islam. These provisions seem to be essentially conveying the same message although somewhat differently in respect of detail. Neither of these two, nor in fact, any of the other constitutions of Afghanistan, however, elaborated on the precise meaning and import of these phrases, leaving the question therefore unanswered as to what exactly the 'basic principles' were as opposed to subsidiary rules of Islam that constituted the criteria of repugnancy. The 2004 constitution has, in fact, phrased the test of repugnancy more widely to include not only the basic principles, but also virtually all the beliefs and ordinances of Islam. The word '*ahkām*, plural of *hukm*: ruling, ordinance, judgment' may be said to have a legal connotation and may refer mainly to the Sharīʾa, but even this explanation is of little help to lay down a pragmatic test by which to determine the conformity or otherwise of a particular statutory ruling with Islam.

Broadly speaking, a legal bill that is in clear conflict with the principles of Islam is hardly likely to be presented to, let alone passed by parliament, and even less likely to be promulgated by the head of state, as that would most likely go against public opinion and prove politically inexpedient. One is, in other words, more likely to be concerned with implicit and more subtle cases of repugnancy. Experience has shown, however, that

people tend to exaggerate and declare instances even of minor divergence with Islamic rules as contravention of major proportions. Instances of this can be found in some of the parliamentary debates in the late 1960s in reference to such issues, for instance, child marriage and polygamy. When the more conservative deputies wanted to oppose reform proposals tabled by government on these issues, they dismissed them as being in conflict with the principles of Islam. In fact, the suggested reforms were often founded in a rationale of their own and violation of the principles of Islam was not at issue. This experience showed 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.[10]

Another question arising in this connection is whether silence can be said to be a form of repugnancy, for there are whole areas of the Shari'a that have been replaced by statutory laws that did not claim their origin in the Shari'a. For example, the Penal Code 1977 and the Law of Criminal Procedure 1965 (amended in 1973, and now under review for further amendment) are both silent on the Islamic *hudud* (prescribed) punishments and provide alternative custodial penalties for the offences in question. The Commercial Law (*Qanun-e Tijarat*) 1955 was taken from European codes and it is silent on forms of transaction and contracts known to the Shari'a. Is it then a form of repugnance for statutory law to bypass the Shari'a and bring in its place other laws? More notable perhaps are the banking laws that were in operation for the greater part of the twentieth century, which are still in force, and they proceed on giving and taking of banking interest. It seems that the presence of a repugnancy clause in Article (64) of the 1964 constitution was not applied to banking laws and instances of their repugnancy with Islam were altogether ignored. Now that the 2004 constitution has extended the scope of its repugnancy clause and declared Afghanistan an Islamic republic, the courts are likely to be faced with more searching questions, and persistent ambiguity over instances of implicit repugnancy with Islamic principles is likely to undermine credibility of the legal system.

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[10] This can be seen in the parliamentary debate on the marriage bill (later Marriage Law 1971) which addressed the issue yet did not take a position on it, as was expected, to proscribe child marriage, due mainly to conservative opposition to the proposed prohibition of child marriage. See for a summary of the parliamentary debate Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (E.J. Brill: Leiden, 1985), 123 f.

One could still keep, perhaps, the repugnancy clause in the constitution, but in order to avoid problems, a certain procedural device and a time frame for the purpose of verification of the existing laws and their conformity with 'the beliefs and principles of Islam' should be provided. One is reminded, in this connection, of Pakistan's experience where the 1956 constitution required conformity of its laws with the injunctions of the Qur'an and Sunnah and assigned a period of five years for the existing laws to be harmonized with Islam. It also set up the Islamic Ideology Council for this very purpose. As a constitutional body, this Commission remains to act as an advisory council to the government in power, yet over time, it seems to have become more of a political tool than a professional body to ascertain juridical conformity of legal bills with the principles of Islam. Measures such as these may, nevertheless, bring greater visibility of the instances of repugnancy with the principles of Islam and suggest solutions to issues as and when they arise.

Shari'a and Statutory Law

Shari'a strongly influences the social mores of the Afghan society, and a great deal of it has been integrated into the life style and culture of its people. Shari'a tends to command veneration almost above that of the statutory law partly due to the greater familiarity of the people with the Shari'a. The parts of Shari'a that relate more closely to the daily lives of the people are its non-sectarian essential parts on principles of belief, devotional matters, and its laws on food and beverage, matrimonial regime, and etiquette of social interaction.

Shari'a has traditionally been the applied law of Afghanistan in the spheres particularly of personal law, property, evidence, and contract. Constitutional law, labour relations and commercial law have, on the other hand, been regulated by a mixture of royal decrees, ministry circulars, and parliamentary legislation of non-Shari'a origin.

Shari'a courts have traditionally operated in Afghanistan as courts of general and applied jurisdiction, in addition to the locally compiled collections of Islamic laws, such as the *Siraj al-Ahkam* (elucidation of the rules of Shari'a), *Tamassok al-Quddat* (guide for judges),[11] the Ottoman *Mejelle*,

[11] *Siraj al-Ahkam* was introduced under Siraj al-Millat wa'l-Din, Amir Habibullah (d. 1918), a 4 vol. compendium of Hanafi jurisprudence and court procedure, whereas

and the traditional Hanafi law manuals which are mainly in Arabic. From time to time, statutory legislation regulated the administration of Shari'a and Shari'a-related matters that were not addressed by the Shari'a itself, as well as issues of concern to customary mores and practices of the Afghan society. Several marriage laws were thus introduced over the years that were overall supplementary to the substantive Shari'a but mainly addressed objectionable customary practices on child marriage, dower, polygamy, and divorce. The substantive aspects of matrimonial law were either wholly or partially left out of the scope of statutory law until the introduction, for the first time, of a comprehensive Civil Code in 1977, which also codified the substantive laws of personal status, including matrimonial law and inheritance.

The basic pattern of the relationship between the Shari'a and statutory law has for a long time been one of uneasy duality and co-existence. Until the early years of the 20th century, one might say that statutory legislation was regarded as an unwelcome intruder and remained therefore at a minimum level leaving the Shari'a as the predominant law of the land. The state occasionally introduced laws that were overall explanatory in character and sought to enhance the visibility and access of the Shari'a in the vernacular languages of the country. It was not until the 1920s when a large number of statutory laws, known as Nizamnamas (regulatory codes) were introduced under the reformist King Amanullah. (r. 1919-28). The 'Nizamnama' struck a note of resemblance with the Ottoman *tanzimat* reforms which had evidently influenced the events in Afghanistan. King Amanullah had apparently remained in contact with developments in Turkey and employed Turkish advisors who assisted him in the formulation of Nizamnamas. Amanullah's constitution of 1923 had provisions that enhanced the role of statutory law side by side with the Shari'a. Yet Amanullah's reforms were short-lived and a popular revolt led by tribal and religious leaders precipitated his downfall in 1928. King Mohammad Nadir (r. 1929-33) introduced a new constitution in 1931, which swung the pendulum squarely back in favour of the Shari'a, and the reformist zeal of Amanullah's period was consequently met with a radical move in the opposite direction. More than 60 Nizamnamas, introduced over a period of nine years, were all set aside and revoked.

Tamassok al-Quddat was introduced by Habibullah's successor, King Amanullah, the latter in a codified form in Dari. Both followed the familiar style of the *Ottoman Mejelle*, and both were compiled by committees of the *'ulama* sponsored by the royal court.

A measure of uncertainty, even confusion, had existed over the relationship of Shari'a to statutory law, especially in cases of divergence and conflict between them. A basic question often arose as to which law was to be applied to particular cases under court consideration. This question had to wait for an answer until the introduction of a new constitution under King Zahir Shah in 1964 that addressed the issue as explained below. Much of the statutory legislation during the latter part of the twentieth century in Afghanistan was influenced, in varying degrees, by Western, mainly French, legal thought and Islamic law akin to its Egyptian counterpart.

Then came the 1964 constitution, which for the first time defined 'law' as a resolution of the two houses of parliament signed by the King. 'In areas where no such law exists, the provisions of the Hanafi jurisprudence of the Shari'a of Islam shall be considered as law' (Art. 69). After the communist military coup of 1978, the Kabul regime attempted to introduce Soviet-style legislation and a judicial system based on socialist doctrines, but these were rejected before they struck root. The subsequent Mujahidin rulers in Kabul (1992-6) declared Shari'a as the basis of their 'Islamic state of Afghanistan' and this was further entrenched subsequently under the draconian regime of the Taliban (1996-2001).

Since the establishment of the Afghan Interim Administration in 2001, a fresh emphasis of note was the incorporation of international human rights principles into the constitution and laws of Afghanistan. This tendency is further endorsed by the increasing involvement of the international community, the UN agencies, and the Afghan Diaspora in the reconstruction of Afghanistan. The fact that millions of Afghans lived in other countries during the war years has had the effect of bringing international influences closer to home. Some have returned while others maintain a level of contact with developments at home. This includes President Karzai and many of his ranking officials, who settled abroad for many years and are still exposed to foreign influence through business, friendship, and family ties.

The 2004 constitution retained the provision of the 1964 constitution on the formal order of priority between the Shari'a and statutory law in favour of the latter and provided, 'law is a resolution passed by both Houses of Parliament and promulgated by the President' (Art. 94). Further details on this are given in Articles (130 and 131) which refer, not only to Hanafi jurisprudence, but also to Shi'i law. This was the first time Afghanistan accorded a constitutional status to Shi'i law, a new development, per-

haps, of no lesser significance than defining 'law' in the case of the 1964 constitution.

With reference to Hanafi law, the courts, under the new constitution, are to apply the provisions of 'this constitution and other laws,' failing which the 'courts shall follow the provisions of Hanafi jurisprudence, and render a decision that secures justice in the best possible way' (Art. 130). The next Article refers to Shi'i law and enjoins the courts to apply the provisions of Shi'i jurisprudence 'in disputes concerning personal status matters and when both parties are Shiites.' This Article specified the general terms of the previous Article with reference to the Shi'a of Afghanistan.

It would appear that the 2004 constitution narrowed down the application of Hanafi law to cases under judicial consideration, which is also the position with regard to Shi'a jurisprudence. This limitation did not exist under the 1964 constitution, which made Hanafi law applicable within and outside the courts, indeed to all government affairs, in the event where statutory law did not provide the necessary guidance.

Another limitation over the application of Hanafi jurisprudence under Article (130) seems to be developing on grounds of interpretation. This is in conjunction with punitive sentences imposed on women under charges of leaving the marital home. A significant proportion of women that are currently serving jail sentences in Afghan prisons have been convicted under this charge. In Pul-e Charkhi prison (just outside Kabul) alone, it is reported that out of the 80 women, 20 were accused or convicted of running away from home. Of these 20, 11 were sentenced to jail terms ranging from six months to 14 years. In an international seminar in Kabul in May 2006, the Lawyers Union of Afghanistan made a strong case that all of these women had identified forced marriage, beating, forced labour and other types of violence as the main reason for their escape from home. It also transpired in the conference debate that running away from home was not even an offence under the existing statutes and the sentencing judges had passed heavy prison sentences by making vague references to Hanafi jurisprudence. Then it turned out that the Hanafi jurisprudence had not stipulated any clear provision on this issue either. What the judges had done was make a vague reference to Article (1) of the Penal Code 1976 that authorizes the judge to order a deterrent (*ta'zir*) punishment for violations not specifically regulated by the text. It was then pointed out by two informed commentators, Minister Ashraf Rasooli, Advisor to President Karzai, and Mr Fazel Ahmad Ma'nawi, the then Deputy President of

the Supreme Court, that Article 130 of the 2004 constitution did not apply to criminal cases and that its application was to be limited to civil disputes only.[12]

With reference to Article (131), we note that as of this writing, there are no Shi'a benches in the courts of Afghanistan, nor has the Shi'a jurisprudence been codified for purposes of judicial practice. The government has, on the other hand, been assigned the task under the 2004 constitution to 'issue decrees regarding the structure and jurisdiction of the courts within one year' (Art.158). No significant progress has been made on this or other legislative bills due to Parliament's preoccupation with other matters. The new Parliament was inaugurated in October 2005 and was for the first six months preoccupied with administrative matters and issues of public concern, such as the publication in Denmark of the caricatures of the Prophet Muhammad, whether female parliamentarians should be accompanied by male relatives when they travel, the state budget, and threats to the country's security. Both Houses formed, in the meantime, 18 house committees to review some 200 laws and presidential decrees issued over the preceding three years.[13]

The Bonn Agreement 2001 had stipulated for the formation of a Judicial Reform Commission (JRC) to look into the somewhat unsatisfactory status of the judiciary. The JRC was formed in early 2002 and was mandated with a fourfold task: to propose reforms for a revised judiciary, evaluate logistic and human resources in the judiciary, review aspects of jurisdiction, and facilitate legal aid and access to justice. However, factionalism within the judiciary and without impeded progress and the JRC almost became a fourth faction among discordant voices from the Supreme Court, the Ministry of Justice, and Attorney General's Office. The JRC did not function as planned due to lack of resources and rigidified, even anti-reform, attitudes within the judiciary that was headed by Fazl Hadi Shinwari.[14] In

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[12] Technical workshop on gender and criminal justice in Afghanistan, Kabul 15-16 May 2006, sponsored by the International Development Law Organization (IDLO), paper entitled 'Recommendation and Summary of Discussions,' 13-14.

[13] UN General Assembly sixtieth session position paper 'The Situation in Afghanistan and its Implications for International Peace and Security', 7 March 2006, 3.

[14] For details see United States Institute of Peace Special Report, 'Establishing the Rule of Law in Afghanistan,' March 2004, 6, 17. The Report concluded that the Judicial Reform Commission should be 'disbanded, and a new expert advisory body attached to the President's office is recommended instead… the current posture of the Supreme Court is a primary obstacle to reform.…', 17.

May 2006, President Karzai nominated Shinwari for another term in office but Parliament rejected his nomination due to 'old age and lack of relevant education. The Parliament also rejected six other of Karzai's nominees for positions on the Supreme Court.'[15] Professor Abdul Salam Azimi, the current Supreme Court President (formerly deputy chair of the Constitution Review Commission) was subsequently nominated for the position and won Parliament's approval three months later.

To summarize, the 1964 constitution introduced a new pattern of relations between statutory law and the Shari'a in favour of the former, a position that has been maintained ever since. This formal order of priority has not, however, affected the bulk of the civil and criminal laws of Afghanistan, which is well entrenched in the Shari'a. The introduction of human rights standards and Afghanistan's belated exposure to foreign opinion and influence are latecomers on the scene, and may in the long term affect the Shari'a's position vis-a-vis statutory law.

It now appears that the existing pattern of introducing piecemeal and Shari'a-compliant reforms in the core areas of civil and criminal law is likely to continue in the near future. Commercial law, constitutional law, municipal laws, labour relations, industry, and commerce will also continue the familiar precedent of being regulated mainly by statutory legislation. Although Afghanistan has become widely exposed to international opinion, the religious factor has not become more flexible but perhaps even less so than it was in more peaceful times. Political uncertainties do not, overall, provide a favourable context for law reform. The 2004 constitution is perhaps a testimony of sorts in that it is more emphatic on conservative Islam than its antecedent, the 1964 constitution. A strong government that can guide and mobilize effectively the human and material resources of the country would appear to be indispensible for any significant progress on law reform in Afghanistan.

Gender Justice Issues

Patriarchal Custom Prejudicial to Women

Tribalism and its customary practices tend to have a generally negative effect on law and governance in Afghanistan, just as they also affect almost

[15] UN Division for the Advancement of Women, 'Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women, Background Paper on Afghanistan,' Technical Assistance Mission to Afghanistan, 26-30 August 2006, 9.

all people, not just the women. Yet their effects are most visible in the sphere of matrimonial law, and the tribal *jirga* operates as an institutional mechanism of tribal custom. Youth and women are mostly affected through excessive control over their choice of a marriage partner, and such practices tend to find an easy refuge under the rubric of Islamic law principle of guardianship (*wilaya*). Tribalism is also seen as a policy issue for the most part, not a constitutional one, which is why the constitutions of Afghanistan do not contain specific references to tribalism. Yet this is a sensitive matter in Afghanistan, and a weak government in Kabul is usually not in a good position to take strong policy measures against the tribes.

In a paper I presented at a human rights conference in Kabul, I stated then and may recapitulate now that 'tribalism and patriarchal practices tend to adversely affect the rights of women in Afghanistan more than any other single factor, be it economic, political, religious and the like.'[16] To combat prejudicial customs has been the central theme of no less than eight statutes Afghanistan introduced on marriage and divorce since the early 1920's. This problem is still with us, and the collapse of central government because of the civil war, persistent conflict, and the consequent emergence of warlords and drug barons significantly contributed to the revival of tribalism in Afghanistan.

Tribal customary codes, such as the *Pashtunwali* (Pashtun customary code) were applied, as they still are, side by side with the Shari'a for dispute resolution by tribal councils, or *jirga*s. This is a male-only dispute settlement institution consisting of local elders and men of influence that make consultative but binding and non-appealable decisions. There are no well-defined jurisdictions but the *jirga* often adjudicates crime and property disputes as well as family matters pertaining to marriage and divorce, money lending, land, and water disputes that are brought before it. Notwithstanding their veneration of the Shari'a, the tribesmen generally prefer to resort to the *jirga* than the formal judiciary. Their preference to resort to the local *jirga* is especially noted in family disputes and cases where a woman is a party to the dispute. The prevailing attitude on this maintains that 'going to official institutions is considered a shameful act for a woman.'[17] *Jirgas* are convened ad hoc to decide on specific disputes and

[16] Paper entitled 'Pernicious Custom, Islam and Women's Rights in Afghanistan,' presented to a conference on Women's Rights, Law and Justice in Afghanistan, organized by the Washington based International Human Rights Law Group, Kabul, 25-6 May 2003.

[17] This is the conclusion of a field survey conducted by researchers from the Max Planck

usually meet in an open space or a mosque. They hear the disputing parties, then discuss the matter and reach a decision. The *jirga* members are 'volunteers who do not receive any money from the government or from any party to the dispute.'[18] In a family dispute, the *jirga* may include representatives from the two sides, and in sensitive issues, only close family members will be allowed. Family members are considered third persons, or non-voting arbitrators. Tribal custom often stands in contrast with the Shari'a on many issues and it tends to be particularly repressive in depriving women of their inheritance rights; it is also notorious for condoning child marriage, forced marriage, and abuse of guardianship powers.

Accurate data on the percentage of disputes resolved respectively by the courts of law or the *jirga* is not available, but it is estimated that 80 per cent of the disputes in Afghanistan are settled through traditional methods, mainly the *jirga*.[19] People tend to be wary of the formal justice procedures due to widespread corruption in the Afghan judiciary. 'Institutionalized corruption, political interference, lengthy pretrial detention, the lack of availability of legal representation and other due process violations remain the norm and contribute to the low level of public trust and confidence in the justice system.'[20] Low salaries and lack of other benefits for judges and prosecutors significantly contribute to corruption. Judges in the provinces receive around $35-50 per month.[21] This lack of confidence in the court system is naturally not helped by the availability of the informal *jirga* mechanism in the country.

The two and a half decades of war in Afghanistan (1978-2002) led to a collapse of law and order in the country and marked a return to tribal laws

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Institute (MPI) of Hamburg based on over 200 interviews conducted in nine provinces of Afghanistan (Kabul, Qandahar, Herat, Balkh, Badakhshan, Bamiyan, Nangarhar, Kuduz, and Paktia): 'Family Structures and Family Law in Afghanistan: a Report of the Fact-Finding Mission to Afghanistan, January-March 2005,' 6 f.

[18] Ibid, 6.

[19] Ibid, 13. This figure was estimated at 90 per cent by the Deputy Special Representative of the UN Secretary General in Kabul, Christopher Alexander, in a paper entitled 'Afghanistan's Justice Sector Overview,' presented on the occasion of the visiting UN High Level Consultation Mission to Afghanistan on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), of which the present writer was also a member (Kabul, 26 August 2006).

[20] United National General Assembly, sixtieth session position paper, 'The Situation in Afghanistan and its Implications for International Peace and Security,' 7 March 2006, 6 (Ref: A/60/712-S/2006/145).

[21] Alexander, 'Afghanistan's Justice Sector Overview,' 11.

that had been weakened because of nation-building efforts over much of the 20th century. In places where the *ʿulama* and religious leaders have wider local support and when they sit in the *jirga* themselves, the Shari'a influence may also be proportionately stronger and may well be applied side by side with customary laws. On occasions, the formal judiciary may communicate with the local *jirga*. In Qandahar province, for example, it is reported that the Public Prosecutor's office occasionally forward criminal cases to the *jirga*. When the *jirga* cannot resolve the case, it might alert the prosecutor's office and pass the case back to it.[22] A similar practice is reported by field researchers in Herat province where the *jirga* also seems to be making the first move: If an agreement cannot be reached, the *jirga* members will refer the case to the official courts. The court may in turn appoint independent arbitrators to facilitate an agreement between the parties.[23] Thus, it appears that despite some level of tension between the Shari'a and tribal laws, the non-sectarian and generally accepted aspects of Shari'a may interact with tribal custom and may be followed by the *jirga*. Defiance of the *jirga* decision is generally frowned upon and may even be penalized, yet in the event where the disputing parties insist to take their case to the local court, they would normally be able to do so.

Many commentators have viewed the *jirga* system as inherently prejudicial to women and suggest that women's rights can only be protected by a functioning judiciary and law enforcement system. The prolonged civil war has also negatively affected the *jirga*: in some parts of the country, local military commanders either dominate the *jirga* or entirely supervene its decisions. Women in these areas enjoy no protection from violence by the militia who are known for their indulgence in forced marriages, kidnapping, and rape.[24]

These developments notwithstanding, Ali Wardak has proposed an experimental model of a system of justice that seeks to integrate the local *jirga*s with the existing formal justice system. This, it is said, would enhance the capacity of the justice delivery system in Afghanistan 'expeditiously and in cost-effective ways.' To this the same observer adds the proviso that his proposed model 'needs to be thoroughly discussed among Afghan and international legal experts as well as among ordinary Afghan people, and

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[22] Cf., Yakin Erturk, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences,' UNESCO document E/CN.4/2006/61/ADD.5, 13.

[23] Ibid, 7.

[24] Erturk, 'Report of the Special Rapporteur,' 14.

then piloted in selected districts in Afghanistan.'[25] Notwithstanding the many reservations that women activists and civil society in Afghanistan as well as the UN agencies have expressed over the merit and feasibility of such a proposal,[26] Wardak's proposal is not without merit and the consultative and experimental approach he has taken for it is sound.

I may refer in this connection to a special development in Herat where the president of the Herat Provincial Court is reported to have authorized the setting up of a local institution, known as the Women's Council of Herat, to consider and issue verdicts in family disputes. It consists of seven members: two judges from the Provincial High Court of Herat, a lawyer, a prosecutor, a physician, a university lecturer, and a psychologist. The council has been authorized to issue oral and written judgments and it has made decisions in several divorce and other family disputes. If the attempt to resolve a dispute brought before it fails, the council refers it to the local court. The council meets on Wednesday afternoons and usually invites the parties for a hearing before taking decisions. According to the Head of the Provincial Council of Herat, this council acts as a branch of the family court and provides advice particularly to women who may solicit its help.[27] The Herat experiment could be seen as one of the possible modalities that may be further adjusted, if deemed necessary, as to how to integrate elements of the *jirga* with the formal justice system.

I conclude this section with a reference to Irene Schneider's recent conference paper where she reflected on the weaknesses of the prescriptive approach to legislation that is commonly used by legal theoreticians, but which has evidently not produced its desired results in the case of Afghanistan. One reason given is legal pluralism in Afghanistan where Islamic law, custom, and statutory law operate side by side and in some cases tend to compete with one another. Schneider has discussed Sally F. More's work on the refutation of the prescriptive approach to legislation and concurred with her conclusion on the following points: First, external and prescriptive legislation alone cannot be expected to have the impact that it presumes to

[25] Ali Wardak, 'Building a post-war justice system in Afghanistan,' *Crime and Social Change* 41(2004), 319.

[26] According to C. Alexander, Deputy Chief of the UN Special Representative in Kabul, some elements of the *jirga* system may never be compatible with the legal rights of the citizens in a modern state. For example, in some cases the *jirga* may recommend direct vengeance (badal) or the marriage of a woman, or even a child from the perpetrators' family to a close relative of the victim's. 'Afghanistan Justice Sector Review', 17.

[27] The MPI report, 'Family Structures,' 7.

have. Second, an analysis of the social structures and the 'semi-autonomous social fields' which possess their own normative regulatory capacities must be undertaken. This may well dictate reversing the perspective approach, which leads to an investigation starting from the social field and not from the legislator.[28]

The typically prescriptive pattern of legislation has clearly not worked well for Afghanistan, in the custom and Shari'a-dominated areas at least. The suggested combined approach would obviously require a more open sociological approach to legislation, and lead us to a tentative conclusion that the *jirga* and local custom must be studied more openly than has hitherto been the case in Afghanistan. My own familiarity with the laws of Afghanistan suggests a state of denial of the *jirga* and tribal methods on the part of the legislators and judges. A degree of openness that we have seen in the case of Qandahar and Herat tends to show welcome departures from that pattern. Yet the state of denial is still with us: Note for example, the Max Planck Institute field researcher's interview with the Deputy President of the Supreme Court in Kabul who is quoted to have said in a reference to the Women Council of Herat that 'the Supreme Court is unaware of this institution.'[29]

Women Empowerment Clauses

The 2004 constitution stands out for its affirmative stance on women's participation in government but it does little to address judicial issues related to abuse of guardianship powers and oppressive customary practices concerning women. Most of the previous Afghan constitutions contained clauses on citizens' equality before the law and prohibition of discrimination against them, which remained, however, ineffective and failed on the whole to curb the prevalence of tribal customs and practices prejudicial to women's rights.[30] The present writer was outspoken on this issue at the CRC

[28] Irene Schneider, 'Registration, Court System and Procedure in Afghan Family Law,' conference paper presented to a workshop on Afghan family law, Kabul 10-12 June 2006, 3.

[29] MPI report, 'Family Structures,' 17.

[30] The MPI field survey in 2005 confirmed that 'the families rarely respect the wish of a girl against their own wishes in the choice of a marriage partner. In most cases, even in urbanized families in places like Kabul, parents impose their will on their children by forcing them to marry regardless of what their children want.' MPI report, 'Family Structures and Family Law,' 14.

and proposed that unlike the previous constitutions which spoke in general terms on gender equality, the new constitution should be more specific, and should adopt effective measures, if it were to make any impact on the tenacious hold of patriarchal custom that compromises women's rights to equality. I submitted that women's rights in Afghanistan were undermined by the ubiquitous practice of child marriage, exorbitant bride price (*walwar*), and dower (*mahr*), forced marriage not only of widows but also of adult boys and girls, and widespread abuses of guardianship powers.[31] The Afghanistan Independent Human Rights Commission estimated that 'between 60 and 80 per cent of marriages in the country are forced marriages. Many of those marriages, especially in rural areas, involve girls below the age of 15. Recent reports indicate that child marriages make up more than 40 per cent of all marriages in Afghanistan.'[32] The heinous tribal practice of *bad* (lit. feud) uses marriage for compensation and settlement of murder and homicide and property and financial disputes. In murder cases, for example, the local *jirga* may order a settlement involving marriage of a young girl by the offender to a close relative of the victim. Similarly, in order to pacify a feud between hostile tribes, one or more girls may be given from one side to the other. The girl then becomes known to have been given in *bad* and usually faces an uncertain predicament.[33] I stressed in my submission to the CRC that such oppressive practices have become national problems of an historical dimension for Afghanistan, which should be addressed in the new constitution, as past legislation concerning them had not made any impact. Although I faced resistance at the CRC concerning a clause I had proposed to insert in the constitution, it was good to see that my proposed text was partially adopted in the final reading and gained the approval of the CLJ. According to this clause 'Family is the fundamental unit of society.... the state shall adopt necessary measures to ensure... the elimination of customary practices (*rusum*) contrary to the provisions of the scared religion of Islam' (Art. 54).

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[31] Field researchers on family law issues in Afghanistan reported in 2005 that that amount of *walwar* in Paktia province could start from 95,000 Afghanis ($2,000) and reach two million Afghanis. It goes higher and higher when the man marries a second, third, or fourth woman. In one case in Gardiz, the capital town of Paktia, a man entering his third marriage paid 4 Million Afghanis ($80,000). MPI Report 'Family Structure', 13.

[32] United Nations Economic and Social Council, 'The Situation of Women and Girls in Afghanistan,' submitted to the Commission on the Status of Women, 50th session, 27 February-10 March 2006, Ref: E/CN.6/2006/5, 8.

[33] Cf., Kamali, *Law in Afghanistan*, 91.

It seems with hindsight that the CLJ was more receptive to reform proposals on women's issues than the CRC, which was dominated by conservative figures. The fact that Karzai and his team as well as a number of international observers were present in the CLJ = with the Bonn Agreement in the immediate background might explain the relative openness of the CLJ to new ideas. Even more significant was the fact perhaps that, for the first time in the history of the CLJ, there was a substantial participation of about one hundred women on this occasion. Some reform measures were consequently adopted in the new constitution that bode well for women's empowerment in Afghanistan. The 2004 constitution thus breaks new grounds in at least some areas of gender equality as in the following clauses:

In its equality clause in Article (22), the constitution provided:

> Discrimination and privilege of any kind is forbidden among the citizens of Afghanistan (*har nawʿ tabʿiz wa imtiyāz bayn-e atibbaʿ-e Afghanistan mamnoʿ ast*). The citizens of Afghanistan, whether man or woman, have equal rights and obligations before the law.

This clause is clearly more emphatic than its counterpart in the 1964 contrition (Art. 25) which simply declared that all citizens were equal before the law without any discrimination and privilege. The more emphatic version now declares such discriminations prohibited, and then adds the words 'whether man or woman.' This phrase did not even exist in the final draft submitted to the CLJ, but was proposed by the female delegates of the CLJ itself, who took an assertive stand on the issue and succeeded in inserting the phrase in the final text.

With reference to the election of the two houses of parliament, the 2004 constitution provided that electoral constituency and other related issues 'shall be determined by the election law,' which shall ensure fair representation for all the people of Afghanistan. The text goes on to provide with regard to the composition of the Lower House (Wolesi Jirga) that 'at least two female delegates shall be elected from each province as a national average' (Art 83).[34]

The new constitution thus took an affirmative action measure on women's participation in parliament. In September 2005, parliamentary and provincial council elections were held in the 34 provinces of Afghanistan.

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[34] The initial draft of this Article provided for a minimum of one female delegate fromeach province, which was subsequently amended and raised to two delegates. This important amendment was also initiated by the female delegates of the CLJ.

Women gained 68 out of the 249 seats in the Wolesi Jirga, a figure that represents the minimum of mandated quota. However, it is noted that out of the 68 candidates, 17 would have been elected even without the quota. Women also secured 121 out of 420 seats in the provincial councils. Reports also show that women made up 41.6 per cent of the 12.5 million registered voters. These are unprecedented developments for Afghanistan when compared with the five female MPs that found their way to parliament in the 1965 election. The fact that women were represented in substantial numbers in all the three preparatory stages of the new constitution, namely the Constitution Drafting Commission, the CRC, and the CLJ, was itself a milestone of development for the country.

The new Wolesi Jirga reflects Afghanistan's ethnic diversity that includes a number of professionals, a contingent of liberals, many of whom were prominent in the Communist Government of the 1980s, some former Mujahidin commanders, a small number of reconciled Taliban, and some individuals accused of serious human rights violations.[35]

With reference to the Upper House (Meshrano Jirga), the 2004 constitution spells out its composition as follows:

1. From among the members of each provincial council, the respective council elects one person for a period of five years.
2. From among the district councils of each province, the respective councils elect one person for a period of three years.
3. The president appoints the remaining one-third from among experts and experienced personalities-including two representatives from the disabled, and two representatives from the Kochis (nomads) for a period of five years. The president appoints 50% of these delegates from among women (Art. 84).

Women thus constitute at least one in six members of the Upper House. As the text provides, female members are also appointed for the longest of the three stipulated terms, which is a favourable step for women to develop insight and experience in parliamentary affairs. In November 2005, each provincial council elected from among its members two representatives to serve in the Upper House; of the 64 elected members, six are women. Then the President appointed 34 out of the 102 members, half of whom are women. The total number of female members in the Upper House thus reached 23, or 22 per cent of its total membership.[36]

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[35] United Nations General Assembly position paper 'The Situation in Afghanistan and its Implications for International Peace and Security,' 3.

[36] UNESCO report, 'The Situation of Women and Girls in Afghanistan', 6.

There is a certain shortage at present of skilled and educated women to take up these new roles. These shortages are mainly due to the near total collapse of education in schools and universities during the decades of war, followed by Taliban repressions, not just for women, but also for all Afghans. Speaking from personal observation as a member of the CRC, eight of the 35 members of this Commission were women, and it proved difficult to find qualified women to be added. There is a prospect, although not in immediate terms, for the female Diaspora of Afghanistan to return to their country and add to the number of educated women that Afghanistan needs. This is of course equally true for men. To encourage the very substantial number of educated Afghans that currently reside in other countries would require incentives that Afghanistan can hardly offer at present. Yet one also finds numerous cases of such Diaspora who have already returned, either temporarily or for good, to join the government ranks or the private sector.

The equality clause of Article (22) and other women empowerment measures of the new constitution would undoubtedly help the prospects of more specifically targeted reforms needed to redress what has become an historical imbalance in the Afghan bill of rights. The Afghan lawmakers were content in the past with lip service to gender equality. Laws were passed that promoted women's rights but were hardly implemented and customary practices that compromised women's rights continued unabated. Curbing entrenched custom and problematic tribalist attitudes evidently needs a more rigorous all-rounded campaign that a statutory text alone has not realized. Afghanistan's experience on women's rights has been confined to prescriptive legislation that has not been followed by supportive measures to address the wider issues of education and awareness raising concerning women's rights. Now that a fresh opportunity has arisen, a wider and a resolute campaign should be undertaken: Every Ministry and department of government, the judiciary, and the law enforcement agencies should adopt policy measures on gender equality within their own spheres of jurisdiction. This may begin, for example, with in-house training programmes of their own officials in Kabul and the provinces, in addition to increasing women's participation in the executive and managerial posts in the ministries and such other measures that may be appropriate to address the particular concerns of every department.

The UN agencies and other international actors in Afghanistan have been engaged in project planning and works on gender equality, which are, however, hindered by security problems and lack of effective governance in

the country. A certain imbalance has also been noted in the prioritization of projects. The international community has shown the tendency to give priority to terrorism and narcotics-related issues often at the expense of economic reconstruction, unemployment, food production, and agriculture. Despite all the emphasis that one can and ought to put on issues of equality and justice, poverty eradication and economic reconstruction would have to be given greater priority nevertheless. It does not take strained logic to say that people are not worried about the kind of laws they may have to follow but care more about the daily problems of subsistence. Vast numbers of the population are currently grappling with degrading poverty, often forcing them to send their children begging on the streets. One can hardly expect a constitution, or any law for that matter, to inspire public confidence under such circumstances. The international community has taken note of this imbalance as of late, but the afterthoughts come rather late and the prospects of sustained commitment to reconstruction have yet to be seen to gain prominence.

We may also note, however briefly, Afghanistan's ratification in March 2003 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which came into effect a month later on 4 April 2003. CEDAW is strongly egalitarian and its adoption, without reservations, by Afghanistan is decidedly ambitious, but may be seen as yet another milestone for the future of gender equality in that country. The UN General Assembly adopted CEDAW in December 1979 and it came into effect as a treaty in December 1981, following its ratification by the 20th member state. This number now stands at over 180, which is just a little short of global consensus. The CEDAW, comprised of 30 articles, is emphatic on the elimination of all levels of discrimination in the areas of customary practices detrimental to women, citizenship matters, health care, education and employment, marriage and family, participation in public life and so forth. CEDAW has a standing committee in the UN that requires its signatories to report every four years on its implementation. The first CEDAW report on Afghanistan was compiled by a committee of experts, which included the present writer, during the last quarter of 2006.

Article (16) of CEDAW on the realization of equal rights in all areas of concern to matrimonial law, choice, and consent of the marriage partners, elimination of child marriage and forced marriage as well as customary practices that adversely affect women's entitlement to equality and justice is likely to prove the most challenging for Afghanistan. CEDAW is also

emphatic on equal access to justice for women and permits affirmative action measures in its pursuit. Most of these objectives are, one might say, compatible with the constitution and laws of Afghanistan, but the realities on the ground tell a very different story. Poverty, difficulties of transportation, and paucity of education and employment opportunities for women, especially in rural Afghanistan, tend to hinder implementation of the laws that already exist. These disabilities are most pronounced with regard to the education of girls, who are often compelled to discontinue their schooling beyond the primary or middle school levels. It is preferable that girls not be present in public space, to be available for domestic chores, prospective arranged marriage, and the like. They are in any case most likely to discontinue schooling after marriage. Women in much of rural Afghanistan are unable to travel to places of employment, to a secondary school away from their hometown or village, a court, or government office. If a woman leaves for a purpose without her male relative's permission that will most likely bring about censure and punishment. The women of Afghanistan are thus severely handicapped regarding their ability to benefit from the equal rights clauses of their own laws, let alone the CEDAW, and it seems difficult, under these circumstances, to see that Afghanistan could measure favourably on the testing grounds of such a comprehensive Convention. All of this confirms the point I made earlier that economic reconstruction and poverty eradication measures must move in tandem with constitutional rights and law reform.

To implement CEDAW, a great deal of work, new legislation, policy measures, and a thorough overhaul of many of the existing laws, especially the Civil Code 1977 would be necessary, and Afghanistan has not shown a particularly assiduous record of observance, even of its own constitutions on women's rights.[37] Expectations are still high on all sides at a time when Afghanistan is under a cloud of uncertainties at present. Time will tell, but now one can only hope for a better future of peace and prosperity for Afghanistan.

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[37] For a series of more specific proposals on reform of the matrimonial law and women's rights issues in the Civil Code, see my Article 'Gender Justice and Women's Rights: A Critique of the Afghan Civil Code 1977,' presented at an international workshop in Kabul on the family laws of Afghanistan organized by the Max Planck Institute of Hamburg, 11 June 2006 (book on conference proceedings forthcoming).

Conclusion

It was not entirely unexpected that a period of adjustment would be necessary for Afghanistan to make a transition from a post-conflict situation toward effective engagement in economic reconstruction and law reform. The fact that the Kabul government has survived for several years amidst factionalism within its ranks, and a host of other problems, may be seen as a kind of achievement in itself. So is the fact perhaps that the international community has remained engaged in Afghanistan. As already noted, a new constitution was successfully introduced and followed by presidential and parliamentary elections. The much-needed basis of legitimacy has thus been created, and there are other encouraging signs as discussed above. Yet the pace of progress toward normality has been slow and has decidedly run into difficulties. Negative perceptions seem to be on the ascendant as of late and resolute action would be needed to open new prospects for peace, economic reconstruction, and law reform.

As for the problematic of restoring peace to war-torn Afghanistan, without wishing to enter details, the military solution that the U.S and its NATO allies have hitherto pursued has only made the situation worse. The Afghans have a strong tradition of resorting to consultation and *jirga* in the quest for solutions to problems of their national concern. Traditionally the Loya Jirga has shown capacity to engage the nation in finding its own bearings with difficult situations. A genuine consultative approach by all the concerned parties, one that is not hindered by pre-conditions and undeclared agendas of any kind, would seem to hold the only prospect of turning the destructive tide of escalating violence that the country is experiencing at present.

Under the 2004 constitution, the Loya Jirga consists of a combined session of the two Houses of Parliament, chairpersons of the provincial and district councils as voting members. Cabinet ministers, the president, and justices of the Supreme Court also participate but without the right to vote (Art. 110). The only shortcoming at present here is the absence of representation from district councils, which have not yet been elected. An ad hoc formula could be found perhaps to overcome the shortcoming, or else to organize the needed district council elections for the purpose. A planned exit of the foreign military forces also seems advisable now and if put on the negotiating table is likely to enhance the appeal of recourse to the proposed consultation.

The introduction of an Islamic republic in Afghanistan has not had a visible impact on the existing status quo in the country. What we have heard of assertive voices on the Islamic identity of law and governance are by no means extraordinary as Islam has always been strong in Afghanistan. Not a great deal of change would be expected on the Islamic republican contents of the 2004 constitution for the near future either. It would be necessary in due course, however, for Afghanistan to articulate in some detail the juristic and political consequences of this change.

In view of the persistent ambiguities in the constitution that call for clarification to guide government action, it would seem advisable to create a research cell, such as an institute of constitutional law research, to articulate the implications of the Islamic republic clause, the repugnancy clause of the 2004 constitution, the creation of new jurisdictions for Shi'a jurisprudence within the judiciary, as well as other adjustments that need to be made in the existing laws and institutions in the country. Women's rights and the gender equality clauses of the constitution need to be elaborated and given a pragmatic base through careful interpretation and advice from the interested parties and actors. The gender equality clauses of the constitution have yet to be comprehensively understood and implemented. To do this, it would be necessary to address women's rights issues in the light of the new constitution and bring in the necessary reforms in the existing laws of the country, especially the Civil Code, which preceded the constitution by some three decades. A plan of action to lead the campaign against prejudicial custom, the implementation of CEDAW, and similar other international treaties Afghanistan has signed could be envisaged. This would not only require adjustment and revision of some of the existing laws, but also the development of new laws and policies to facilitate a meaningful implementation of the new constitution and treaty obligations of Afghanistan.