

CONSTITUTIONAL DEVELOPMENTS IN AFGHANISTAN: A COMPARATIVE AND HISTORICAL PERSPECTIVE

*Saïd Amir Arjomand**

TABLE OF CONTENTS

I. Introduction.....	943
II. The Establishment of Constitutional Monarchy	945
III. Restoration of Monarchy and the Second Afghan Constitution	948
IV. The Constitution of 1964.....	951
V. The Making of the Constitution of 2004	955
VI. Conclusion	960

I. INTRODUCTION

The path of constitutional development in Afghanistan has been very bumpy. She has had seven constitutions in eight decades, between 1923

* Distinguished Service Professor of Sociology, State University of New York at Stony Brook; Inaugural Crane Fellow and Visiting Professor of Public Affairs, Princeton University, 2004-05; B.A., University of Sussex, 1968; Ph.D., University of Chicago, 1980. Professor Arjomand served as Editor of *International Sociology* from 1998 to 2003, and the Founder and President of the Association for the Study of Persianate Societies from 1996 to 2002. His most recent book, co-edited with Edward A. Tiryakian, is *RETHINKING CIVILIZATIONAL ANALYSIS* (2004). Professor Arjomand is currently working on a constitutional history of the Islamic Middle East. This Article is a modified version of the public address delivered by Professor Arjomand at Drake University Law School's 2005 Constitutional Law Symposium.

and 2004,¹ not to mention the non- or anticonstitutional interludes of the rule of the bandit Amir, Bacha-i Saqqā, from January to October 1929, and the Taliban's "Islamic Emirate of Afghanistan," effective from 1996 to 2001, as the final stage of the recent long and many-sided civil war.² The practical result of these constitutions on Afghan politics has been limited to two periods of actual parliamentary constitutional government, 1947-53 and 1964-73. Nevertheless, these constitutions are important landmarks in the shifting patterns of Afghan constitutional politics, and they comprise a variety of types and models of constitutional organization.

In fact, the whole range of twentieth century constitutional types are represented in the seven (or eight, counting the Rabbāni draft) constitutions of Afghanistan.³ The first, the Constitution of April 9, 1923, promulgated by the modernizer King Amānullāh Khan (1919-29), belongs to what can be called the authoritarian type, aimed at the organization of the state rather than limitation of government,⁴ while the Soviet ideological type is represented by the 1980 Interim Constitution of the Democratic Republic of Afghanistan,⁵ the Islamic ideological type by the 1993 Draft Constitution of the Islamic State of Afghanistan,⁶ and, interestingly, the post-Soviet "new constitutionalism" by the ill-fated 1987 (Najiballāh)

1. The seven do not include the unpromulgated Mujahideen (Rabbāni) draft constitution of 1993.

2. See generally Saïd Amir Arjomand, *The Role of Religion in the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan*, in AFGHANISTAN: TOWARDS A NEW CONSTITUTION 18-22 (New York Univ. Ctr. on Int'l Cooperation 2003) (describing the 1923 and 1964 Afghan constitutions), available at <http://www.cic.nyu.edu/pdf/E14RoleofReligioninConstitutionArjomand.pdf> (last visited June 3, 2005).

3. I refer to the typology of constitutions discussed in NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* (2002). See also Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 INT'L SOC. 7 (2003) (exploring the historical beginnings and modern evolving role of ideology in constitutional development); Saïd Amir Arjomand, *Constitutions and the Struggle for Political Order*, 33 EUR. J. OF SOC. 39 (1992) (same).

4. See VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN* 251 (1969).

5. See ONLINE CTR. FOR AFGHAN STUDIES, *THE COMMUNIST ERA CONSTITUTION*, <http://www.institute-for-afghan-studies.org/Constitutions/Constitutions.htm> (last visited June 3, 2005) (detailing Afghanistan's constitutional provisions during the country's communist era).

6. See Mariam Nawabi, *Islamic Law in Majority Countries*, at <http://www.aals.org/am2004/islamiclaw/majority.htm> (last visited June 3, 2005) (discussing the impact of Islam in the Afghan constitution of the Taliban era).

Constitution of the Republic of Afghanistan.⁷ The constitutions of 1964 and 2004 can be said to belong basically to the liberal type, with provisions for the limitation of government and protection of rights.⁸

II. THE ESTABLISHMENT OF CONSTITUTIONAL MONARCHY

The small constitutionalist movement among the urban Afghan intelligentsia in the first decade of the twentieth century was stimulated by the constitutional revolutions in Russia in 1905, Iran in 1906, and the Ottoman Empire in 1908, but was abruptly ended in 1909 with the execution of eight of their leaders and imprisonment of another thirty-five after the discovery that the group had decided to arm itself.⁹ The king's brother and regent, Nā`eb-al Sałtana Allāh Sardār Nasrallāh Khan commented: "Education produces constitutionalism, and constitutionalism is opposed to the power of the sultan as sanctioned by the Šarī`a[t] (Šarī`a) (sacred law)."¹⁰ Nevertheless, the king allowed the publication of the modernist newspaper, *Serāj al-akbār*, which advocated constitutionalism as part of the introduction of modern civilization to Afghanistan and became the mouthpiece of the Afghan intellectuals, who called themselves the Young Afghans, following the Young Turks, and included the king's second son, Amān-Allāh.¹¹ After the assassination of his father in 1919, apparently with his complicity, Amān-Allāh Khan ascended to the throne of Afghanistan.¹² Calling himself a "revolutionary king" (*pādšāh-e enqelābī*), he appointed constitutionalists to government posts and promulgated the first constitution (*Nezām-nāma-ye asāsī*) on April 9, 1923.¹³

The Constitution of 1923 abolished slavery,¹⁴ made free primary

7. AFG. CONST. of 1987, available at <http://www.afghangovernment.com/Constitution1987.htm> (last visited June 3, 2005).

8. For the Pushtu and Dari (Persian) texts of the Constitution of 2004, see <http://www.constitution-afg.com/resrouces/1382Constitution.pdf> (last visited June 3, 2005). See also AFG. CONST. of 1964, available at <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

9. M. Hassan Kākar, *Constitutional History of Afghanistan*, in 6 ENCYCLOPAEDIA IRANICA 158, 158-59 (1992).

10. *Id.* at 159 (quotation marks omitted).

11. *Id.*

12. *Id.*

13. *Id.* (citations omitted).

14. AFG. CONST. of 1923, art. 10, available at <http://www.afghangovernment.com/Constitution1923.htm> (last visited June 3, 2005). I have consulted the English translation of the constitutions published in Kabul in 1996

education compulsory,¹⁵ prohibited torture,¹⁶ and provided that “all the subjects of Afghanistan have equal rights and duties before the state regarding the Šarīʿat and the state law.”¹⁷ It was, however, highly authoritarian in that it did not adopt the principle of ministerial responsibility to parliament, which had been established in Iran in 1907 and the Ottoman Empire in 1908, but rather made ministers responsible to the king (who in fact acted as his own prime minister, except for a short interval), and was mainly aimed at the rational organization of the state by separating the administrative and judicial powers, and adding as consultative organs a Council of State and a number of Provincial Councils.¹⁸ The Council of State also had the power to review the government budget and international treaties.¹⁹ With regard to the reconciliation of the Šarīʿat and state or public law (*qānun*), the Constitution of 1923 acknowledged the duality of the legal system by stating that all cases and lawsuits in the courts of justice would be resolved according to the ordinances of the Šarīʿat and the civil and penal state laws.²⁰ It should be noted that criminal laws had been codified since 1921, and the severe Penal Code of 1924-25 offered a synthesis of the Šarīʿat provisions and customary tribal law, the Pushtunwali.²¹ Furthermore, Article 72 stated that in the process of legislation, actual living conditions of the people, requirements of the time, and particularly the ordinances of the Šarīʿat would be given serious consideration.²²

Hidden by the theoretical recognition of the Šarīʿat and state law as

under the title THE CONSTITUTIONS OF AFGHANISTAN. The Persian texts of these constitutions had been published in Kabul by Sarvar Dānish a year earlier under the title of *Qavānin-e asāsi-ye Afghānistān*. As the English translations are not always accurate, I have translated the cited articles from the official Dari (Persian) texts myself.

15. *Id.* art. 14.

16. *Id.* art. 24.

17. *Id.* art. 16.

18. *See id.* art. 39.

19. *Id.* arts. 48-49. In August 1928, Amān-Allāh convened a Loya Jirga, which approved a constitutional amendment creating a real parliament of 150 deputies with limited legislative power, but rejected his proposed social reforms such as Western education for girls and raising the minimum age for marriage. GREGORIAN, *supra* note 4, at 259-60. However, Amān-Allāh fell before the amendment could go into effect. *Id.* at 265.

20. AFG. CONST. of 1923, art. 21, available at <http://www.afghangovernment.com/Constitution1923.htm> (last visited June 3, 2005).

21. GREGORIAN, *supra* note 4, at 248-51.

22. AFG. CONST. of 1923, art. 72, available at <http://www.afghangovernment.com/Constitution1923.htm> (last visited June 3, 2005).

the two pillars of the legal order was the radical secularization entailed by the translation of Islamic jurisprudence into positive statutory laws. The Šarīʿat was no longer what Max Weber regarded as “jurists’ law,”²³ left to the interpretation of the *ulema* (Muslim clerics);²⁴ the state was given jurisdiction over all cases.²⁵ In practice, the government encroachment over the autonomy of the local Mullahs in regulating family problems became evident with the officials’ attempts to improve the position of women in accordance with the administrative code of 1923.²⁶ Some Mullahs attacked the new code and the opening of schools for girls as contrary to the Šarīʿat, and their cause was taken up by the Mangal tribe, which rebelled in the Khost region in 1924.²⁷ The Khost rebellion lasted over nine months into January 1925, and the king was forced to revoke important sections of the new code and limit the schooling of girls to those under twelve.²⁸ More significantly, he was forced to Islamicize the Constitution by amending Article 2, which had declared Islam the official religion, making official “the sublime Hanafi rite” (concerning the norms of the Šarīʿat), and adding that “Hindus and Jews must pay the poll tax and wear distinctive clothing.”²⁹ Article 24, prohibiting torture, was modified to except the punishments of the Šarīʿat.³⁰

Yet worse was to come. Amān-Allāh Khan’s reforms, especially the removal of the veil, education of women, adoption of Western clothing, and the changing of the weekly holiday from Friday to Thursday provoked a strong traditionalist reaction throughout the country.³¹ In October 1928, the Shinwari tribe rebelled and soon captured Jalalabad, and a Tajik bandit

23. See James Q. Whitman, *The Disease of Roman Law: A Century Later*, 20 SYRACUSE J. INT’L L. & COM. 227, 229-30 (1994) (explaining that the idea of jurists’ law “found a subtle champion in Max Weber”).

24. See GREGORIAN, *supra* note 4, at 7 (defining *ulema* as “Islamic theologians”).

25. Such control is indicated by the preamble to the Penal Code of 1924-25, which states that crimes, whether committed against an individual or the state, fell within the state’s jurisdiction; the same applies to religious and political crimes. *Id.* at 248 (citations omitted).

26. *Id.* at 254-55.

27. *Id.*

28. *Id.* at 255.

29. AFG. CONST. of 1923, art. 2, available at <http://www.afghangovernment.com/Constitution1923.htm> (last visited June 3, 2005).

30. *Id.* art. 24. Three other Articles were also amended. The amendments were passed by a Loya Jirga convened in Paghman and signed by the king on January 28, 1925.

31. GREGORIAN, *supra* note 4, at 261, 263.

known as Bacha-i-Saqao (Water-Carrier's Son) rose against the infidel Amir, vowing "to 'serve the cause of God . . . [by] helping the cause of the *ulema* and [Šarī'at] and of the Holy Prophet."³² Neither Amān-Allāh's hasty rescinding of most of his reforms and other concessions in early January 1929,³³ nor his abdication in favor of his brother were to any avail, and the bandit captured Kabul and held the throne until October 1929, when he was defeated by Nādir Khan who became the new king of Afghanistan and assumed the title of Shah.³⁴

III. RESTORATION OF MONARCHY AND THE SECOND AFGHAN CONSTITUTION

Nādir Khan's Constitution of 1931 was in some respects significantly more liberal than that of 1923, and made Afghanistan a constitutional monarchy in theory. It retained the last Constitution's provision of free compulsory education,³⁵ prohibition of slavery³⁶ and torture,³⁷ and the recognition of the duality of the legal order was implicit in the principle of equality that "all the subjects of Afghanistan have equal rights and duties before the state regarding the [Šarī'at] and the state law,"³⁸ and elsewhere.³⁹ It also created a national parliament with legislative power, consisting of an elected National Consultative Assembly⁴⁰ and a royally appointed upper House of Nobles,⁴¹ and made the ministers responsible to parliament.⁴² Article 71 set up a consultative council in each province.⁴³ The structure and elections of these provincial councils, as well as those of municipal ones, were, however, to be decided by subsequent legislation.⁴⁴

32. *Id.* at 263-65, 276 (quotation marks and citation omitted).

33. These included the granting of automatic right of residence in Afghanistan to the *ulema* of Deoband, and the inclusion of religious luminaries in a new council of fifty notables. *Id.* at 264-65.

34. *See id.* at 285-90 (describing Nādir Khan's ascent to the throne).

35. *See* AFG. CONST. of 1931, art. 20, *available at* <http://www.idli.org/AfghanLaws> (last visited June 3, 2005).

36. *Id.* art. 11.

37. *Id.* art. 19.

38. *Id.* art. 13.

39. The dual formula appears in Article 19, as cited in *supra* note 37, and a similar one in Articles 11 and 16, which prohibits the search of persons and private domiciles without "ordinances of the [Šarī'at] and enacted codes." *Id.* arts. 11, 16.

40. *Id.* art. 29.

41. *Id.* art. 67.

42. *Id.* art. 61.

43. *Id.* art. 71.

44. *See id.* arts. 72, 105 (providing that the process by which members are

The king could, however, veto the bills passed by parliament,⁴⁵ and Article 104 gave the government broad emergency power to deal with rebellions and disturbances of general peace and security.⁴⁶ Although no provisions for the amending of the Constitution were made, Nādir followed his predecessor's practice of calling a Loya Jirga in 1932 to approve two amendments that prohibited Afghan officials and students abroad from marrying foreign wives and the foreigners' ownership of property in Afghanistan.⁴⁷

In practice, the deputies to the lower house were hand picked by the king just as much as the members of the upper house, and the parliament became a means for keeping the tribal leaders and landlord in Kabul during the months of May through October when they were likely to foment trouble in their regional strongholds.⁴⁸

Nādir Shah's Constitution, however, omitted all mention of women as a concession to the *ulema*, and was much more emphatic than its predecessor in its recognition of the Šarī'at. The king was required "to rule the country according to the tenets of the Šarī'at of the Holy Prophet (peace be upon Him), the sacred Hanafi rite and the constitution of the state."⁴⁹ Although both secular (*adliyya*) and religious courts were mentioned, the latter was required to base its decisions on Hanafi jurisprudence,⁵⁰ and the former dealt with "general cases pertaining to the [Šarī'at]."⁵¹ Article 65 required that the enactments of "the National Consultative Assembly should not clash with the ordinances of the holy religion of Islam and the policy of the state."⁵²

selected, as well as number and duty, is set forth in regulations and code).

45. The veto power was implicit in Article 7, which empowered the king, among other things, to "ratify the enactments of the National [Consultative] Assembly." *Id.* art. 7.

46. *See id.* art. 104 (giving the government the power to adopt measures to restore peace).

47. *Id.* amends. 1, 2. The Constitution of 1923 did provide for its amendment upon the suggestion of two-thirds of the members of the Council of State and the approval of the cabinet and the king. AFG. CONST. of 1923, art. 70, *available at* <http://www.afhangovernment.com/Constitution1923.htm> (last visited June 3, 2005). But as we have seen, Amān-Allāh Khan preferred to convoke Loya Jirgas twice to amend the Constitution. *See supra* notes 19, 29-33 and accompanying text.

48. GREGORIAN, *supra* note 4, at 307.

49. AFG. CONST. of 1931, art. 5, *available at* <http://www.idli.org/AfghanLaws> (last visited June 3, 2005).

50. *Id.* art. 88.

51. *Id.* art. 87.

52. *Id.* art. 65.

Although the Constitution did not invest any organ or person with the power of judicial review of laws for conformity with the Šarīʿat or the Constitution, as a part of his rapprochement with the *ulema* and the tribal chiefs, Nādir Shah decided to submit all laws and regulations to a certain Jamʿiyyat al-ʿUlamāʾ (society of the *ulema*) to ascertain their conformity with the Šarīʿat.⁵³ He also rescinded Amān-Allāh's secularist measures and made the Šarīʿat the basis of civil and criminal laws.⁵⁴ Nevertheless, the king remained the highest court of appeal according to Muslim traditions requiring the ruler to be accessible to all his subjects and charged him with removal of "injustices" (*mazālim*).⁵⁵ It is interesting to note that to fulfill this charge, Nādir placed a complaint box at the Ministry of Defense.⁵⁶ In practice, the coexistence of the religious and semisecular state courts resulted in a disorganized and contradictory legal system.⁵⁷

Nādir was assassinated in 1933, and was succeeded by his nineteen year old son, Moḥammad-Zāher Shah, but the new king's uncle occupied the office of prime minister for the next thirteen years.⁵⁸ Only after World War II and the passage of the Municipal Law of 1947 did the enabling liberal features of the 1931 Constitution produce a democratic interlude with the free municipal and national elections in 1947 and 1950, respectively.⁵⁹ The new liberal parliament enacted a free press law and ushered in a lively democratic period.⁶⁰ In fact, the reform-minded urban intellectuals were a minority of forty or fifty out of the 120 deputies comprising the parliament.⁶¹ With a very high level of illiteracy, however, male universal suffrage resulted in the dominance of the landlords in the Afghan parliament, similar to preland reform in Egyptian, Iraqi, and Iranian parliaments. The liberal interlude of 1949-53, similar to that in Iran

53. GREGORIAN, *supra* note 4, at 299.

54. *Id.*

55. Irene Schneider, *Religious and State Jurisdiction During Nāṣir Al-Dīn Shāh's Reign*, in RELIGION AND SOCIETY IN QAJAR IRAN 84, 87 (Robert Gleave ed., 2005).

56. GREGORIAN, *supra* note 4, at 299. An interesting earlier parallel is the setting up of the "justice-boxes" by the Shah of Iran in 1864. See Schneider, *supra* note 55, at 86-87.

57. LOUIS DUPREE, AFGHANISTAN 468 (1980 ed.).

58. Kākar, *supra* note 9, at 160.

59. *Id.*

60. *Id.* (noting that the reformist members became so outspoken that the pursuit of a more open government was abandoned).

61. DUPREE, *supra* note 57, at 494; Kākar, *supra* note 9, at 160-61 (noting that a minority of liberal democrats favoring constitutional monarchy dominated the assembly).

in roughly the same period, was the result of the presence and activism of a minority of urban intelligentsia, and was easily suppressed by an apprehensive Afghan government when Zāher Shah's cousin and brother-in-law, Sardār Moḥammad-Dā'ūd Khan, became prime minister in 1953.⁶² Public life in the provinces, however, may have maintained some of its liveliness, as indicated in 1964, when the delegates sent by the provincial councils waxed eloquent at the constituent Loya Jirga.⁶³ Be that as it may, Zāher Shah persuaded Dā'ūd to resign in 1963 and appointed a commoner prime minister with instructions to prepare a new constitution.⁶⁴

IV. THE CONSTITUTION OF 1964

A Constitutional Committee formed at the end of March 1963 met regularly over the next year and completed a draft constitution, which the king referred to a larger Constitutional Advisory Commission for discussion and public airing, and then convened a broadly representative constituent Loya Jirga on September 9, 1964, the anniversary of the proclamation of the 1931 Constitution.⁶⁵ It was the first Loya Jirga to keep its proceedings in writing, and its 452 members (including six women) subjected the articles of the draft constitution to lively debate for eleven full days, altering some of them.⁶⁶ The Constitution was signed by Moḥammad Zāher Shah on October 1, 1964.⁶⁷

The liberal features of the two earlier constitutions were considerably enhanced in the 1964 Constitution, even though the king retained the unconditional prerogative to dissolve parliament⁶⁸ and there existed a whole chapter on the state of emergency.⁶⁹ It established a bicameral parliament (*shurā*) consisting of an elected lower house (*Wolesi Jirga*) and an upper house (*Meshrāno Jirga*)—a third of whose members were royally appointed, a third elected indirectly, and a third elected directly by residents of the province.⁷⁰ For the first time in Afghan history, the Loya Jirga was given a constitutional definition: a grand council consisting of the

62. Kākar, *supra* note 9, at 160.

63. DUPREE, *supra* note 57, at 469, 568, 573.

64. Kākar, *supra* note 9, at 161.

65. DUPREE, *supra* note 57, at 565-69.

66. *Id.* at 568, 573-74.

67. *Id.* at 586.

68. AFG. CONST. of 1964, art. 64, available at <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

69. *See id.* arts. 113-19.

70. *Id.* arts. 44-45.

members of the two houses of parliament and the presidents of the provincial Jirgas.⁷¹ Sadly, however, none of these bodies existed when the constituent Loya Jirga was convened in December 2003, with the interim restoration of the 1964 Constitution.⁷²

A significant break with the Afghan practice of government in the past half-century was instituted by depriving members of the royal family from becoming members of parliament and the cabinet, holding the position of prime minister, or service as a justice of the Supreme Court.⁷³ Article 37 unrealistically declared: "Work is the right and [duty] of every Afghan . . ."⁷⁴ The office of the attorney general to investigate crimes was introduced,⁷⁵ and a Supreme Court was created,⁷⁶ with the king being instructed to see to its establishment by October 14, 1967.⁷⁷ The Supreme Court was duly established on October 15, 1967.⁷⁸ Meanwhile, a bar association had been set up in 1965 and training programs and judiciary reforms were on their way.⁷⁹ The new parliament, freely elected in accordance with the new Constitution, had also opened in October 1965.⁸⁰

The Constitution of 1964 had quite a few other virtues as well. It was the product of the meeting of liberal constitutionalism and Islamic modernism that proposed to interpret the principles of Islam without undue restriction from the rigidities of medieval Islamic jurisprudence and succeeded in finding the finest formula for the reconciliation of Islam and constitutionalism in the Middle East to that date or since. Its Article 64

71. *Id.* art. 17.

72. *See* UNITED NATIONS DEV. PROGRAMME, AFGHANISTAN NAT'L HUMAN DEV. REPORT 2004: SECURITY WITH A HUMAN FACE 128 (2004), *available at* http://www.undp.org.af/nhdr_04/nhdr04.htm [hereinafter UNITED NATIONS DEV. PROGRAMME] (explaining that the members of the Constitutional Loya Jirga were elected by representatives of the Emergency Loya Jirga).

73. AFG. CONST. of 1964, art. 24, *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

74. *Id.* art. 37. With even greater lack of realism, this guarantee of employment is retained and modified in the 2004 Draft Constitution. Article 48 simply states: "Work is the right of every Afghan." AFG. DRAFT CONST. of 2004, art. 48, *available at* <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

75. AFG. CONST. of 1964, art. 103, *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

76. *Id.* art. 105.

77. *Id.* art. 127.

78. DUPREE, *supra* note 57, at 585.

79. *Id.* at 582.

80. *Id.* at 586.

stated: “No laws can be in contradiction (*munāqiz*) to the principles of the sacred religion of Islam and the other values contained in this Constitution.”⁸¹ As had been the case with the 1931 Constitution, the Article was addressed to the legislature, and again no organ was given the power of judicial review. But in contrast to the early 1930s, a secular body, the National Center for Legislation in the Ministry of Justice, was in charge of the determination of constitutionality of the existing laws and proposed legislation and their conformity with the principles of Islam.⁸² Article 69 further stated that the enactments of parliament comprised all laws of Afghanistan, and Hanafi jurisprudence was valid only by default in the absence of statutory law.⁸³ It is interesting to note that the constitutionalists and Islamic modernists completely carried the day in the debates of the constituent Loya Jirga, airing their frustration with the inadequacies of the judiciary system and religious courts, and in the end only a few clerical members voted against Article 69.⁸⁴ Furthermore, Article 102, which similarly allowed the court to resort to Hanafi jurisprudence only residually and in the absence of a pertinent statute,⁸⁵ was passed almost unanimously as the Mullahs sensed the general hostility of their lay colleagues and dared not oppose it.⁸⁶

The Constitution of 1964 ushered in nearly a decade of democratic politics, with a flourishing free press, student demonstrations, and political mobilization.⁸⁷ Although Zāher Shah refused to sign a law allowing political parties,⁸⁸ several were formed in this period, including the Communist and the Islamic parties, whose leaders later planned to overthrow parliamentary democracy.⁸⁹ This second democratic interlude

81. AFG. CONST. of 1964, art. 64, *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

82. DUPREE, *supra* note 57, at 580.

83. AFG. CONST. of 1964, art. 69, *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

84. DUPREE, *supra* note 57, at 579.

85. AFG. CONST. of 1964, art. 102, *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 5, 2005). The Egyptian Civil Code of 1948, which has been adopted by a number of Arab countries as well, similarly allows the residual use of Islamic jurisprudence. *See* THE EGYPTIAN CIVIL CODE 1 (Perrott, Fanner & Sims Marshall, trans., Tipocrafia Dell’Istituto Don Bosco 1952).

86. DUPREE, *supra* note 57, 583.

87. *See generally id.* at 587-623 (providing an historical perspective of the period).

88. BARNETT R. RUBIN, THE FRAGMENTATION OF AFGHANISTAN 73 (2d ed. 2002).

89. *Id.* at 84-89.

came to an end with the overthrow of Zāher Shah in 1973 and establishment of a republic by Moḥammad Dāʿūd Khan, the former prime minister whom the 1964 Constitution had barred from holding office.⁹⁰ The codification of the laws of Afghanistan, however, continued under President Dāʿūd Khan, and to the 1966 Law of Saranwali (Prosecution) and the 1973 Laws of Criminal Procedure and of Police and Gendarmerie were added the 1975 Afghan Civil Code and the 1976 Criminal Codes.⁹¹ Dāʿūd signed a new Constitution in 1977.⁹² Both the Communists and the Islamists, who later became known as the Mujahideen for their anti-Soviet Jihad, continued to conspire under Dāʿūd, and in the tragic decades of civil war that followed his overthrow in April 1977, offered Afghanistan written constitutions for their respective socialist and Islamic ideological states.⁹³ This period of civil war also witnessed the remarkably progressive and presumably Gorbachev-inspired Constitution of President Najiballāh in 1987.⁹⁴ After the overthrow of Najiballāh, the Mujahideen government published a rigidly ideological Islamic draft constitution signed by President Burhān al-Din Rabbāni in the autumn of 1993.⁹⁵ This draft constitution was not promulgated however, apparently because of widespread opposition to it. The draft constitution stated categorically that “the order of the Islamic state of Afghanistan is erected on the basis of the Koranic text[:] ‘There is no command except for God,’”⁹⁶ and further affirmed that “the [Šarīʿat] of Islam is the single (*yagāna*) source of legislation in the country.”⁹⁷ Unlike the Communists and the Mujahideen, the Taliban, who became the dominant power in 1996, did not bother to

90. Kāker, *supra* note 9, at 161.

91. CHRIS JOHNSON ET AL., AFGHANISTAN’S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 26 (Jan. 2003), available at <http://www.odi.org.uk/hpg/papers/evaluations/afghandfid.pdf>.

92. RUBIN, *supra* note 88, at 75.

93. See Dānish, *supra* note 14, at 207-38 (setting out the Persian text of Constitution of the Democratic Republic of Afghanistan); *id.* at 285-309 (same as to the Mujahideen (Rabbāni) draft constitution of 1993).

94. RUBIN, *supra* note 88, at 147.

95. See Dānish, *supra* note 14, at 285-309.

96. *Id.* at 285-86 (quoting Article 2 of the draft constitution of 1993)

97. *Id.* at 286 (quoting Article 5 of the draft constitution of 1993). Unlike the Communist constitutions and that of the Islamic Republic of Iran, which typically state the ideological foundations of the constitution in the preamble, the 1993 draft has them scattered among the articles of the main body of the constitution. Article 6 claims that “the reconstruction of the national life will be on the basis of the ordinances of the Koran and the Sunna in accordance with the Hanafi jurisprudence,” and Article 10 considers “the endeavor toward the unification of the Islamic *ummat* (community of believers)” one of the main duties of the Islamic state of Afghanistan. *Id.* arts. 6, 10.

pay lip service to constitutionalism by writing a constitution. Following the American invasion of Afghanistan and the overthrow of the Taliban, the Bonn Agreement of December 5, 2001 basically restored the 1964 Constitution, except for the monarchy, as the interim constitution of Afghanistan while a new one was prepared.⁹⁸

V. THE MAKING OF THE CONSTITUTION OF 2004

Although it is understandable in light of the twenty-three years of devastation by civil war and the vastly more difficult conditions in post-Taliban Afghanistan, the process of constitution-making following the Bonn Agreement compares unfavorably with that of 1963-64. The Constitutional Commission was less distinguished and conscientious,⁹⁹ and its chair, Vice-President Ni'matallāh Shahrāni, a cleric and professor at the Šarī'at Faculty of the University of Kabul, pushed the designation "Islamic Republic of Afghanistan" despite opposition from many commission members.¹⁰⁰ The constituent Loya Jirga was arguably less broadly representative, except, remarkably, for including twenty percent women among its 502 members.¹⁰¹ Its procedure was more irregular and less open, and there was a lot of manipulation and behind the scenes alterations of the draft.¹⁰² Above all, there was much less public debate and publicity; only two months passed between the publication of the draft (early November 2003) and the promulgation of the Constitution (January 4, 2004),¹⁰³ as compared to six months in 1964. As a result, not a single rural woman out of three in five provinces surveyed, and not a single rural man in one out of five provinces surveyed in a 2004 sample survey had even

98. Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. DEMOCRACY 5, 7-9 (2004).

99. Although it apparently held public consultation meetings and distributed questionnaires to the Afghan public in June and July of 2003, it is not clear how this "public consultation strategy" contributed to the drafting process. The United Nations Assistance Mission to Afghanistan also commissioned a number of technical memoranda by international constitutional experts including the present Author for presentation to the Commission. CTR. ON INT'L COOPERATION, CONFLICT PREVENTION, RECOVERY AND PEACEBUILDING: AFGHANISTAN RECONSTRUCTION PROJECT, at <http://www.cic.nyu.edu/conflict-project4.html> (last visited June 3, 2005).

100. Rubin, *supra* note 98, at 5-19.

101. *Id.* at 14.

102. Carlotta Gall, *Chairman Walks Out of Afghan Council*, N.Y. TIMES, Dec. 31, 2003, at A11.

103. U.S. INST. OF PEACE, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN (Mar. 2004), available at <http://www.usip.org/pubs/specialreports/sr117.html> [hereinafter U.S. INST. OF PEACE].

heard of the new Constitution.¹⁰⁴

The 2004 Constitution has a number of positive features. Reflecting the aspiration of the Afghan people to end the anarchy of the warlords, it mandates a presidential system with a centralized administration.¹⁰⁵ This is commendable from the viewpoint of maintaining national unity and integrity. The demand for a parliamentary system allowing the distribution of the offices of president, prime minister, and the speakers of the houses of parliament among different ethnic groups was firmly resisted, presumably because many Afghans were haunted by the memory of the president and the prime minister waging war in the streets of Kabul under the Mujahideen.¹⁰⁶ The new Constitution retains the bicameral national parliament, consisting of an elected lower house, with at least one seat from each province reserved for women,¹⁰⁷ and an upper house, one third of whose members—split equally between men and women—are appointed by the President, and the remaining two-thirds indirectly elected.¹⁰⁸ It is remarkable that the Islamist members of the constituent Loya Jirga made no objection to these parliamentary quotas for women. It is equally remarkable that the women delegates stood up to the clerical Speaker of the Loya Jirga¹⁰⁹ and the Islamist warlords and insisted on the explicit equality of women by adding the qualification “whether women or men” to a clause of Article 22 to read: “[T]he citizens of Afghanistan—whether women or men—have equal rights and duties before the law,” and on doubling the women’s quota in the lower house to twenty-five percent.¹¹⁰ The constitutional definition of the Loya Jirga was retained from the previous constitution, with a slight modification, adding among its members the presidents of the district councils to those of the provincial

104. UNITED NATIONS DEV. PROGRAMME, *supra* note 72, at 128. The highest levels of awareness recorded in the survey were 67% for rural men in Nangarhar and 53% for rural men in Herat. *Id.*

105. AFG. DRAFT CONST. of 2004, arts. 136-37, available at <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

106. Amin Tarzi, *Assessing the Draft Constitution (Part 1): Presidential Powers and the Role of Religion*, Radio Free Europe/Radio Liberty (Nov. 6, 2003), available at <http://www.globalsecurity.org/military/library/news/2003/11/39-061103.htm> (last visited June 3, 2005).

107. AFG. DRAFT CONST. of 2004, art. 83, available at <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

108. *See id.* art. 84.

109. Amy Waldman, *Meeting on New Constitution, Afghan Women Find Old Attitudes*, N.Y. TIMES, Dec. 16, 2003, at A13.

110. Rubin, *supra* note 98, at 14-15.

councils.¹¹¹

The 2004 Constitution also makes generous provisions for ethnic, cultural, and, more problematically, religious pluralism.¹¹² Fourteen ethnic groups are explicitly recognized in Article 4,¹¹³ while Article 16, declaring Dari (Persian) and Pushtu as official languages of Afghanistan, also recognizes six other languages as official in particular regions,¹¹⁴ and Article 43 makes provisions for supporting teaching each language in schools in the relevant regions.¹¹⁵ The Shi'ite jurisprudence, for the first time in Afghan history, is granted official recognition not only by being given the same residual validity of the Hanafi jurisprudence,¹¹⁶ but also by categorical validity concerning the personal status law of the Shi'a, which constitute some fifteen percent of the Afghan population,¹¹⁷ and is taken to include the Isma'ili minority, perhaps one to two percent of the population, which is not mentioned separately.¹¹⁸ Article 45, which problematically mandates the basing of the educational system on "the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles," also requires the religious instructors at schools to take into consideration "the Islamic sects existing in Afghanistan."¹¹⁹ Articles 138

111. AFG. DRAFT CONST. of 2004, art. 110, *available at* <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

112. *Id.* arts. 4, 16, 43.

113. *Id.* art. 4. This recognition appears in the original Pushtu and Dari (Persian) texts, which can be found at <http://www.constitution-afg.com/resrouces/1382Constitution.pdf> (last visited June 3, 2005). Updated drafts have scattered the references.

114. *Id.* art. 16.

115. *Id.* art. 43.

116. *Id.* art. 131. My recommendation to the Afghan Constitutional Commission, drawing the lesson from the unhappy petrification of Muslim personal status law in India as a result of a similar constitutional concession to the Muslim minority, had been to *avoid* such a concession that would freeze personal status law for the Shi'a, while making possible progressive or, at the very least, new legislation for the majority Hanafi Sunnis. The better alternative was to make special provisions in conformity with Shi'ite law in the family law statutes of Afghanistan for the Shi'ite citizens. Arjomand, *supra* note 2, at 22.

117. No official population statistics for Afghanistan have been made available since the civil war. These figures are reasonable estimates.

118. Article 131 uses the term "the Shi'ite rite" (*madhhab-e taṣṣayu*) in the singular, but in preference to the more restrictive alternative, "the Ja'fari rite," which could *not* be taken to include the Isma'ili branch of Shi'ism. AFG. DRAFT CONST. of 2004, art. 131, *available at* <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

119. *Id.* art. 45.

through 141 mandate the creation of provincial, municipal, and village councils,¹²⁰ with Article 139 providing for the role of provincial councils in development projects.¹²¹ These councils could act as an engine for democratization,¹²² and could facilitate programs for local-level reconstruction and development alongside the elected Community Development Councils envisaged in the current National Solidarity Program.¹²³ Last, but not least, there is an unqualified affirmation of the Universal Declaration of Human Rights in the Preamble and in Article 7,¹²⁴ and Article 58 sets up an Independent Human Rights Commission for Afghanistan.¹²⁵

Nevertheless, it is possible to argue for the partial superiority of the 1964 Constitution on substantive as well as the aforementioned procedural grounds. In a memorandum submitted to the Constitutional Commission of Afghanistan through the United Nations Assistance Mission for Afghanistan, I praised the subtlety of the formulation, while emphasizing that the projected constitutional court was indispensable for sensitive and balanced judicial review in light of the Islamic and constitutional values, and suggested that the 1964 wording might be updated in a “new constitutionalist” direction by making explicit that the constitutional principles include internationally recognized human rights.¹²⁶ I was very pleased to see the formulation of Article 64 of the 1964 Constitution¹²⁷ reappear in the draft constitution published by the Commission on November 3, 2003,¹²⁸ even without my suggested addition. I was equally

120. *See id.* arts. 138-41.

121. *Id.* art. 139.

122. There is evidence for such democratization at the local level in neighboring Iran, where the local and municipal councils, mandated by the Constitution of 1979, were finally elected in 1999 and have been re-elected since. Kian Tajbakhsh, *The Fate of Local Democracy Under Khatami*, Presentation at the Woodrow Wilson International Center for Scholars (Dec. 16, 2003), *available at* <http://wwics.si.edu/index.cfm> (last visited June 3, 2005).

123. *See* UNITED NATIONS DEV. PROGRAMME, *supra* note 72, at 137 (listing the elements of the current National Solidarity Programme, designed to spur community-driven development).

124. AFG. DRAFT CONST. of 2004, pmbl., art. 7, *available at* <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

125. *Id.* art. 58.

126. Arjomand, *supra* note 2, at 20-21.

127. AFG. CONST. of 1964, art. 64 (“There shall be no law repugnant to the principles of the sacred religion of Islam and the other values embodied in this Constitution.”), *available at* <http://www.afghan-web.com/history/const/const1964.html> (last visited June 3, 2005).

128. AFG. DRAFT CONST. of 2003, art. 3 (“In Afghanistan, no law can be

disappointed, however, when the wording of the draft was changed in the Loya Jirga. The Constitution of January 2004 omits the reference to constitutional values¹²⁹ and contains the following inferior formulation in Article 3: “No law shall contravene [*mukhālif*] the tenets and provisions of the holy religion of Islam in Afghanistan.”¹³⁰ What is more distressing is that the worthy idea of creating a constitutional court had been dropped by the Commission, and the draft Constitution gives power of judicial review not only to the Supreme Court but also to the lower courts, which means that every small town Mullah can strike down any law as contrary to the Šarī‘at without the slightest consideration for other constitutional values and rights.¹³¹ The current Chief Justice of the Supreme Court, Fazel Hadi Shinwari, is known for his fundamentalist views and has appointed several more judges than the nine mandated by the Constitution.¹³² So far, there has been no need to resort to this power of judicial review because “judges routinely make decisions without reference to written law.”¹³³

Although providing for an independent commission to supervise the

contrary to the sacred religion of Islam and the values of this Constitution.”), available at <http://www.constitution-afg.com/resrouces/Draft.Constitution.pdf> (last visited June 3, 2005).

129. The formula survived in Article 35 of the 2003 draft constitution, which required the manifestoes and charters of political parties “shall not contravene the Holy religion of Islam and principles and values enshrined in this constitution.” *Id.* art. 35.

130. AFG. DRAFT CONST. of 2004, art. 3 (“There shall be no law repugnant to the principles of the sacred religion of Islam and the other values embodied in this Constitution.”), available at <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

131. See *id.* art. 121 (stating that “[t]he Supreme Court . . . or the Courts can review compliance with the Constitution”). The great majority of Afghan judges are Mullahs, and many of them were apparently associated with the Taliban. Only a third of judges and prosecutors are educated to university standards, and although a large number of positions in the courts are vacant, the very low salaries are unlikely to attract scarce educated manpower. See UNITED NATIONS DEV. PROGRAMME, *supra* note 72, at 147. Pursuant to the Bonn Agreement, an Afghan Judicial Commission was set up in May 2002 to reform the judiciary but so far remains dormant. JOHNSON ET AL., *supra* note 91, at 27. See generally U.S. INST. OF PEACE, *supra* note 103 (surveying the deplorable conditions of the Afghan judiciary, including the unavailability of printed books of statutes, the extreme scarcity of lawyers, and the rather ineffective aid for judicial reform offered by Italy).

132. U.S. INST. OF PEACE, *supra* note 103, at 5. What is even worse is that he is close to retirement and the front runner for his position is `Abd al-Rasul Sayyaf, a Mujahideen clerical warlord with one of the worst war crime records.

133. *Id.*

implementation of the Constitution¹³⁴ goes a small way to repair the absence of a constitutional court and may one day counter the clerical domination of the Supreme Court,¹³⁵ it is no substitute for a constitutional court. Quite apart from the possibility of providing a mechanism for the reconciliation of Islam and constitutionalism, as I have suggested in the light of the experience of the Egyptian Supreme Constitutional Court,¹³⁶ a constitutional court is a major institutional innovation for judicial review, especially in civil law systems, and has been used to safeguard the transition to democracy and human rights.¹³⁷ The 1987 Najiballāh Constitution had provisions for establishing a constitutional court.¹³⁸ By dropping the idea in 2004, apparently because the training of constitutional judges required a long time, Afghanistan has foregone one of its major “latecomer’s advantages” in constitutional design.¹³⁹

VI. CONCLUSION

With the hindsight of a quarter-century of constitution-making in the Middle East and four subsequent Afghan constitutions, I tend to concur with Louis Dupree’s judgment that the Afghan Constitution of 1964 can be considered “the finest in the Muslim world.”¹⁴⁰ My judgment is based not on the practical success of the 1964 Constitution, but on its unmatched

134. See AFG. DRAFT CONST. of 2004, art. 89 (permitting the Afghani legislature to create a special commission for the purposes of “inquir[ing] about and study[ing] government actions”), available at <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

135. See *id.* arts. 119, 121 (setting forth the Supreme Court’s ultimate interpretive authority, while requiring Supreme Court judges to swear to uphold justice consistent with the “sacred religion of Islam and the provisions of this Constitution”). A similar commission was set up by the reformist President Khātami in Iran in December 1997, but has been ineffective in this regard. Saïd Amir Arjomand, *Authority in Shiism and Constitutional Developments in the Islamic Republic of Iran*, in *THE TWELVER SHIA IN MODERN TIMES: RELIGIOUS CULTURE & POLITICAL HISTORY* 325 (Rainer Brunner & Werner Ende eds., 2001).

136. BROWN, *supra* note 3, at 180-84.

137. Saïd Amir Arjomand & Kim Lane Scheppele, *Opinion Paper on a Constitutional Court for Afghanistan* 7-8 (Mar. 16, 2003), available at <http://www.cic.nyu.edu/pdf/E15AConstitutionalCourtMemoArjomandScheppele.pdf> (last visited June 3, 2005).

138. See AFG. CONST. of 1987, arts. 122-27, available at <http://www.afghangovernment.com/Constitution1987.htm> (last visited June 3, 2005).

139. See Arjomand & Scheppele, *supra* note 137, at 7-8 (deeming the constitutional court an important institution for countries seeking to instill democracy and human rights).

140. DUPREE, *supra* note 57, at 565.

achievement in reconciling Islam and constitutionalism. Although the Constitution of the Islamic Republic of Afghanistan has been hailed as a model for Islamic democracy, “pervasively Islamic” and “thoroughly democratic,”¹⁴¹ I hope I have substantiated my opinion that it represents a definite regress from the subtle formulations of the Constitution of 1964 in this regard, as it does from the Constitution of 1987, with regard to the “new constitutional” provisions for judicial review and protection of individual and social rights.

The Afghan Constitution of 2004 is heavily dependent on the 1964 document, whose text was the basis of the draft prepared by the Constitutional Commission.¹⁴² However, like all constitutions, it is also the result of a number of compromises,¹⁴³ the most important being the compromise concerning Islam and human rights. The unqualified endorsement of universal human rights was a concession by the Islamists for perhaps stepping over one or two of the red lines drawn by the international parties to this compromise, even though they had no formal representation in the Loya Jirga.¹⁴⁴ Women were the tacit beneficiaries of this compromise, and their significant constitutional gains were not contested.¹⁴⁵ The Head of the Afghan Interim Government, subsequently President, Hāmid Karzai, acknowledged the imperfections of the 2004 Constitution in his closing speech to the constituent Loya Jirga, stating: “[T]he Constitution is not the Koran. If five or ten years down the line . . . stability improves, . . . then a Loya Jirga can . . . be convened to adopt a different system of government.”¹⁴⁶ This recognition goes some way to repair the absence of a “sunset clause,” which would have been appropriate in light of the extraordinary circumstances of constitution-making in post-Taliban Afghanistan.¹⁴⁷ In any event, if and when the

141. Noah Feldman, *A New Democracy, Enshrined in Faith*, N.Y. TIMES, Nov. 13, 2003, at A31.

142. Rubin, *supra* note 98, at 10.

143. See, e.g., *id.* at 11-18 (describing the debate over the Afghan constitution and the compromises over the form of government, the role of Islam, and the recognition of cultural diversity).

144. *Id.* at 14.

145. *Id.*

146. *Id.* at 19 (quoting Hāmid Karzai, Address to the Closing Session of the Constitutional Loya Jirga (Jan. 4, 2004)) (alteration in original).

147. Instead, in Article 150, the 2004 Constitution allows for amendments proposed by a committee specially appointed by the president for that purpose and approved by a two-thirds majority vote of the Loya Jirga. AFG. DRAFT CONST. of 2004, art. 150, available at <http://www.afghangovernment.com/2004constitution.htm> (last visited June 3, 2005).

decision is made to amend the present Afghan Constitution, the highest priority should be given to a more satisfactory reconciliation of Islam and constitutionalism and the establishment of a constitutional court, with exclusive power of judicial review and a special standing before it provided for the Independent Human Rights Commission.