

A Constitutional Reckoning with the Taliban's Brand of Islamist Politics: The Hard Path Ahead

Haroun Rahimi



Afghan Institute for Strategic Studies



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The Hard Path Ahead**



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Haroun Rahimi

EXECUTIVE SUMMARY

This research investigates the Taliban's views on the relation between state law and Fiqh, and the legislative power by examining three documents with credible links to the Taliban in the context of Afghanistan's constitutional history. It illustrates how the Taliban's normative ideas on law and legislation reflect a reactionary and traditionalist conception of Islamist politics which stands in contrast to the normative ideas contained in the 2004 Constitution whose genealogy goes back to the constitutionalist movements that predates the communist and Islamist raptures in the country's constitutional history. It articulates the central normative issue of the peace process to be the way that Taliban's reactionary and traditionalist brand of Islamist politics is reconciled with the ideals of rule of law and democratic governance that form the normative underpinnings of the 2004 Constitution.

The first section of this research identifies three intellectual influences of Taliban's normative views on law and legislation: 1) Sunni-Hanafi legal orthodoxy elaborated in the colonial context of sub-continent in the service of a reactionary social reformation project, 2) the reality of Mullah Omar's Emirate, and 3) the first formulation of the constitutional principle of an Islamist political movement articulated in the Mujahedeen 1993 Draft Constitution. The second section frames the constitutional evolution from the first written Constitution until the 1964 Constitution as a dialectic dialogue between the politically neutral Sunni-Hanafi orthodoxy represented by Uluma and the Afghan

monarchs (and later a broader coalition that included the technocrats as well) over the relations between state law and Fiqh and the legislative power of the state. As an outcome of that dialectic process the 1964 Constitution established a new formulation of normative relation between state law and Fiqh, where state law was given preference as long as it did not contradict the basic principles of Islam and placed the legislative power within an elected Assembly. A formula that was later adopted into the 2004 Constitution.

The third section focuses on a specific period of Afghanistan's history when Islamist politics had gained constitutional manifestation albeit in draft formats. It shows how the constitution-making attempts in the height of Islamists politics in Afghanistan demonstrate a shared desire among most Islamists groups to use the state institutions, that is coercive institutions, to enact their Islamist visions on the society. Taliban stood out amongst these groups, however, for their traditionalist and narrow understanding of Islamic legal tradition that left virtually no room for the society to participate in the determination of that Islamist vision and the relation of state to that vision.

The fourth section situates Afghanistan's current Constitution in the historical context. Section five investigates the question of whether Taliban's legal views of have changed since their ousting from power through examination of the group's more recent legislative documents. The analysis presented suggests that in defining their insurgency against the post-2001 order, the anti-democratic, and anti-liberal views of the

Taliban have further hardened. The post-2001 dynamic of the groups also seem to suggest a shift in the focus on articulating an Islamist constitutional vision in line with the Hanafi-Orthodox Legal views (a task which arguably was attempted by the Uluma council that drafted the group's constitution) while in power, to remaking the post-2001 society through coercive state institutions into an imagined one where the group's narrow understanding of classical Hanafi legal texts resonate more. Finally, the analysis presented in this section suggests that the death of the group's charismatic leader, Mullah Omar, has not tempered the group's views on participatory governance per se but it has pushed the question of political leadership to the forefront of the group's constitutional thinking. The analysis of this section suggests that the gulf between the constitutional views of the group and the post-2001 constitutional order has only widened since their ousting from the power.

Section six reflects on the question of constitutional manifestation of Islamist politics in the context of the on-going peace process. The section, which serves as a conclusion, argues that Taliban's Islamism reflects a hybrid approach to the question of Islam and state. On the one hand, the Taliban-brand of Islamism has incorporated the statist tenant of modern Islamism, which is a belief in the use of the state as a vehicle for enforcement of Islam's ideals and visions. This incorporation took place through natural osmosis between the Mujahedeen movement and the Taliban. On the other hand, despite being statist, the Taliban has remained strictly traditionalist. It has rejected the other tenet of modern Islamism, which is a belief in the need to reform the classic Fiqh and to

understand the original texts of Islam as broad ethical principles for political, social, cultural and economic life. It is the second belief that has tempered the harsh consequences of strict application of classic Fiqh in modern time and accommodated (or welcomed) the broad principles of democratic governance in most Muslim countries. Taliban's Deobandi influence was a cause of this rejection. Taliban remains a strong adherent of classic Hanafi Fiqh but dropped the political neutrality that underpinned that Fiqh. It is the Taliban's rejection of the second tenet of modern Islamism, making them statist and traditionalist, modern and reactionary at the same time, that constitutes their brand of political Islam: harsh, unyielding, and hostile to any state-society relations that would be based on pluralism and democratic principles.

The section argues that the closest counterpart to the Taliban brand of political Islam is the Iranian Velayat Faqih model, the Guardianship of the Islamic Jurist; however, the Iranian version, compared to the Taliban's version, is tempered to the point that it allows for a circumscribed version of democracy and limited pluralism, largely because of a whole host of corrective elements of Iranian history and society that act as the counterweight to the theocratic pull of Velayat Faqih. In the course of the peace process in Afghanistan, the question is whether the relatively democratic and pluralistic post-2001 order can be that counterweight to the Taliban's harsher brand of Islamism? Is the post-2001 order robust enough to do that? Is the post-2001 cohesive enough to do that? How much influence will the domestic factors of both Taliban's and post-2001 order have relative to international factors in

negotiating a basic state-society formula that could replace the 1964 formula? The answers to these questions remain to be seen.

INTRODUCTION

The legal system undergirded by the 2004 Afghan Constitution is headed for a historical reckoning. The Bonn process that culminated in the adoption of a new Constitution in 2004, Qanun Asasi Jumhuri Islami Afghanistan [Constitution of Islamic Republic of Afghanistan] hereinafter, “the 2004 Constitution”,¹ excluded the Taliban since most involved in the process seemed to believe that the Taliban were an anomaly in the history of the country.² The Bonn process reinstated the 1964 Constitution—the last Afghan Constitution with broad legitimacy—as the country’s interim Constitution until a new Constitution was formed, a task which was accomplished in January of 2004.³ Adoption of the 1964 Constitution as the interim Constitution served as the prelude for the 2004 Constitution drawing heavily on the 1964 Constitution and its negotiated solution on the relation between

¹ The text of Qanun Asasi Jumhuri Islami Afghanistan [Constitution of Islamic Republic of Afghanistan] hereinafter, “the 2004 Constitution”, used here comes from the Collections of Afghanistan’s Constitutions prepared by Afghanistan’s Ministry of Justice [LINK](#). The translations are mostly of the Author.

² With hindsight, Lakhdar Brahimi, then the UN Representative to the UN Talks on Afghanistan, in an interview which first appeared in *Journal of International Affairs* Vol. 58, No. 1 (2004), argued this exclusion was the “original sin” of the post-2001 system. “You also need to have.... a more consistent, substantive, long-term, national reconciliation process. For example, all the Taliban should have been in Bonn. *I call it the original sin*. The absence of the Taliban was a big, big hole in the process. But it was not possible to have, *because of September 11, because of the behavior of the factions....*” (emphasize added) [LINK](#)

³ See II.1 and II.2 of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions contained in the Security Council Resolution 0/2001/1154 (5 December 2001), [LINK](#)

state law and Shari'ah⁴ and legislative power of the state. Now after almost two decades, in one of the better possibilities ahead, the 2004 Constitution and the legal order it ushered in have to reckon with the Taliban's views on law and legislation. This is the right time to ask *what views do Taliban hold about law and legislation? How do those views relate to the legal history of Afghanistan? What does this mean for law and legislation in a post-peace legal system?*

Taliban not only have proven to be incredibly secretive but also metamorphic. It is very much not only possible but likely that even the group's leadership does not have an answer to these questions. However, I believe these are important questions worth exploring. I intend to do so by examining three important legal documents that can be credibly linked to the Taliban. The first document is the draft Constitution of Taliban, *Dastur Emarat Islami Afghanistan* [Taliban Draft Constitution or TDC] which was prepared by a convention of Uluma headed by then the Taliban Chief Justice during the Taliban period in power in July of 1998.⁵ The second document is a Charter, *Manshur Emarat Islami*

⁴ Shari'ah can be understood as precepts of Islam regarding outward behaviors of Muslims. Muslim jurists articulate Shari'ah precepts through a pluralistic, discursive practice of applying reason to the two primary texts of Islam: Qur'an, which Muslims believe to be the literal words of Allah and Sunnah, which consists of the normative prophetic tradition. Since the ninth and tenth century, there has been a reduction in the pluralistic nature of the Muslim juristic discourse, called Fiqh, as five schools of juristic thoughts largely monopolized the discourse. Here I use the term Shari'ah and Fiqh interchangeably mirroring the common lexicon of Afghanistan's legal vernacular. At times, I use the term Shariat which is the Farsi version of the Arabic term Shari'ah to remain faithful to the original text being discussed.

⁵ *Dastur Emarat Islami Afghanistan* [Order of the Islamic Emirate of Afghanistan] (Draft) (1998), hereinafter "Taliban 1998 Draft Constitution". The text of Taliban 1998 Draft Constitution was accessed on *Afghanpaper.com*. Taliban Constitution Is

Afghanistan [the Charter].⁶ This document is not dated but it was leaked to the public during the group’s negotiation with the United States in 2020.⁷ Taliban’s Spokesman denied the group’s connection with the document⁸ but judging from its content it can be assumed with reasonable confidence that it represents at the very least a starting document for negotiating constitutional questions inside (and outside) the group in anticipation of the group’s rise in power. The negotiation-inducive impetus behind the Charter can be surmised from its detailed references to the verses of the Holy Quran, prophetic tradition, and Hanafi Fiqh⁹—something that was not incorporated in the Taliban Draft Constitution ostensibly because the latter was supposedly based on internal consensus. The Charter does not read like a complete draft Constitution but rather a first drafting attempt. It has left some sections blank and deferred other sections entirely to the rules to be promulgated in the future.¹⁰ The last documents are the group’s *Layeha* [Code of Conduct], three versions of which have been leaked to the public until

Published (Afghanpaper.com, 28 July 2009) [LINK](#). The Author has checked this text against other versions made available online to ensure accuracy. The translation of the Taliban 1998 Draft Constitution used here are of the Author.

⁶ Da Afghanistan Islami Manshur [Charter of Islamic Emirate of Afghanistan] hereinafter “the Charter”. The text of the Charter was obtained through the TOLONews website at this [LINK](#). Translations of the Charter used here are of the Author.

⁷ Taliban Drafts ‘Charter’ for Future Govt: Document (TOLONews, 13 April 2020) [LINK](#)

⁸ Taliban Drafts ‘Charter’ for Future Govt: Document (TOLONews, 13 April 2020) [LINK](#)

⁹ See the footnotes throughout the Charter.

¹⁰ See the upcoming discussion of the Charter below under the heading, Have Taliban’s Views on Law and Legislation Changed?

now (2006, 2009, and 2010).¹¹ *Layeha*s do not represent the Taliban’s vision of law or legislation per se. *Layeha*s are meant to govern the internal workings of the group during their armed insurgency and structure their shadow governance in areas where they have control.¹² However, they do contain legal provisions that can be instructive.¹³

I do not examine the Taliban’s current *de facto* legal practice in areas under their control nor do I examine their *de facto* legal practices when they were in power (1996-2001). It is not because I do not believe that such empirical studies are important in understanding the views of the group. But it is because such studies are already done by people more qualified than me who have better access to empirical data than I do.¹⁴ More importantly, I am interested in the deeper convictions that underpin the *de facto* practice of law: the types of convictions that are highlighted and articulated in a constitutional document. Practically, the Taliban’s legal practice and the group’s articulation of its legal ideas are bound to diverge (as they did under other Constitutions throughout

¹¹ The Layeha: Calling the Taleban to Account (Afghanistan Analysts Network) [LINK](#), hereinafter “Layeha”. The version of the Layeha is mentioned within (). The Translation of Layehas are of Afghanistan Analysts Network.

¹² “All *military* and *administrative* officials and the *common mujahedin* of the Islamic Emirate are obligated to restrict themselves to this [Layeha] *in their Jihadi affairs* and manage their *daily Jihadi affairs* in its light” Layeha (2010) p. 3 (emphasize added).

¹³ See the upcoming discussion under the heading, Have Taliban’s Views on Law and Legislation Changed?

¹⁴ See e.g., “You Have No Right to Complain”: Education, Social Restrictions, and Justice in Taliban-Held Afghanistan (Human Rights Watch, June 30, 2020) [LINK](#); How Life Under Taliban Rule in Afghanistan Has Changed (The Washington Post, December 29, 2020) [LINK](#)

Afghanistan's legal history¹⁵). Taliban's Draft Constitution did not squarely reflect the reality of the group's legal practice—in part, because it supposedly remained a draft. However, I believe, Taliban's literal and legalistic approach to its agreement with the US government, and its protracted negotiation over the text and content of negotiations' code of conduct with the Afghan government, suggest that the leadership of the group takes its public, written, legal commitments seriously—with the caveat that those written commitments so far have favored the group. As such, any possible future agreement on the interim government and the country's future legal system between the Taliban and the Afghan government will have to credibly, albeit vaguely, articulate the views of the Taliban on law and legislation. The documents examined here can help us understand the deeper underlying convictions held by the group which will drive those negotiations.

I will not attempt a comprehensive study of the Taliban's legal views. Instead, I will use a historical lens to understand the group's view, as expressed in the foregoing documents, with regard to *the relationship between state law and Shari'ah and Fiqh and the power to legislate*. These two fundamental issues underpin the superstructure of the legal system. Together they form the boundaries of what a state in a Muslim context can *legally* coerce its citizens to do.

¹⁵ For an example from the current Constitution, the 2004 Constitution, consider provisions related to the elections of the mayors or district councils (arts. 140 and 141). These provisions do not reflect the *de facto* practice under the current Constitution.

I argue that Taliban's normative ideas on law and legislation reflect a reactionary and traditionalist conception of Islamist politics which stands in contrast to the normative ideas contained in the 2004 Constitution whose genealogy goes back to the constitutionalist movements that predates the communist and Islamist raptures in the country's constitutional history. It means that a central normative issue of the peace process is how the Taliban's reactionary and traditionalist brand of Islamist politics is reconciled with the ideals of rule of law and democratic governance that form the normative underpinnings of the 2004 Constitution.

This research is organized as follows: the first section explores the intellectual influences on the Taliban's conception of relations between state law and Shari'ah and the legislative power of the state. The second section situates the twin questions of this research in the historical context. The third section focuses on a specific period of Afghanistan's history when Islamist politics had gained constitutional manifestation albeit in draft formats. Section four connects the features of the current Constitution of the country with the historical constitutional trends in the country. Section five investigates the question of whether Taliban's legal views of have changed since their ousting from power through examination of the group's more recent legislative documents. Section six reflects on the question of constitutional manifestation of Islamist politics in the context of on-going peace process. Finally, the last section briefly examines the current approaches into reckoning with the Islamists politics in the peace process.

What frameworks would the Taliban use to articulate their views on the relation between the state law and Shari'ah and the power to legislate in their draft Constitution?

This section will explore the sources of legal thoughts in the Taliban movement. It illustrates that Taliban's conception of law, the relation between state law and Shari'ah, and the legislative power of state are informed by three sources: 1) Sunni-Hanafi legal orthodoxy elaborated in the colonial context of sub-continent in the service of a reactionary social reformation project, 2) the reality of Mullah Omar's Emirate, and 3) the first formulation of the constitutional principle of an Islamist political movement articulated in the Mujahedeen 1993 Draft Constitution.

The question of whether the Taliban was an emergent phenomenon or a planned proxy for foreign powers is hotly debated by Afghans and international observers.¹⁶ The truth possibly, as usual, lays somewhere in the middle of these two extremes. Whether Taliban as a movement was emergent or planned, the historical analysis presented here suggests that its legal views were not only emergent but also possessed deep

¹⁶ For an example of evidence-based investigation into the relation between the Taliban and its main backer, Pakistan's Inter-Services Intelligence (ISI), See Matt Waldman, *The Sun in The Sky: The Relationship Between Pakistan's ISI And Afghan Insurgents* (Crisis States Research Center, Discussion Paper 18, June 2010) [LINK](#). Waldman argues "Although the Taliban has a strong endogenous impetus, according to Taliban commanders the ISI orchestrates, sustains and strongly influences the movement." p. 1. For a counternarrative that describes the emergent nature of the Taliban movement, See Abdul Salam Zaeef, *My Life with the Taliban* (Columbia University Press, 2010) Ch. 8: The Beginning.

historical lineage. As this research shows, the Taliban's views as contained in their Draft Constitution represent both continuity and change in relation to historical legal trends in the country.

Taliban are strong partisans of Hanafi-Sunni legal orthodoxy. Most of their early members received a varying degree of education in Hanafi-Sunni legal orthodoxy in Deobandi Schools in Pakistan.¹⁷ Sunni Legal Orthodoxy refers to the set of consensuses reached within Sunni branch of Islam on the basic questions of laws, legal reasoning, and prophetic traditions within the formative period of Islam. These consensuses were canonized in authoritative books of Fiqh and Hadith. As Fzlur Rahman writes "Islam had passed, during the preceding three centuries [the first three centuries following the death of the Prophet Muhammad PBUH], through a period of great conflict of opinions and doctrines and had finally attained stability, through the emergence of an orthodoxy, only towards the end of the 3rd[Hijri Calendar]/beginning of the 10th Century [Georgian Calendar]. When that point was reached and a difficult and stormy formative period had ended, the results were given permanence."

¹⁸ (emphasis added)

The Hanafi-Sunni legal orthodoxy would not have helped the Taliban devise a constitution for a nation-state. Nor would it support the

¹⁷ For a description of how the *madrassa* in camps in Pakistan interacted with the Taliban movement in the earlier stages of jihad movement in Afghanistan from the perspective a of a major Taliban figure See Abdul Salam Zaef, *My Life with the Taliban* (Columbia University Press, 2010) pp. 13 – 20.

¹⁸ Fzlur Rahman, *Islam* (University of Chicago Press 2nd Edition 1979) pp. 77-78.

idealistic view of politics espoused by the group. Hanafi-Sunni legal orthodoxy was never integrated into a national legal system. In its classical articulation and application, the Hanafi-Sunni legal orthodoxy views on politics are very pragmatic. It does not support the idealistic views of politics that the Taliban profess. To pre-modern exemplars of *Sunni* madhabs¹⁹, the premodern state was a political reality that was meant to ensure the survival of the *Ummah*. For the Sunni-Hanafi Orthodoxy, the state is not a vehicle for enforcing Islamic visions but a necessary tool for maintaining public order and stability. This principle of political neutrality was developed in the formative years of Islam in response to the early civil wars that occurred within the *Ummah*. The initial impetus to safeguard the unity of *Ummah* by espousing political non-commitment in civil conflicts matured into theological and philosophical doctrines that underpinned the practice of Fiqh as canonized in the Sunni orthodoxy and the dominant *Sunni* madhabs.²⁰

¹⁹ Madhab is often translated as a school of thought. In the history of Islam, madhabs formed over a long period of time but they took their distinct shapes during the ninth and tenth century. In its expansive conception, madhab consists of a distinct scholarly guild/grouping, a distinct methodology of extracting particular rulings from the original texts of Islam, and a shared collection of authoritative jurists texts that contain exemplary rulings that enact the groupings' methodology.

²⁰ The political neutrality of the early Muslim thought should not be confused with separation of "religion and state" or "religion and politics". Religion as it is used in these later concepts is a modern phenomenon that emerged out of the conflict between Christianity and European enlightenment. The modern concept of religion, which is bounded, private, and personal, did not exist in the minds of pre-modern Muslims (and non-Muslims for that matter). For an analysis of this development See the work of Saudi anthropologist, Talal Asad, e.g., Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003). What is meant here by the political neutrality of dominant early Muslim thought is much narrower. It is about what stance should Muslims take in conflicts over the issue of rulership.

Fazul Rahman explains this development in a passage worth quoting in full (emphasis added):²¹

This historical characterization then culminates in a statement of the political ideology whose most fundamental principle requires Muslims to stick to the majority of the Community and to be faithful to their political leader or ruler. The loyalty to the ruler is due even though he “strikes your back and confiscates your property.” The experience of civil wars and their attendant chaos, particularly the incessant military campaigns of the Khawārij [who adopted an aspirational view of politics rooted in Islam albeit backed with extreme violence], resulted in *a firm doctrinal commitment to political conformism* for which the ground was effectively and simultaneously being prepared by religious *irjā* [as a theological and philosophical doctrine, *irja*, predeterminism, maintained both that humans actions are predetermined and that passing judgment on a professing Muslim’s faith should be deferred to Allah]. Finally, this ḥadīth not only teaches political conformism but downright *political quietism* in the absence of a majority party and its leader. One should cling to the stem of a tree until one dies, rather than take part in political activity. This quietist teaching is spectacularly displayed in another ḥadīth recorded in the Ṣaḥīḥ of Muslim [Muslim, al-Sahih, ”Kitāb al-Fitan.”]: The Messenger of God said: “There will be civil wars (fitna) during which to sit at home will be better than one who is standing up [i.e., in readiness to go forth into war], and one who is

²¹ Rahman, Fazlur. Revival and Reform in Islam (pp. 91-92). One world Publications. Kindle Edition.

standing up will be better than one who is walking, and one who is walking will be better than one who is running [i.e., rushing into fight].”

In the case of Hanafi madhab, which is most relevant for the Afghan context, Abu Hanifa himself maintained that the head of state cannot be expelled for being a corrupt person, *fasiq*.²² In pre-modern times, some attempted to reform the political quietism of Sunni Orthodoxy. The most important figure among them was Ibn Taymiyya. “[A] combination of moral concern with those of the existential values of the community, [led] Ibn Taymiyya’s determinism (*irja*) [to be] different from earlier forms. Whereas earlier *irjais* had one-sidedly stressed unconditional obedience to the ruler at all cost, Ibn Taymiyya formulated a theory of mutuality, centered around the concept of the *umma* as a whole, under which both the ruler and the ruled have their being.”²³

In modern times, in fact, it was the discontents with the neutrality of Sunni legal orthodoxy²⁴ on the questions of politics and leadership of the

²² Sharh al-aqa'id an-nasafiyya, Imam Abu Hanifa, p.180-181.

²³ Rahman, Fazlur. Revival and Reform in Islam (p. 190). Oneworld Publications. Kindle Edition.

²⁴ It should be noted that there are other genre of writings, outside legal writings of Fiqh, in the Islamic civilization that are concerned with the affairs of the state and conduct of Muslim rulers. Important examples of this genre are the work of Philosopher Nasir al-Din al-Tusi such as Nasirean Ethics and The Attributes of the Noble. For an analysis of this genre of Islamic writing see Shahab Ahmed, What is Islam? The Importance of Being Islamic (Princeton University Press, 2015) where he writes on the political theory of Islam, “We will not readily find the answer to this fundamental legal question in the texts to which we usually resort as normative in the matter of Islamic law: namely, the jurisprudential discourse of uṣūl al-fiqh. ut if we are prepared to seek Islamic norms elsewhere—that is, in intellectual and discursive and social diffusion—

Muslim community that gave rise to the Salafism (who built upon the views of Ibn Taymiyya²⁵) and Islamists movements (who built on the work of legendary Muslim political activist, Jamaluddin Afghani, and those inspired by his activism such as Muhammad Abduh²⁶) across the Muslim world. In reaction to a perceived moral and political decline in the Muslim world, the Salafi movement rejects the classic Fiqh along with the *Sunni madhabs* which developed based on the Sunni Legal Orthodoxy for their use of what the Salafis perceive to be *speculative* reasoning.²⁷ Salafis instead believe that the only way to regain the political status of the Muslim world is to reform the moral character of the society based on the *sure* knowledge of religion as contained within the doctrines and practices of earliest Muslim generations (hence, *salaf*

we will find the answer to this fundamental legal question readily enough in a non-legal genre: namely, the philosophically-inflected discourse of akhlāq-ethics. It is under the conceptual canopy of akhlāq-ethics that Muslims have tended historically most to discuss political theory—that is, the subject of how Muslims should govern their collective affairs in a polity. The seminal work in this genre for the Balkans-to-Bengal complex was the aforementioned book of Nāṣir-ud-Dīn Ṭūsī, the Akhlāq-i Nāṣirī, which, over the course of the half-millennium after its author’s death, was—as we shall see—routinely invoked, paraphrased, and elaborated upon in discussions of the relation of the ruler to law-making.” p. 462

²⁵ Bernard Haykel, “On the Nature of Salafi Thought and Action” in the book *Global Salafism: Islam's New Religious Movement* (ed. Roel Meijer) (Oxford Scholarship Online, 2014) pp. 43 – 44.

²⁶ Erkan Toğuşlu and Johan Leman, *Translocality and Hybridization in Current Modern Islamic Activism in Modern Islamic Thinking and Activism Dynamics in the West and in the Middle East* (ed. Erkan Toğuşlu & Johan Leman) (Leuven University Press, 2014) [LINK](#) P. 203.

²⁷ Bernard Haykel, “On the Nature of Salafi Thought and Action” in the book *Global Salafism: Islam's New Religious Movement* (ed. Roel Meijer) (Oxford Scholarship Online, 2014) pp. 42 – 43.

which means predecessors).²⁸ Islamists concur with the Salafis in that Muslim societies have been declining morally and politically (as well as technologically). Islamists also agree that the classic Fiqh is (at least partly) to blame for this decline but not for doing too much rational reasoning; on the contrary, Islamists believe classic Fiqh was not rational enough. Islamists want to reform Fiqh and rationalize it most often by going back to the Quran (and to a lesser extent) *sunnah* to extract rational principles or by scavenging through the corpse of classic Fiqh (from all *madhabs*), and selectively using those rulings that serve the modern needs according to different utility-based criteria. Jocelyne Cesari explains the methodology of Muhammad Abduh, the figure that best exemplifies this approach, in the following paragraph (emphasis added)²⁹

Following al-Afghani, Abduh practiced pragmatism, choosing to be guided by *whichever school of law was the best fit for a particular pressing issue*—a practice eventually known as *talfiq*... Instead of following the specific rules of a particular madhab, Abduh adhered to the principle that *al-maslahah al-mursalah* (public interest) *took precedence over every other consideration*.

...

²⁸ Bernard Haykel, “On the Nature of Salafi Thought and Action” in the book *Global Salafism: Islam's New Religious Movement* (ed. Roel Meijer) (Oxford Scholarship Online, 2014) p. 35

²⁹ Jocelyne Cesari, *What is Political Islam* (Lynne Rienner Publishers, 2018) p. 29

Abduh was aware that these interpretations required *ijtihad* as well as *scientific modes of reasoning*. He believed that if Muslims were unable to secure their beliefs via proofs, they would be very vulnerable to *rational* or atheist objections to their faith. Abduh suggested that ulemas with knowledge should also undertake their own *ijtihad* in accordance with contemporary issues, such as the problems of divorce and polygamy. The ulemas must be in the “vanguard of the acquisition of sciences.” Their moral influence over the masses would allow them to “incite the people to learn what they need to protect their religion.” (emphasis added)

While Shi’ah Islam started as an aspirational political movement, it gradually arrived at a similar pragmatic political ideology of neutrality. In the case of Shi’ah Legal Orthodoxy, the argument was that the Shi’as must *wait* for the return of the last Imam, who is currently inaccessible, and only re-establish just rule under his leadership.³⁰ In the meantime, Shi’as had to wait. This political neutral stance was abandoned in the epoch that culminated in the Iranian Revolution through writings of

³⁰ As Fazlur Rahman write that “Al-Ashcarī relates that the Imāmī Shīcī are unanimous on three issues. ... Secondly, that no rebellion against an established government is allowed except through an Imām.” Fazlur Rahman continues to write “Twelver Shīcī never rebelled after Ḥusayn, the Prophet’s grandson, and since the sixth Imām Jaḥfar al-Sādiq (d. 148/765), they have eschewed the acquisition of political power. The doctrine of abstention from rebellion, except through an Imām, seems to be a logical development from the stance of Jaḥfar al-Sādiq and subsequent Imāms. It is not certain, but it is possible that Khumaym started, soon after his successful rebellion in 1979, to call himself Imām. However, Khumayn’s whole concept of ‘rule by the clergy’ (wilāyat-i-faḥīh) seems to run counter to the Imāmī Shīcī tradition.” Rahman, Fazlur. *Revival and Reform in Islam* (pp. 79-80). Oneworld Publications. Kindle Edition.

jurists such as Ruhollah Khomeini whose views had a lot of parallels with the Islamist movements in the Sunni world.³¹

In principle, the Taliban formally rejected both Salafi and Islamist movements (and, *a fortiori*, Shi'a political revivalism) in their support of the Hanafi-Sunni legal orthodoxy as elaborated upon by the Deobandi schools in the Indian subcontinent. However, their Constitution borrowed heavily from the only other Constitution drafted by the Islamic political movement in the country i.e., *Usul Asasi Dawlat Islami Afghanistan*, [Fundamentals of Islamic State of Afghanistan] hereinafter “the 1993 Mujahedeen Draft Constitution”,³² which in turn had Islamist influences in common with both the Iranian Revolution and the Egyptian Brotherhood.³³ While the former drafted a Constitution that could be consulted by the Rabbani Government, the drafter of the Mujaheddin Constitution, the latter did not draft a Constitution (at least not until Egypt’s 2012 Constitution drafted with Morsi in power), so its influence had to remain primarily intellectual. I point out the borrowed provisions

³¹ Id.

³² The text of Draft of *Usul Asasi Dawlat Islami Afghanistan*, [Fundamentals of Islamic State of Afghanistan] hereinafter “the 1993 Mujahedeen Draft Constitution”, used here comes from the Complete Texts of Afghanistan’s Constitutions prepared by Sarwar Danish (Ibn Sina Univery Press, 2015). Translations are of the Author.

³³ See the upcoming discussion under the heading, Islamist Politics and Afghanistan’s Constitutional History. Also, on the influence of Iranian Revolution See Zahir Tanin *Afghanistan dar Qarn 20* [Afghainstan in the 20th Century] (Erfan Press, 2004) p. 314. On the modern political influences on the Mujahedeen also See Oliver Roy, *Islam and Resistance in Afghanistan* (Cambridge University Press, 1990) p. 81.

of the Iranian 1979 Constitution (with amendments)³⁴ that made their way into the Mujahedeen Draft Constitution and through the latter into the Taliban Draft Constitution in footnotes to the following section of this research: *Islam and state under the Mujahedeen and Taliban draft Constitutions*. Despite the strong influence of the Islamist's ideas through the Mujahedeen Draft Constitution, the Taliban kept the anti-democratic views of Hanafi-Orthodoxy as elaborated by Deobandi in the colonial context of sub-continent for normative and practical reasons that I explain now.

As I stated before, many early members of the Taliban received education in Deobandi schools in Pakistan.³⁵ Deobandi is an

orientation [...] associated with a madrasa founded in a small north Indian town called Deoband in the United

³⁴ The text of Iran (Islamic Republic of)'s Constitution of 1979 with Amendments through 1989, hereinafter “the Iranian Constitution” used here is the English text made available by the Constituteproject.org, [LINK](#).

³⁵ Zaman writes, “Mawlana Sami‘ al- Haqq’s Deobandi madrasa, the Dar al-‘Ulum Haqqaniyya, in Akora Khattak near Peshawar in the North-West Frontier Province, played an especially important role in the war. ... During the Soviet occupation, Afghan students at this madrasa—‘400 out of 680 (about 60 per cent)’ in 1985—were exempt from the normal boarding restrictions imposed on other students; and al-Haqq, the monthly magazine of this madrasa, served as an important vehicle for propagating the cause of jihad in Afghanistan, and indeed, as a veritable ‘war reporting magazine.’ The Soviet occupation of Afghanistan ended in 1989, but that did not bring peace to this troubled land. ... [A] new movement [Taliban] arose, ... to challenge ... warlords, to bring an end to their continued conflict, and to restore Islamic norms that the erstwhile mujahidin were seen to have betrayed. ... [T]his movement had strong ties with Pakistan and was, in fact, *rooted in the Deobandi madrasas*, especially of Pakistan’s North-West Frontier and Baluchistan provinces. It was in these madrasas that numerous young Afghans had come of age during the years of the Soviet occupation.” Muhammad Qasim Zaman. *The Ulama in Contemporary Islam: Custodians of Change* (Princeton Studies in Muslim Politics, 2002) p. 137.

Provinces (now Uttar Pradesh) in 1867. Thousands of other madrasas—all called Deobandi, though often without any formal affiliation with the parent madrasa—share the same doctrinal orientation, which *emphasizes the study of law* and of the traditions attributed to the Prophet Muhammad (hadith), as well as a self-consciously reformist ideology defined *in opposition to existing forms of ‘popular’ Muslim belief and practice.* (emphasis added)³⁶

The Deobandi’s rendition of Hanafi-Sunni legal orthodoxy occurred within a colonial context in the Indian subcontinent unburdened with the need for creating a national legal system for the country or answering the constitutional questions presented in this analysis. As such, as Metcalf writes in his seminal work on the history of Deoband, the Deobandi Ulama “fostered a kind of turning away from issues of the organization of state and society, toward a concern with the moral qualities of individual Muslims. (emphasis added)³⁷

After establishment of Pakistan, the Pakistani Deobani Ulama advocated for Islamization of the state law. Pakistani Deobani Ulama have expressed accommodating views towards the state laws mostly out

³⁶ Muhammad Qasim Zaman. *The Ulama in Contemporary Islam: Custodians of Change* (Princeton Studies in Muslim Politics, 2002) p. 11.

³⁷ Barbara D. Metcalf, *Islamic Revival in British India: Deoband 1860-1900* (Princeton: Princeton University Press, 1982) p. 351.

of practical considerations while maintaining affinity with the Taliban's more traditional methods of enforcing Shari'ah. On this, Zaman writes the following about the views of Mulwai Taqi Usmani, a leading Deobandi intellectual, and other Pakistani Ulama on the relation between Islam and state law in Pakistan and the Taliban approach to enforcement of Shari'ah when the Taliban was in power,

Taqi 'Uthmani's approach to the implementation of the shari'a [in Pakistan] is not that of a gradualist, for he would like to see it enforced even while the task of codification (and of bringing various laws into conformity with the shari'a) continues apace. It nevertheless is an approach that *envisages a gradual transformation of the country's legal system*. Certain other 'ulama, while also professing to accommodate many existing laws into the shari'a, have called for a much more radical transformation of the political and legal system; *and the admiration that many of them have expressed for the Taliban's rough and ready execution of the hudud and other punishments suggests, at least, that they are not enamored of the meticulous work involved in the codification of the shari'a.*"³⁸ (emphasis added)

³⁸ Muhammad Qasim Zaman. *The Ulama in Contemporary Islam: Custodians of Change* (Princeton Studies in Muslim Politics, 2002) p. 96.

With regard to the legislative power of elected bodies, the views of Pakistani Deobandi Uluma remained generally antagonistic towards democratic lawmaking. For example, Mufti Muhammad Shafi of Dar al-Ulum Karachi writes, “If a hoard of highly skilled medical doctors is constituted to resolve the economic problems of the country, or economists are gathered from all over to conduct research into a medical problem, the result would only be failure and a waste of time. Likewise, *if laws are to be made for the country on the basis of the Qur'an and the sunna, then the people needed for the task are those who have deep insight and rich experience with the fields of knowledge pertaining to these.*” (emphasis added) ³⁹

The influence of the Deobandi brand of puritan and reactionary Sunni-Hanafi orthodoxy is visible in both Mujahedeen and Taliban’s constitutions. Both Taliban’s Draft Constitution and their Charter (latter more than former) contain strong reactionary policies that were in part informed by the Deobandi thoughts (as well as their post-2001 adversary with the values and institutions embodied in the Afghan post-2001 system, albeit, this latter is limited to the Charter).⁴⁰ Taliban further shared the hostile views of Deobani Pakistani Uluma towards democratic lawmaking both in their Draft Constitution and the Charter.

³⁹ Mufti Muhammad Shafi, “Pakistan main dini islahat,” in Taqi ‘Uthmani, *Nifaz-i shari‘at*, 85 (emphasis added) retrieved from Muhammad Qasim Zaman. *The Ulama in Contemporary Islam: Custodians of Change* (Princeton Studies in Muslim Politics, 2002) p. 98.

⁴⁰ See the upcoming Discussion under the headings *Islamist Politics and Afghanistan’s Constitutional History and Have Taliban’s Views on Law and Legislation Changed?*

A brief note on the historical institution of Khilafat is also in order. Khilafat was an important consideration in the early phases of Afghanistan constitution-making during the reforms of Amanullah Khan.⁴¹ However, it was both unhelpful and uninspiring for the Taliban in devising a constitution. Normatively, under the Hanafi-Sunni legal orthodoxy, the Taliban would not have a strong claim to Khilafat.⁴² Practically, any claim of Khilafat for their Amir would put Taliban in conflict with all the Muslim majority states including Pakistan, Saudi Arabia, and the United Arab Emirates, few countries that supported them when they were in power; it would also weaken their tribal support

⁴¹ Faiz Ahmad writes on the views of King Amanullah Khan on Khilafat, “By gambling on the “excited state of mind” of Indian Muslims in the charged atmosphere of Ottoman defeat in World War I and burgeoning Khilafat movement across the subcontinent, Aman Allah sought to capitalize on his own visions for a Greater Afghanistan, including a possible recapture of Pashtun ancestral lands in the frontier. ... Aman Allah ... attended the historic All-India Khilafat Conference at Bombay in February 1920...” Faiz Ahmad, *Afghanistan Rising: Islamic Law and Statecraft Between the Ottoman and British Empires* (Harvard University Press, 2017) p. 191.

⁴² Most classic Muslim jurists agreed (and some argued that even a consensus was reached) based on a number of Hadith found in the canonical sunni books of Hadith that the Khalifa must be from Quraysh (i.e., the tribe of the Prophet). Mufti Muhammad Taqi Usmani, a prominent contemporary Deobandi mufti, relays these views in one of his fatwas made available on the Deoband.org, however, he qualifies this classical rule by adding, “[A]ll of this is when one who is qualified for caliphate from Quraysh is present. As for when one who combines the qualities required is not found, then there is no dispute in the permissibility of contracting the caliphate for a non-Qurayshi, ... Furthermore, these conditions are only considered when the caliphate is contracted by the Ahl al-Hall wa ‘l-‘Aqd [the people of losing and binding; they are the ones who are qualified to appoint a leader for the Ummah]. However, when a Muslim man becomes dominant and becomes imam by his dominance, then he assumes the rules of imamate even if these conditions are absent in him, and his regulations are executed and his appointments are sound, and following his judgement is permissible, as was clarified by the fuqaha (jurists).” [LINK](#) The latter half of this opinion reflects the Hanafi-Sunni Orthodoxy neutral position vis-à-vis the question of political role.

because tribes would not have been interested in the global politics of Khilafat. While the Taliban leader was called Amir-ul-Momenin, and despite their connections with the global networks such as Al-Qaida, the Taliban never pursued any global agenda beyond statements of sympathy for fellow Muslims.⁴³

Outside the Hanafi-Sunni legal orthodoxy, by the year 1998, the Ulama convention that drafted a constitution for the Taliban had the reality of Emirate to draw upon. The Emirate was not a fully thought-out legal or ideological blueprint for the state or politics. It was an emergent reality that took shape as the movement unfolded in the country and revolved around the character of their then charismatic Amir—Amir literally means commander—Mullah Muhammad Omar. Emirate as a political-legal institution most likely came into existence after Mullah Omar was considered Amir.⁴⁴ Mullah Omar was not an Amir because the Taliban

⁴³ As Ahmed Rashid writes on the relation between Taliban and the Bin Laden “until the winter of 1998 the Taliban saw Bin Laden as an asset, a bargaining chip over whom they could negotiate with the Americans. ... By early 1999 it began to dawn on the Taliban that no compromise with the US was possible [securing the US Recognition of Taliban in exchange for Bin Laden] and they began to see Bin Laden as a liability.” Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2nd Edition, 2010) pp. 343-344. Robert D. Crews also writes on the meeting between Mullah Omar and Chechen Muslim fighters, “the visit by a Chechen delegation did not bring about grand expression of solidarity between the Taliban and the Chechen rebels, as is frequently imagined in newsrooms and spy agencies, but instead yield bitter arguments, mutual incomprehension, and, on the Chechen side, a bewildered rejection of the Islamic legal prescriptions of their Taliban hosts.” Robert D. Crews & Amin Tarzi, *The Taliban and the Crisis of Afghanistan* (Harvard University Press, 2009) p. 50.

⁴⁴ As Ahmad Rashid writes about the selection of Mullah Omar by a *shura* where Pakistani operatives were also present, “To patch over their differences, the core group of Kandaharis around Mullah Omar nominated him to become the ‘Amirul Momineen’ or ‘Commander of the Faithful’, an Islamic title that made him the undisputed leader

wanted to establish an Emirate. It was indeed the other way around. The Draft Constitution formalized that reality. Emirate not only formalized the reality of Mullah Omar's Emirate, but it also helped the group solve the problem of what form to give their state. The 1964 Constitution called the Afghan state, "a constitutional monarchy" (Art. 1), other constitutions since then bore the title of "Republic" until the Mujahedeen's Draft Constitution. Mujahedeen's draft constitution called the states "Islamic state". None of them would satisfy the twin requirements of acknowledging the reality of Amir Mullah Omar and the refusal of "UnIslamic" elements of "kingdom" or "republic" (and the Taliban's ongoing war with the remanent of Mujahedeen factions⁴⁵).

In short, the political insufficiency of the Hanafi-Sunni legal orthodoxy facilitated the influence of Islamists ideas on the Taliban's Constitution through the Mujahedeen draft Constitution but the lack of precedential support for electoral and democratic institutions in the Sunni-Hanafi Orthodoxy, the reactionary sentiments of Deobandi thoughts, along with the political reality of unitary power of Amir caused the group to diverge

of the jihad and the Emir of Afghanistan. (*The Taliban were later to rename the country as the Emirate of Afghanistan*). On 4 April 1996, Omar appeared on the roof of a building in the centre of the city, wrapped in the Cloak of the Prophet Mohammed, which had been taken out of its shrine for the first time in 60 years. As Omar wrapped and unwrapped the Cloak around his body and allowed it to flap in the wind, he was rapturously applauded by the assembled throng of mullahs in the courtyard below, as they shouted 'Amirul Momineen.'" Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2nd Edition, 2010) pp. 120-121.

⁴⁵ In the same meeting where Mullah Omar was selected as Amir, a jihad was declared against Rabbani government. Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2nd Edition, 2010) p. 121.

constitutionally from the Mujahedeen. In this way, the Taliban Draft Constitution is not a complete break from the country's past. It draws on the past constitutions—it draws heavily on the 1993 Mujahedeen Draft Constitution in particular. In fact, its introduction states that it was drafted based on a review of the provisions of the past Afghan Constitutions.⁴⁶ Only those provisions that contradicted the Shari'ah were *amended* or removed.⁴⁷ When needed, new Shari'ah-based provisions were added.⁴⁸ From the content of the draft examined here, it is clear that the Taliban *Uluma* convention did not consider the two Afghan Constitutions that were enacted during the communist rule of the country or the Daud's constitution arguably because of their communist and republican ideological overtones. The examination of the content of the Taliban Draft Constitution presented here reveals that, save for the provisions concerning Emirate, they drew heavily on the Mujahedeen draft constitution even though they were actively fighting with the previous Mujahedeen at the time. This move can be understood if one considers the insufficiency of Sunni-Hanafi Islamic Orthodoxy and Deobandi movement when it came to creating a constitution for a nation-state, on the one hand, and the common aspirational views of Islamic politics shared by the Mujahedeen and Taliban—In fact, many early members of Taliban, including Mullah Omar, actively participate in the Mujahedeen movement until Mujahedeen began fighting between

⁴⁶ Introduction to the Taliban 1998 Draft Constitution accessed on *Afghanpaper.com*. Taliban Constitution Is Published (Afghanpaper.com, 28 July 2009) [LINK](#).

⁴⁷ *Id.*

⁴⁸ *Id.*

themselves.⁴⁹ Taliban-leaked Charter, as discussed in this research, however, diverges from the Mujahedeen draft Constitution and adopts *a de novo* framework for making a Constitution while preserving the Taliban's point of divergent from their intellectual predecessor, Mujahedeen, that is Emirate. As this research argues, the position of Amir is reformed in the Charter due to the removal of the overpowering influence of Mullah Omar, what I call the "Mullah Omar Effect".⁵⁰

The foregoing analysis allows thinking about legal influences that informed the Taliban's Draft Constitution more clearly: 1) Sunni-Hanafi legal orthodoxy elaborated in a colonial context of sub-continent in the service of a reactionary social reformation project, 2) the reality of Mullah Omar's Emirate, and 3) the first formulation of the constitutional principle of an Islamist political movement articulated in the Mujahedeen 1993 Draft Constitution.

⁴⁹ See, for example, Abdul Salam's Zeef account. Abdul Salam Zaeef, *My Life with the Taliban* (Columbia University Press, 2010) p. 42

⁵⁰ For an analysis of the charismatic role of Mullah Omar in the Taliban movement during their reign in power See Neamatollah Nojumi, *The Rise and Fall of the Taliban*, in *The Taliban and the Crisis of Afghanistan* (ed. Robert D. Crews & Amin Tarzi) (Harvard University Press, 2009) pp. 110-111

How Islam has figured into the Afghanistan's constitutional history?

The question of how state law, *Qanun*, relates to Shari'ah and Fiqh has been controversial throughout Afghan legal history. While previous Afghan leaders, at least as early as Amir Adbul Rahman Khan had promulgated public laws in the country,⁵¹ the question first seriously arose during the reign of Amir Amanullah Khan (1919-1929). What made Amanullah's reform unique, I argue, were twofold: first, Amanullah Khan attempted to articulate the normative relation between state (state law) and Shari'ah in a written Constitution (something that previous rulers had not done); second, Amanullah Khan attempted to use its written Constitution to establish a *unified* legal and judicial system where state law and *Fiqh* were co-constitutive (another normative move that the previous Afghan rulers had not done). Amanullah Khan attempted to codify Hanafi Fiqh and promulgate other laws and position *them along, but not above*, preferred opinions (*mufti be ha*) of Hanafi madhab in a *unified national legal system*.⁵²

⁵¹ *Asas al-Quzat* [the fundamental of judges] and *Katabchah-yi Hukumati* [the government booklet] both written by Mawlawi Ahmad Jan Khan and approved by Amir Adbul Rahman Khan. Faiz Mohammad Katib, *Siraj al-Tawarikh* [Light of History], 3 vols., Afghanistan Digital Library, URL, AHS (1331), p. 762.

⁵² As Faiz Ahmad writes of Amani legislative project, "The hallmark of Islamic legal modernists in Afghanistan was a fierce resistance to transplanting European egal odes, instead opting for a synthesis of Afghan-Muslim jurisprudential heritage—particularly of the Hanafi school of Islamic law—with the presumed requirements of modern statehood, legality, and governance. By paying close attention to the question of originality, heritage, and provenance in Afghan state legislation, Aman Allah's lawmakers combined jurisprudential continuity and innovation at the same time" Faiz Ahmad, *Afghanistan Rising: Islamic Law and Statecraft Between the Ottoman and British Empires* (Harvard University Press, 2017) p. 9.

Article 16 of the Amanullah's Constitution, *Nizamnamah Asasi Daulat Aliyah Afghanistan* (1923),⁵³ Afghanistan's first written Constitution, states that "every citizen of Afghanistan possess equal rights and duties under the Shariat *and ordinance of the state*". Article 21 stated, "In the courts of law, public complaints are resolved in accordance with Shariat *and principles* of civil and criminal courts". The second half of Article 24 stated, "outside dignified Shariat *and ordinance of the state which is promulgated in accordance with shari' precepts* no one is to be penalized."

On the power to legislate, the Amani Constitution (1923) empowers the state to identify and codify the preferred opinions of Hanafi Madhab as well as to legislate in accordance with the Shari'ah in matters related to the state independent of specific opinions within Fiqh. Under the Amani Constitution, the Amani state would share the legislative power with the elected representatives of the people and the appointed Uluma, albeit not as co-equal, through the institution of the *state council*.

Those who participated in the legislative reforms of Amanullah Khan included a diverse group of Uluma some of whom were not from the traditional Ulumas of Afghanistan. As Faiz Ahmad writes, "Among the 'framers' of Afghanistan's first constitution were Afghan ulema trained

⁵³ The text of *Nizamnamah Asasi Daulat Aliyah Afghanistan* [Book of Order of the Highly State of Afghanistan], hereinafter "the 1923 Constitution or Amani Constitution", used here comes from the Collections of Afghanistan's Constitutions prepared by Afghanistan's Ministry of Justice [LINK](#). The translations are of the Author.

in Deobandi madrasas, radical members of the Young Afghan republican movement, an Indian Muslim physician, and an Ottoman Turkish lawyer who was appointed to the very helm of the drafting commission [Osman Bedri Bey (1881–1923)]. Apart from their common religion, the only characteristics tying the authors of Afghanistan’s first constitution together were that they hailed from highly literate professional classes and had graduated from educational institutions in Afghanistan, India, or the Ottoman Empire.”⁵⁴

Article 46 of the Amani Constitution (1923) stated, “ordinances of states are to be perused by the *state council* and submitted to the *meeting of ministers*, after whose approval and royal endorsement the ordinance will be implemented.” The *state council* was comprised of both elected and appointed members (art. 40). Former senior military and civil officials would also receive automatic membership (art. 47). The ministers were appointed by the King (art. 28). The *state council* and the *meetings of the ministers* were also given the power to interpret the constitution and other state laws subject to royal approval (art. 71). On the question of compliance of state ordinance with the Shari’ah (i.e., Hanafi Fiqh), *Mahkama Tamiz*, the Court of Discern, which was the highest judicial body in the country (the King was above the courts) and

⁵⁴ Faiz Ahmad, *Afghanistan Rising: Islamic Law and Statecraft Between the Ottoman and British Empires* (Harvard University Press, 2017) p. 210. Osman Bedri Bey “was a graduate of the Ottoman Empire’s most prestigious high school and law school, the Mekteb-I Mülkiye Şahane and the Mekteb-I Hukuk Şahane respectively.” p. 223.

was headed by the members of the *state council* played an important role.⁵⁵

The normative reformulation of the relation between Hanafi Fiqh and state law and the legislative power of the state was a major factor, albeit one among many, for the resistance against Amanullah Khan's legal innovations.⁵⁶ Those who opposed him proclaimed to do so to ensure the supremacy of Hanafi Fiqh over state law and to circumscribe what they perceived to be the illegitimate expansion of the state's legislative power.⁵⁷ The opposition succeeded in removing King Amanullah from power and rolled back his most controversial ordinance.

After a short period of political instability, Nadir Shah took power as the new Afghan King. Nadir Shah's 1931 Constitution, *Usul Daulat Aliya Afghanistan*,⁵⁸ was more of a compromise. It restated the Hanafi Fiqh supremacy but not completely. The state retained its legislative power

⁵⁵ For more information on the Court of Discern See Nizamnama-e Tashkilat Asasiya-e Afghanistan [The Law of Basic Organization of Afghanistan] (1923) arts. 213, 217 and 221.

⁵⁶ Senzil Nawid, *Religious Response to Social Change in Afghanistan, 1919–29: King Aman-Allah and the Afghan Ulama* 110 (1999).

⁵⁷ As Faiz Ahmad writes, “[T]he codes [Amani Constitutions and other ordinances] pitted the king's reformist elite against powerful tribal confederations wary of Kabul encroaching on their autonomy, with each side *employing Islamic discourses to promote its view of the good society*.” Faiz Ahmad, *Afghanistan Rising: Islamic Law and Statecraft Between the Ottoman and British Empires* (Harvard University Press, 2017) p. 233

⁵⁸ The text of *Usul Daulat Aliya Afghanistan* [The Basic Principles of State of Afghanistan], hereinafter “the 1931 Constitution”, used here comes from the Collections of Afghanistan's Constitutions prepared by Afghanistan's Ministry of Justice [LINK](#). The translations are of the Author.

but subject to some limits.⁵⁹ The state had to reverse the controversial Amania ordinance and stay away from legislating in areas that, according to Uluma, would interfere with the application of Hanafi Fiqh. This was formally achieved by bifurcating the legal system into *public* and *shari'*. The latter remained the exclusive prerogative of Hanafi Madhab while the state had the power to legislate in the former domain albeit its legislation could not contradict with “principles of illuminating religion of Islam.” (Principle 65) The state was supposed to exercise its legislative power through a bicameral legislature.

Principle 5 of the Constitution, in part, stated that King Nader has made a commitment, in the presence of the representatives and elites of the country, to conduct the affairs of the country “in accordance with preferred opinions of dignified prophetic Shari’ and *Hanafi madhab and the fundamental principles of the state* [i.e., this Constitution]”. Principle 87 stated “courts of law hear the *public shari'* claims” based on the state enacted laws. Principle 88 stated, “in the *shari'* courts, disputes are resolved in accordance with rules of *Hanafi madhab.*”

⁵⁹ As Faiz Ahmad writes, “[H]istories of Afghanistan during the Aman Allah era have largely focused ... on his overthrow at the hands of the violent revolts of 1929. What has often gone unnoticed is that while some of the original provisions of the Basic Code were later amended in the face of violent revolts ..., structurally the 1923 Constitution established a model for future Afghan constitutions. *Aman Allah's constitution was extensively copied in the 1931 Constitution passed and implemented by his Musahiban successors, Nadir Shah (r. 1929–1933) and Zahir Shah (r. 1933–1973) ...* By designing new kinds of governmental institutions, including a wide-ranging bureaucracy with a multitiered cabinet, subordinate ministries, and centralized network of courts applying *uniform* legal codes, Aman Allah laid the foundations for a ‘rule of law’ in the country.” (emphasize added) Faiz Ahmad, *Afghanistan Rising: Islamic Law and Statecraft Between the Ottoman and British Empires* (Harvard University Press, 2017) p. 233.

Article 51 provided that “any new law whose enactment is needed will be drafted by the ministry and will be submitted by the ministers and the prime minister to the *National Assembly* after whose approvals and royal endorsement, the laws become binding.” Principle 44 stated that National Assembly will approve “the promulgation of new state ordinance [*usul nameh*] or modification and repeal of enacted laws [*qawanin muqrrareh*]”. The members of the lower house, National Assembly (*shurai milli*) were to be elected every three years (see Principle 29 & 31) but the members of the upper house, Assembly of Nobles (*majlis ai ’yan*), were to be appointed by the King (see Principle 67).

Principle 68 stated that each resolution must be passed by both the National Assembly and the Assembly of Nobles. If they disagreed, a joint committee of two assemblies is formed to resolve the disagreement but if the joint committee fails, the King decides on the disagreement (Principle 70). Article 65 stated that “the resolutions of the National Assembly must not contradict the precepts of illuminated religion of Islam or the doctrines [*siyasat*] of the country.” Arguably, this provision entrusts the National Assembly with the obligation to ensure state laws do not contradict the precepts of Islam. An obligation that was given to the *state council* (which it exercised along with the Court of Discern) under the Amani Constitution. However, notwithstanding lack of constitutional standing, during the Nadir Khan rule, according to Vartan Gregorian, 'The Jamiyatul- Ulama (The Society of the Learned Muslim

Interpreters of Law) was entrusted with the interpretation of existing law. All proposed governmental regulations and laws were also to be submitted to the society in order to ascertain their compatibility with holy writ.”⁶⁰ In both the Amani and Naderi constitutions, the legislature would exercise care before a measure was enacted to ensure Shari’ah-compliance. In both cases, in addition to the legislature, a judicial or quasi-judicial body would also exercise a weak form of judicial review over the issue of Shari’ah-compliance of state laws. The reviews of the Court of Discern and Jamiyatul- Ulama could be characterized as weak form of judicial review because neither was given constitutional standing as the final arbiter of the question of shari’ah-compliance of state laws (especially after a measure was enacted).

Notwithstanding the elective design of the legislature under the Naderi Constitution, in practice, as Muhammad Qubar observed, the National Assembly did not amount to what the 1931 Constitution suggests. “In effect, all the powers of three branches of the state (even if it can be called three branches) were only in the hands of the King and his two brothers (prime minister and minister of war) alone”.⁶¹

King Nadir's rule ushered in a long period of political stability in the country presided over by his family, often known as *Musahiban*. Thanks

⁶⁰ Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernization, 1880-1946* (Stanford University Press, 1969) p. 299.

⁶¹ Mir Qulam Muhammad Qobar, *Afghanistan dar Masi Tarikh [Afghanistan in the Course of History]*, Vol. 2, p. 57 and pp. 104-105

to this political stability, limited openness in the public space, and intellectual and education exchange programs for the elites, and increased internationalization of Afghan elites, a Constitutionalism movement—along with other communist and Islamist movements—took shape among the country’s elites demanding a more democratic system of governance.⁶² The Constitutionalism ideals culminated in the adaptation of the 1964 Constitution.

Qanun Asasi Afghanistan [Afghanistan Constitution] enacted in 1964⁶³ unified the judiciary and established the supremacy of state law over Fiqh while requiring that state law do not contravene “the basic principles of the sacred religion of Islam”, i.e., the repugnancy clause (article 64(2)). The 1964 Constitution also removed the distinction between courts of law and *shari’* courts establishing a unified judiciary headed by the Supreme Court. In a sign of nationalization of laws, the 1964 Constitution did not require knowledge of Shari’ah explicitly as a condition of appointment to the Supreme Court (Article 105 only requires “sufficient knowledge of jurisprudence, the national objectives, and the laws and legal system in Afghanistan”). Two previous Constitutions did not explicitly address the substantive qualifications of

⁶² Mir Qulam Muhammad Qobar, *Afghanistan dar Masi Tarikh* [Afghanistan in the Course of History], Vol. 2, pp. 137-139.

⁶³ The text of *Qanun Asasi Afghanistan* [Afghanistan Constitution], hereinafter “the 1964 Constitution”, used here comes from the Collections of Afghanistan’s Constitutions prepared by Afghanistan’s Ministry of Justice [LINK](#). The translations are from the English version of the 1964 Constitution made available by Afghanistan: The Arthur Paul Afghanistan Collection at the University of Nebraska-Omaha [LINK](#). However, the Author has made revisions to this translation frequently

judges arguably because it was deemed to be obvious in light of Hanafi madhab. The power to ensure consistency between state law and precepts of Islam remained with the Shura (parliament).⁶⁴ *In accordance with its national and unified view of the legal system, the 1964 Constitution also omitted references to Shari'ah or Islamic law along with references to state law throughout its provisions in a break with the constitutional lexicon of the two previous Constitutions.*

Article 97, in part, states, “it is within the jurisdiction of the judicial branch to adjudicate *all claims* brought before it in which real and fictional persons, including the state, as plaintiff or defendant are involved, in accordance with the rules of law.” Article 102 states, “the courts in the cases under their consideration shall apply the provisions of this Constitution and other *state laws*. Whenever no provision exists under Constitution or state laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi Jurisprudence of the Shariat of Islam and within the limitations set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way.”

Article 64(1) of the 1964 Constitution states, “the Shura [parliament] enacts laws for organizing the vital affairs of the country in accordance with the provisions of this Constitution.” This statement is followed by,

⁶⁴ The Constitution does not explicitly state that the power to decide on the Shari'ah compliance of the laws fall with the parliament. I understand the parliament to have held that power, nonetheless, because the repugnancy clause was embedded in the article that talks about legislative power of the parliament (art. 64).

“There shall be no law repugnant to the basic principles of the sacred religion of Islam and other values embodied in this Constitution” suggesting that the power to ensure Shari’ah-compliance of law was held by the parliament also. Article 41 through 45 establish a bicameral parliament where the members of the lower house, Wolesi Jirga, were all elected for 4 years but the members of the upper house, Meshranu Jirga, were a mix of royal appointees and indirectly elected by the local councils. If a house rejects a bill passed by the other house, *Article 74 adopts the joint-committee solution of its predecessor, but it gave the power to override a disagreement to a supermajority of Wolesi Jirga, not the King.*

The period of Constitutional Monarch lasted for about a decade until Daud Khan, an ambitious royal family member, ended the Constitutional Monarch through a coup. Daud enacted a new Constitution in 1976, Qanun Asasi Jumhuri Afghanistan [Constitution of Republic of Afghanistan]⁶⁵ “the 1976 Constitution”, which kept the 1964 basic arrangement with regard to the nationalization and unification of the judiciary and the legal system as well as the supremacy of state law over Fiqh subject to a repugnancy clause (see Article 64, 97, and 99). *However, notably, it was the first Constitution not to reference Hanafi madhab as the madhab of the state or the maddhab according to which the state rituals are conducted.* Article 22 omitted the reference to

⁶⁵ The text of Qanun Asasi Jumhuri Afghanistan [Constitution of Republic of Afghanistan], hereinafter “the 1976 Constitution”, used here comes from the Collections of Afghanistan’s Constitutions prepared by Afghanistan’s Ministry of Justice [LINK](#). Translations are of the Author.

Hanafi madhab and only stated that “Religion of Afghanistan is the sacred religion of Islam...” (However, it retained Hanafi Fiqh as a gap filler in case state law is not sufficient to resolve a case).

Under the 1976 Constitution, a unitary National Jirga (*Milli jirga*) was vested with the power to legislate (art. 62). All members of this unitary legislative body were to be nominated by a political party and elected by the votes of the electorate (art. 49); a 50% quota was given to the farmers and laborers in the National Jirga. The Republican design of the 1976 Constitution was never implemented.⁶⁶ The 1976 Constitution was soon suspended following a communist coup in 1978.

The first Constitution in Afghanistan under a communist regime, Usul Asasi Jumhuri Democratic Afghanistan [Fundamentals of Democratic Republic of Afghanistan] was enacted in 1980 hereinafter “the 1980 Constitution”.⁶⁷ The 1980 Constitution omits any reference to the state religion (or madhab). It maintained a unified but not independent judiciary (See Article 55). Article 56 contained a revised version of the state law supremacy clause which referred to both percepts of *Shariat* (but did not explicitly refer to Hanafi madhab) and “*principles of democratic legality*”. The power to legislate, along with all-important

⁶⁶ As Zahir Tanin writes, “Daud Government attempted big economic and social reforms but it never attempted political reform” Zahir Tanin Afghanistan dar Qarn 20 [Afghanistan in the 20th Century] (Erfan Press, 2004) p. 100

⁶⁷ Usul Asasi Jumhuri Democratic Afghanistan [Fundamentals of Democratic Republic of Afghanistan] hereinafter “the 1980 Constitution”, used here comes from the Collections of Afghanistan’s Constitutions prepared by Afghanistan’s Ministry of Justice [LINK](#). Translations are of the Author.

state powers, was vested in the Revolutionary Council of the Afghanistan Democratic Republic (article 37 and 40). The 1980 Constitution simply vested the powers in the existing Revolutionary Council but stated that the Council would enact a selection process for the future member of the Council ensuring board participation (art 36).

Following an internal divide within the communist camp, and in a bid to mitigate the burgeoning resistance to the radical state policies, the communist government then headed by Dr. Najibullah, enacted a new Constitution in 1987 which was more in line with the country's legal tradition, Qanun Asasi Jumhuri Afghanistan [Constitution of Republic of Afghanistan] hereinafter "the 1987 Constitution".⁶⁸ The 1987 Constitution referred back to the basic formula promulgated by the 1964 Constitution. Article 2 both acknowledged the sacred religion of Islam as the religion of Afghanistan (but no reference to Hanafi Madhab as Afghanistan's madhab) and restated the repugnancy clause which required no law to contradict the basic principles of the sacred religion of Islam and other values embodied in this Constitution. Article 107 restated the judiciary as an "independent" branch of the state (albeit the Chief Justice was made accountable to the President under Article 110). Article 112 restated a modified version of the 1987 Constitution's state law supremacy formula which omitted an explicit reference to Hanafi madhab but dropped the part that referred to "*principles of democratic*

⁶⁸ The text of Qanun Asasi Jumhuri Afghanistan [Constitution of Republic of Afghanistan] hereinafter "the 1987 Constitution", used here comes from the Collections of Afghanistan's Constitutions prepared by Afghanistan's Ministry of Justice [LINK](#). Translations are of the Author.

legality” as a co-equal gap filler in the absence of explicit legislation. The legislative power was reverted to a bicameral legislator with a composition that mirrored the 1964 Constitution (arts. 77 – 81). The 1987 Constitution was revised in 1990 but those revisions made no changes on these issues (see Articles 2, 77-81, 108, and 112 of the 1990 Constitution).⁶⁹

The constitutional evolution from the first written Constitution until the 1964 Constitution can be framed as a dialectic dialogue between the politically neutral Sunni-Hanafī orthodoxy represented by Uluma and the Afghan monarchs (and later a broader coalition that included the technocrats as well) over the relations between state law and Fiqh and the legislative power of the state. This dialogue was reified in the process of making the 1964 Constitution in an actual dialogue between Musa Shafiq and his father Mulawi Kamwi.⁷⁰ The Amani Constitution attempted to create a unified legal system where Fiqh and state law were co-constitutive, promulgated, and enforced by a unified set of institutions. The Uluma’s refusal to let the distinct character of Fiqh dissolve into the state led to a compromise that was formalized in

⁶⁹ The text of revisions consulted here comes from the Collections of Afghanistan’s Constitutions prepared by Afghanistan’s Ministry of Justice [LINK](#). Translations are of the Author.

⁷⁰ Mir Muhammad Siddiq Farhang, a member of the 1964 Constitution drafting committee, has explained the dialogue between the two figures in the course of 1964 Loya Jirga. Father and son debated the inclusion of Hanafi Maddhab in the text of the Constituion, a debate that Mulawi Kamwi and the Uluma won, and the supremacy of state law over Fiqh, a debate in which Musa Shafiq and his constitutionalist supportive prevailed. Notably, there was no debate as to the qualifications of the ruler or the state role in reforming the society based on a Islamic vision. See Mir Muhammad Siddiq Farhang, Khaterat, [Recollections] (Tisa Publisher, 2015).

Afghanistan's second Constitution. State law and Fiqh remained distinct and co-equal. The legal and judicial system was bifurcated to accommodate that distinction. The 1964 Constitution was able to reverse this distinction in favor of state law. *The 1964 Constitution established a new formulation of normative relation between state law and Fiqh, where state law was given preference as long as it did not contradict the basic principles of Islam and placed the legislative power within an elected Assembly.* The 1964 formula was achieved in negotiation with a politically neutral Sunni-Hanafi orthodoxy represented by traditionalist Uluma. The Daud and communist Constitutions attempted to temper the 1964 basic formula with the leftist democratic and revolutionary ideals, but they failed to have any lasting impact. The 1964 basic formula more or less endured. That all was going to change when the political Islam with Islamists ideas rose to power in Afghanistan.

ISLAMIST POLITICS AND AFGHANISTAN’S CONSTITUTIONAL HISTORY

Following the withdrawal of the first Soviet forces and shortly after the Soviet support, the communist regime fell, and the Mujahedin factions took over Kabul.⁷¹ After a short transitional arrangement headed by Sibghatullah Mujaddadi, Burhanuddin Rabbani came to power following an agreement between different Mujaheddin factions.⁷² The Rabbani’s government drafted a Constitution, Draft of *Usul Asasi Dawlat Islami Afghanistan*, [Fundamentals of Islamic State of Afghanistan] hereinafter “the 1993 Mujahedeen Draft Constitution”⁷³ which was discussed and approved by the then high council of the state in 1993, however, the Mujaheddin in-fighting did not allow for the 1993 Draft Constitution to be ratified.⁷⁴

⁷¹ Zahir Tanin Afghanistan dar Qarn 20 [Afghainstan in the 20th Century] (Erfan Press, 2004) p. 388-386.

⁷² Zahir Tanin Afghanistan dar Qarn 20 [Afghainstan in the 20th Century] (Erfan Press, 2004) p. 385.

⁷³ The text of Draft of *Usul Asasi Dawlat Islami Afghanistan*, [Fundamentals of Islamic State of Afghanistan] hereinafter “the 1993 Mujahedeen Draft Constitution”, used here comes from the Complete Texts of Afghanistan’s Constitutions prepared by Sarwar Danish (Ibn Sina Univery Press, 2015). Translations are of the Author.

⁷⁴ The Complete Texts of Afghanistan’s Constitutions prepared by Sarwar Danish (Ibn Sina Univery Press, 2015) footnote on the p. 295. See also Shamshad Pasarlay, ‘Islam and the Sharia in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective’ (2016) 3 The Indonesian Journal of International & Comparative Law 192–196.

On the level of constitution-making, leading figures of Mujahedeen parties *represented a new brand of politics and Islam in Afghanistan*.⁷⁵ The negotiated outcome of the dialectic relation of a politically neutral Sunni-Hanafi legal orthodoxy and state power which underpinned the 1964 basic formula on the relationship between state law and Fiqh and the state's legislative power held no more. Mujahedeen leadership, by and large, adopted an aspirational view of politics based on Islam. *They were Islamists. They saw the state as the vehicle of implementation of an Islamic vision of politics, society, culture, and economy*⁷⁶ and their draft Constitution showed it. The Mujahedeen Draft Constitution contained extensive provisions on *Islamic economics* (article 89), and *Islamic*

⁷⁵ As Oliver Roy writes on the origin of Islamist movement in Afghanistan whose central figures latter led the major Mujahedeen factions, "The phenomenon of Islamism in Afghanistan is of recent origin and owes more to the Egyptian Muslim Brothers than to Indian fundamentalism ... While it stands within the fundamentalist tradition, *it nevertheless represents a complete break from Afghan cultural tradition*. The Islamists are intellectuals, the product of modernist enclaves within traditional society; their social origins are what we have termed the state bourgeoisie — products of the government education system which leads only to employment in the state machine. Except for the group of "professors" in the faculty of theology, they do not consider themselves to be scholars Qulama) but as intellectuals (*roshanfikir*)" (emphasis added) Oliver Roy, *Islam and Resistance in Afghanistan* (Cambridge University Press, 1990) p. 69.

⁷⁶ Oliver Roy writes, "The appropriation of Western political concepts, now filtered through a re-reading of the fundamental documents of their religion, has made it possible for the Islamists to adopt the political ... formula which has served liberation movements elsewhere so well, ...: the theory of the party and the myth of the revolution. The Islamists, also, have a theory of the avant-garde, centralised, relatively disciplined party whose members are linked by a common ideology, reinforced by a certain political training. It is in this sense that the three Islamist parties in the resistance (the two Hizb and the Jamiat) are true political parties, and thus also relatively efficient war machines; while the three nationalist parties are nothing more than clubs for people of influence and traditionalist 'ulama. The party is a modern concept which has no place in the world-view of the 'ulama, who recognise only the community of believers and the body of scholars." Oliver Roy, *Islam and Resistance in Afghanistan* (Cambridge University Press, 1990) p. 81

banking and finance (article 93), and in keeping with the internationalized ethos of the time (shared with their Iranian and Egyptian counterparts), it included a complete chapter on *Islamic foreign policy* (Chapter 9). It is also important to keep in mind that the Mujahedeen draft Constitution was not adopted for its unacceptable political distribution of power and not its articulation of the role of the *Islamic state*.⁷⁷ Shi'ah factions, however, rejected it for its exclusionary approach towards the Jafari maddhab. I will discuss this along with the Constitutions drafted by the two Shi'ah factions in the subsequent section.

Where Mujahedeen failed, the Taliban did not. That is why when the Taliban drafted their Constitution, they retained Mujahedeen's articulation of the *Islamic state* and only replaced the parts about the political role with Emirate. All the provisions on *Islamic economics*, *Islamic banking and finance*, and *Islamic foreign policy*⁷⁸ were adopted by the Taliban in their draft Constitutions, more or less verbatim and in a similar order (see Chapters 8 and 9 of Taliban Draft Constitution compared to Chapters 8 and 9 of The Mujahedeen Draft Constitution).

In what follows, I structure my analysis of the Taliban and Mujahedeen draft Constitutions in the following fashion. I discuss the relation

⁷⁷ The Complete Texts of Afghanistan's Constitutions prepared by Sarwar Danish (Ibn Sina University Press, 2015) footnote on the p. 295.

⁷⁸ The common text of provisions on foreign policy in both MDC and TDC, and the fact of dedicating a chapter to the foreign policy, reflect basically a chapter of same title in the Iranian Constitution (Chapter 6)

between Islam and the state in one place because they are almost identical. However, I discuss their solution for the political rule separately because they are different.

Distribution of Political Power under the Mujahedeen and Taliban Drafts Constitution

Taliban and Mujahedeen had to solve the practical problem of political rule in a way that dealt with their respective reality of political power. Mujahedeen was a political coalition of “leaders, Uluma, military commanders, and jihadi figures” so they formalized that political reality in a high council. Taliban’s political reality was a unitary force of Amir Mullah Omar which they formalized in their Emirate.

Taliban and Mujahedeen also differed on one fundamental issue: elections. This issue runs across both practical questions of power and the Islamic state. In their draft Constitution, Mujahedeen in principle accepted elections but deferred it to the future but the Taliban rejected it completely. The reasons behind this divergence of view, I argue, were both normative and practical. Normatively, the Taliban rejected elections because it has no precedent within the Sunni-Hanafi orthodoxy—mostly because Sunni-Hanafi orthodoxy was politically neutral, but the Taliban, being strict traditionalist, did not understand it that way.⁷⁹ Mujahedeen, on the other hand, admitted it because their

⁷⁹ Taliban’s views on elections were more or in less line with those of Deobandi Pakistani Uluma as discussed in the discussion of intellectual influences of Taliban.

views were more inclusive of the modern Islamist reformulation of Islamic Fiqh which did not see an inherent contradiction between the Islamic state and elections.⁸⁰ Practically, the Taliban did not need elections because of the unitary and dominant political reality of their Amir. Mujahedeen, on the other hand, needed elections, albeit in the future, to arbitrate the question of leadership since they were a coalition of different factions each with a claim to power.

Given this divergent reality of political power, in the Mujadeheen draft, the political power in the mujahedeen system was *distributed*. The power to legislate and supervise the state is vested in the *high council* whose members consist of “leaders, *Uluma*, military commanders, and jihadi figures” (article 46-47). Article 112 of the same draft empowers the *high council* to interpret the constitution. The head of state and head of government each have enumerated powers under Chapters 4 and 5 of the Mujahedeen Draft Constitution. Given the political reality of mujahedeen factions, the head of state and the head of government were to be selected through political agreements, therefore, the draft Constitution is silent on their method of appointment or removal except in the case of death and resignation in which case the *high council* will fill the vacancy (arts. 50(12) and 60).

See for example, Mufti Muhammad Shafi‘, “Pakistan main dini islahat,” in Taqi ‘Uthmani, *Nifaz-i shari‘at*, 85 retrieved from Muhammad Qasim Zaman. *The Ulama in Contemporary Islam: Custodians of Change* (Princeton Studies in Muslim Politics, 2002) p. 98.

⁸⁰ See Oliver Roy, *Islam and Resistance in Afghanistan* (Cambridge University Press, 1990) p. 81

Under the Taliban Draft Constitution, on the other hand, all the powers emanate from the position of Amir who is the head of state (art. 51), i.e., the Mullah Omar Effect. The Amir appoints the members of the Islamic shura from those who qualify ‘the people of loosing and binding’, ahl hal wa aqd, that is the ones who have the qualifications to select the leader in a Muslim community under classical Fiqh (arts. 46 and 47). Amir also appoints and removes the head of government, ministers, and chief justice, justices, and judges (art. 55). The Islamic shura constitutes the legislature and is empowered to interpret the Constitution (art. 108). Due to the Mullah Omar Effect, the Taliban Draft Constitution also does not deal with the method of selection of an Amir except in case of death and resignation. In the latter case, the Chief Justice acts as the interim head of state, unless the Amir had willed otherwise, then the Islamic shura convenes with the participation of the Chief Justice and the head of government “to make a decision” (arts. 50(11) and 50(12)).

Islam and state under the Mujahedeen and Taliban draft Constitutions

Both the Mujahedeen Draft Constitution (MDC) and the Taliban Draft Constitution (TDC) in their second articles found an Islamic state upon a verse from the Holy Quran which confirms the ultimate sovereignty of Allah—the “Islamic State of Afghanistan” in the case of former and “Islamic Emirate of Afghanistan” in the case of later. (Quran 12:40: “...*al-Hukm* [the power to decide] belongs to Allah...”). Remarkably,

“the Hukm belongs to Allah” was the slogan of the Khawarij, the first group to adopt a politically active (and violent) understanding of Islam.⁸¹

Articles 3 and 4 in both MDC and TDC establish Islam as the religion of Afghanistan and formalize Hanafi madhab as the formal religion and madhab of the country. Article 5 in both drafts established Shariat as *the only* source of legislation and restate a stricter repugnancy clause. In both texts, it reads, “Shari’at Islam is the only source of legislation in the country; *all aspects* of individual and societal life are to be regulated in light of life-giving guidance of Islam; under no circumstances, no law or regulation can be enacted in contradiction to the fundamentals of Shari’at.”⁸²

Article 6 in both drafts makes it clear that the *state is the vehicle for the implementation of Islamic visions in different aspects of life*. It proclaims, “Islamic State of Afghanistan [or the Islamic Emirate of Afghanistan in the case of Taliban] is founded on political, social, cultural, and economic institutions which are in accordance with the Islamic principles and rules; legislation and regulation of national way of living will be made in accordance with rulings of Quran and Sunnah and accordance with Hanafi Fiqh.”

⁸¹ See Rahman, Fazlur. *Revival and Reform in Islam* (pp. 46-47). Oneworld Publications. Kindle Edition.

⁸² This is similar to the Article 4 of Iranian Constitution which reads “All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter”

Article 7 in both texts establishes the quality of being God-fearing, having *Taqwa*, as the most important qualification of holding positions in the government. It proclaims that the state “will give the responsibility to those who are worthy of the responsibility and having *Taqwa* [being God-fearing] is the most important qualification of being qualified for a responsibility.”⁸³

The Mujahedeen draft diverges from the Taliban’s version in Article 8 and later in Article 46 where the former’s draft establishes the right of self-determination of people and envisions an elected council with legislative power to be formed in the future. Both rights of self-determination and election are absent from the Taliban Constitution (and later were explicitly rejected by the Taliban Charter). Article 8 of the Mujahedeen Draft Constitution states, “The right of people to determine their political, social, cultural and economic lives *in accordance with the rules of Islamic Shariat* will be ensured through an elected shura of representatives of nation.” Article 8 of Taliban Draft Constitution keeps most of this language but omits the reference to “the right of people.”

Article 9 in both MDC and TDC establishes the Islamic principle of enjoining good and forbidding wrong. It reads, in more or less the same language, the state “recognizes enjoining good and forbidding wrong to be the mutual obligation of all the people as well as the mutual obligation

⁸³ Article 6 of the Iranian Constitution also reference being God-fearing, *taqwa*, as a part of Oath taken by the Members of Assembly.

of the state and the people; the conditions and limitations of this obligation will be determined by law.”⁸⁴

Article 12 in both texts obligates the state to support the teaching and learning of the Arabic language.⁸⁵ The Taliban’s version specifies the need to educate the population in the Hanafi texts in Arabic too. Article 16 of the Mujahedeen’s draft and article 17 of the Taliban’s draft concerns the institution of the family. Both obligate the state to regulate the affairs of the family in accordance with Islamic laws and ethics.⁸⁶

The Mujahedeen draft incorporates the 1964 Constitution’s chapter on the rights of the citizen, including its provision on the right to elect and be elected, *but it adds the Islamic restriction to all its provisions*. This is a revert to the pre-1964 Constitutions where Shari’ah and state law were

⁸⁴ Article 8 of Iranian Constitution deals with this principle in a language that is almost verbatim of the MDC and TDC text. It reads, “In the Islamic Republic of Iran, of enjoining good and forbidding wrong is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government.”

⁸⁵ The common text of the MDC and TDC on the Arabic education broadly reflects the sentiment in Article 16 of the Iranian Constitution (however, the Iranian version stresses the link between Arabic and “Persian”). Article 13 of MDC and 14 of TDC on the country’s calendar, more or less verbatim, adopt the text of Article 17 of Iranian Constitution which reads “The official calendar of the country takes as its point of departure the migration of the Prophet of Islam God’s peace and blessings upon him and his Family. Both the solar and lunar Islamic calendars are recognized, but government offices will function according to the solar calendar. The official weekly holiday is Friday.” The TDC version however privileges the lunar Islamic calendar.

⁸⁶ The common text of MDC and TDC reads “Since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programs must tend to facilitate the formation of a family, and to safeguard its sanctity and the stability of family relations on the basis of the law and the ethics of Islam.” This text is verbatim adaptation of Article 10 of Iranian Constitution.

co-constitutive and neither had exclusive power vis-a-vis the other but this time the state is dominated by the Islamists who want to in part reverse the dynamics that led to the 1964 Constitution. Article 19 of MDC states, “every Afghan, *within the limits of Islamic Shari'ah*, has the right to be elected and to elect.” The Taliban’s draft, more or less, adopts the same rights that can be found in the Mujahedeen’s draft but omits the right to elect or be elected.

Article 18 of MDC and article 19 of TDC state, “Liberty is the national right of humans unless the exercise of liberty harms the liberty and dignity of others or public benefits and public security, public interests, *Islamic rules, and regulations*.” Article 34 of texts states, “freedom of thought and expression, *within the limits of Shariat Islam*, is immune from violation.” Article 17 of MDC and article 18 TDC state “All people of Afghanistan, with observance of Islamic rules, have equal rights and responsibilities before the laws.”

Despite the constitutional commitment to non-discrimination, both drafts include many gendered provisions. In article 39, both texts, distinguish between the education of males and females, refuse to enshrine a right to education for females equal to men, and instead refer the education of females to a *special law*. Both texts in article 43, in another provision exclusively addressed to Afghan women, state “Islamic Hijab must be observed.” Later both texts obligate the state to

enforce this obligation (Article 65(12) MDC, article 64(12) TDC).⁸⁷ Both drafts, in another example of gendered provision, include manhood as a required qualification for holding the position of head of state and head of government (Arts 52 and 62 of MDC and Arts 53 & 62 of TDC).

Article 41 of both texts obligate each member of the nation to “safeguard the achievements of *jihad*”. In article 42 both texts include a catch-all statement on Islamic law which read, “observance of all Islamic laws in personal, family, and social life, compliance with provisions of this Fundamental Principles [i.e., this Constitution] and other laws of the state, observance public order and public security and safeguarding national interests are of the obligations of all people of Afghanistan.”

On the position of judiciary, following the 1964 Constitution, both drafts proclaim the judiciary to be independent and headed by the Supreme Court (art. 70 in both drafts)—even though in a text common to both drafts the head of state (or Amir) are given the unilateral power to appoint the Chief Justice, the Justices, other judges (TDC art. 55(5)-(7), MDC art. 54(4)-(6)).

In another instance of partial continuity with the 1964 Constitution both texts maintain a unified judiciary *but not a unified legal system*

⁸⁷ The Iranian Constitution does not have similar provisions on Hijab; however, the later mandatory Hijab became part of the Iranian law through ordinary legislation. The inclusion of Hijab provisions in the MDC and TDC could be attributed to the influence of Deobandi thoughts on protecting the boundaries of licit and illicit in the Muslim society.

(represented by the inclusion of the reference to Shari'ah and Islam along with state law) (see Article 81 of MDC and Article 80 of TDC). In a break from 1964 Constitution, however, both drafts add the qualifications of *Shari'* to the court judgments. Article 71 of both drafts reads, "courts ... are obligated to ensure justice and issue *shari'* judgments based on evidence." In another innovation, compared to the 1964 Constitution, both drafts in their article 72 add substantive religious-based qualification for the justices of the Supreme Court. Article 72 of both texts list the following qualifications: "religiosity, knowledge, God-fearfulness, and sufficient knowledge of legal and judicial affairs of the country."

On the principle of legality of punishment, both drafts add the *Islamic Shariat* to the 1964 formulation. Article 23 of MDC and 22 of TDC read, "no one is to be punished unless according to *the rules of Islamic Shariat* or laws which were in force before the actions which are subject of the indictment."

As explained both drafts drop the 1964 formulation of the relationship between state law and Fiqh and the legislative power of the state. As such, neither draft contains a state law supremacy clause. Nor do they have provisions that would consider Hanafi Fiqh as a gap filler which would put the Fiqh in a secondary position. Both drafts present a modern version of Amani's formulation where state law and Fiqh and Shari'ah are co-constitutive in a new context where a Muslim state is used to

transform the society per the Islamic visions of those who controlled the state.

As the foregoing analysis makes abundantly clear, both texts were exclusively *Hanafi*. They did not envision any role on the constitutional level for Shi'as of Afghanistan. This exclusion led the Shia'h factions of the Mujahedeen drafting two versions of their proposed constitutions for Afghanistan: Tarh Musawada Qanun Asasi Jumhuri Islami Afghanistan [The Draft Constitution of Islamic Republic of Afghanistan], hereinafter "Harkat Draft Constitution", drafted by the Harkat Islami Afghanistan Political Party, headed by the influential Shi'ah scholar of Afghanistan, Grand Ayatollah Muhammad Asif Mohseni (1935-2019), in 1986;⁸⁸ and Qanun Asasi Jumhuri Federali Islami Afghanistan [Draft Constitution of Afghanistan Federalist Islamic Republic], hereinafter "Wahdat Draft Constitution", drafted by the Hizb Wahdat, headed by the prominent Shi'ah revolutionary, Abdul Ali Mazari (1946-1995), in 1989.⁸⁹

Unlike the Rabbani's and Taliban's drafts, Harkat's and Wahdat's drafts recognize both Jafari and Hanafi Fiqh as the sources of extracting the particulars of Islam, in the case of former, and the official maddahbs of

⁸⁸ The text of Tarh Musawada Qanun Asasi Jumhuri Islami Afghanistan [The Draft Constitution of Islamic Republic of Afghanistan] hereinafter "Harkat Draft Constitution" used here is from the Harakat Political Party's Publication made available through Afghanistan Center at Kabul University. Translation are of the Author.

⁸⁹ The text of Qanun Asasi Jumhuri Federali Islami Afghanistan [Draft Constitution of Afghanistan Federalist Islamic Republic], hereinafter "Wahdat Draft Constitution", used here comes from the Complete Texts of Afghanistan's Constitutions prepared by Sarwar Danish (Ibn Sina Univerty Press, 2015). Translations are of the Author.

Afghanistan, in the case of latter (article 4 of the Harkat Draft Constitution and article 2 of the Wahdat Draft Constitution). Both Shi'ah drafts also require the judicial and legal institutions to consist of at least 1/3 of the followers of Jafari madhab (art. 140 of the Wahdat Constitution, and 103 for the members of Majlis Tadwin [Constitutive Council] and 139 with regard to the members of the cabinet)

Both Harakat's and Wahdat's drafts reflect Islamist conception of state as a vehicle of enforcing an Islamist vision of society (former more than latter⁹⁰), however, they are both more inclusive than their Rabbani (or Taliban) counterparts. Article 5 of the Harkat Draft Constitution states that all laws and regulations must be based on the precepts of Islam and whatever contradicts the commands of Islam is void. Article 11 of the same draft includes, inter alia, the following as the duties of the state: creating the environment conducive to the spiritual growth based on faith and fearfulness of God (Taqwa), guiding people in light of *enjoining what is right and forbidding what is wrong*, and spreading of Islamic culture towards the end of "now surely to Allah do all affairs eventually come"⁹¹. Despite these prescriptions, articles 2 and 3 of the draft affirm the "God-given", "inviolable" right of people to self-determination through general elections and article 22 of the draft states that all people of Afghanistan including men and women without any form of discrimination are equal before the law and enjoy complete

⁹⁰ Shamsahd Pasarlay, *Shīr Constitutionalism in Afghanistan: A Tale of Two Draft Constitutions*, 20(2) *Australian Journal of Asian Law* (2020) p. 6 [LINK](#)

⁹¹ Holy Quran 42:10.

political, social, economic, and cultural rights in accordance with the precepts of Islam and the laws protect them all equally. The Wahdat Draft Constitution, although being less infused with the Islamist politics language, in its article 3 states that the primary source of laws in Afghanistan are the fundamentals of sacred religion of Islam. Article 31 of the draft states that high teachings of Islam, Islamic ethics, inter alia, form the spiritual foundation of the society and the state is obligated to “preserve, honor, spread, and enforce them”. Despite these provisions, article 1 of the draft states that the power comes from the people and is transferred from the people to different organs of the state through elections and voting. Article 56 contains a detailed anti-discrimination rule (similar to the Harkat draft but it includes difference in religion and does explicitly subject the anti-discrimination rule by the precepts of Islam).

On the relation between state law and Shari’ah, Harakat’s and Wahdat’s drafts both consider state law to be the extension of Shari’ah (for example, both use Shari’ah precepts or Islamic precepts along with state law when defining the limits of legal behaviors or constitutional rights). Article 141 of the Wahdat Draft Constitution states that the judiciary in adjudicating disputes is to “only follow laws and sacred Shariat of Islam.” Article 143 states that the courts in adjudicating disputes are to issue rulings “based on this Constitution, federal laws, and rulings of Shari’at Islam.” Whenever these sources are insufficient to resolve a case, courts are to “issue rulings based on fundamentals of Shari’at Islam in a way that would ensure justice in the best form.” (article 143(2)).

The Harakat's Draft Constitution in its article 146 states that the rulings of the courts must be based on "valid laws." Article 147 of the same draft states that if a judge cannot find "a source for resolving the case" the judge must request a fatwa from the Majlis Tadwin [Constitutive Council]. Article 148 states that the rulings of Hanafi fiqh with regard to the Sunnis and the rulings of Jafari Fiqh with regard to "all Shi'ahs" are enforceable.

The Harakt's and Wahdat's drafts diverge sharply from each other on the question of legislative power. The Wahdat's draft empowers a popularly elected legislature "to approve, amend, and abrogate [federal] laws" (article 101(5)) and to approve state laws (article 101(20)) subject to a repugnancy clause (article 3) which is to be interpreted and enforced by a Constitution Court (art. 165). The Harkat's draft, on the other hand, in a design similar to the division of the legislative power in the Iranian constitution, envisions a bifurcated legislative branch with different electorates (art. 161(a)): Majlis Shura Islami [The Islamic Consultative Assembly] which is elected by the general electorate (art. 163) and a Majlis Tadwin [Constitutive Council] whose members are "elected" from the Hanafi and Jafari Ulumas in an election where only the other Ulumas (with at least 10 years of Islamic education) can vote (arts. 102 – 104). The Islamic Consultative Assembly "can enact laws to resolve the current issues of the country on the condition that those laws do not conflict with the religion of Islam and the Constitution" (art. 177). However, the subsequent article (178), suggesting that there are two types of legislation, one "Shari" and one non-Shari', states that "The

Assembly cannot enact or annul shari' rulings and the enactment of and annulment of shari' rulings is to be done by the Constitutive Council" Article 179 reaffirms this distinction by stating "in the case of disagreement, the Consultative Assembly is the authority for interpreting and explaining the enacted laws and the Constitutive Council is the authority for shari' laws but both [the Assembly and the Council] together are the authority on interpreting the constitution." Article 98 also empowers the Constitutive Council as the final arbiter on the question of Shari'ah-compliance of the laws. In addition to these important legislative powers, the Constitutive Council is also given, inter alia, the power to oversee the elections (art. 66), the power to approve the qualifications of the presidential nominees (art. 113), the power to approve the presidential declaration of war and peace (art. 99) and to appoint and remove the Chief Justice (art. 101).

The foregoing analysis of constitution-making attempts in the height of Islamists politics in Afghanistan demonstrate a shared desire among most Islamists groups to use the state institutions, that is coercive institutions, to enact their Islamist visions on the society. Taliban stood out amongst these groups, however, for their traditionalist and narrow understanding of Islamic legal tradition that left virtually no room for the society to participate in the determination of that Islamist vision and the relation of state to that vision. Shi'ah groups also stood out for their attempts to both carve out the space for political and juridical participation in the states for their themselves and to obtain normative

validation for the shi'ah legal tradition in Afghanistan's Hanafi legal hegemony.

THE 2004 CONSTITUTION AND RETURN TO THE PRE-ISLAMIST POLITICS CONSTITUTIONALITY

Following the events of 9/11, the US invaded Afghanistan and ended the Taliban rule. The Bonn process started a process that culminated in the adoption of a new Constitution in December of 2004. The 2004 Constitution draws heavily from the 1964 constitution. On the question of the relationship between state law and Fiqh and the legislative power of the state, the 2004 Constitution goes back to the basic formula of 1964 but ends the exclusive authority of Hanafi Fiqh (arts. 3, 130 and 131). Unlike the 1964 Constitution, the 2004 Constitution does not associate Afghanistan with Hanafi Fiqh exclusively (art. 131). More importantly, in a modified version of the state law supremacy clause, the 2004 Constitution adds Jafari madhab of Shia as a gap filler in the cases involving Shi'ahs of Afghanistan (art. 131). However, the main impact of this latter modification has been limited to the enactment of the Law on Personal Status of Shias (2009). In a resolution of the High Seminar of Heads of Courts (3-8 December 2007), the Judiciary decided against direct application of the Jafari fiqh in courts arguing, "the Constitution adds the condition 'according to the provision of law' where it allows for the application of Jafari Fiqh in personal status case. Until the enactment of such a law [the personal status law was yet to be enacted],

the courts should follow the Civil Code.”⁹² This example illustrates that the exclusive influence of Hanafi fiqh over the Afghan legal system and how the Afghan judiciary understands the Afghan legal system is deeply rooted.

Like the 1964 Constitution, the 2004 Constitution reaffirms the supremacy of state law over Fiqh subject to a repugnancy clause (arts. 3 and 130). Similarly, it presents a unified understanding of the legal system, avoiding the use of Islamic laws, Shari’ah, or Fiqh along with the state laws. This latter approach is confirmed by a survey of the text of 2004 Constitution. The follow exchange from a 2011 judicial seminar further illustrates it. In the National Judicial Seminar (25 – 28 December 2011), a judge made the following proposition, “In article 8 of the Civil Procedure, where it defines the subject of a legal claim, along with the ‘laws of Islamic Republic of Afghanistan’ the term ‘percepts of shari’ should be added so the definition becomes more complete.”⁹³ The Seminar discussed the proposition (the transcript of the discussions are not provided) and dismissed the proposition in a resolution that reads, “Laws of Afghanistan are based on percepts of Shari’ah and the definition is also consistent with that.”⁹⁴

The 2004 Constitution was able to sidestep the question of the Islamic state and the Islamist politics entirely because, on the one hand, the

⁹² Resolution of the High Seminar of Heads of Courts (3-8 December 2007) p. 162.

⁹³ Resolution of the High Seminar of Heads of Courts (25 - 28 December 2011) p. 199.

⁹⁴ Resolution of the High Seminar of Heads of Courts (25 - 28 December 2011) p. 199.

Taliban and the Hizb Islami, two strong partisans of those views were excluded in the process of making the 2004 Constitution, and on the other hand, the views of other Mujahedeen groups (for example, Hizb Jamiat) on the use of the state as a vehicle of enforcing Islamic visions were tempered in the course of fighting its extreme incarnation in the Taliban government. The 2004 Constitution returned to the 1964 Constitutional arrangement which was negotiated in relation to a politically neutral Sunni-Hanafi orthodoxy. As I discuss in the concluding section, in the course of the peace process with the Taliban, Afghanistan is going to be forced to reckon with the Islamist politics on the relation of state law and Shari'ah and the legislative power of the state.

In another historical innovation, the 2004 Constitution empowers the Supreme Court “At the request of the Government, or courts” “[to] review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution” (art. 121). This provision, in effect, puts the question of compliance of laws with the “the tenets and provisions of the holy religion of Islam” (art. 3) under the jurisdiction of the Supreme Court. This amounts to a hard form of judicial review which was never adopted in a prior constitution. No previous Constitution, in its text, entrusted a judicial organ with this authority; while the Court of Discern or the Jamiat Uluma, under the Amani and Naderi constitutions respectively, played a role in determining Shari'ah-compliance of the laws, they were not mandated by the constitution as the final arbiter on the issue, making their version

of review a weak form of judicial review. Conversely, all prior Afghan constitutions in this text reserved the power of ensuring Shari'ah-compliance of the laws to a legislative body, be it the state council, the national assembly, or parliament. The drafters of the 2004 Constitution had considered a constitutional court as well but that institution did not make it to the final text.⁹⁵ Instead, in a hastily drafted provision, the 2004 Constitution mandated “The Independent Commission for supervision of the implementation of the Constitution shall be established” (art. 157) (ICSIC) causing a series of political skirmishes over which institution, the Court or the Commission, has the power to interpret the Constitution (but not the question of Shari'ah compliance of law which was explicitly vested in the Supreme Court under art. 121).

Have Taliban's Views on Law and Legislation Changed?

As stated in the introduction, we do not know the Taliban's constitutional views since they lost power. Journalists and researchers have documented the Taliban's *de facto* legal practices in areas under their control.⁹⁶ Those reports show a great deal of continuity with their legal practice when they were in power.⁹⁷ Inasmuch as formal legislation

⁹⁵ For a similar analysis See Shamshad Pesarlay, Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of

Coordination and Deferral Theory (Dissertation, 2016) [LINK](#) pp. 181-182

⁹⁶ See e.g., “You Have No Right to Complain”: Education, Social Restrictions, and Justice in Taliban-Held Afghanistan (Human Rights Watch, June 30, 2020) [LINK](#); How Life Under Taliban Rule in Afghanistan Has Changed (The Washington Post, December 29, 2020) [LINK](#)

⁹⁷ Id.

is concerned, the Taliban have enacted *Layehas* to regulate the internal affairs of their forces and their shadow governments. The *Layehas* do reflect the Taliban's adherence to Sunni-Hanafi's legal orthodoxy. For example, in a provision regarding the legal claims against those who surrendered to the Taliban stemming from their actions before their surrender, the *Layeha* (2010) relies on the authority of the *Hedaya*, an authoritative Hanafi fiqh book.⁹⁸ In another example, aligned with the provision of the group's draft Constitution, the *Layeha* (2010) names being God-fearing (*Taqwa*) as the main qualification of those who are given responsibility.⁹⁹ However, given the reality of their need to co-opt traditional institutions in their cause, *Layeha* (2010) states with regard to the legal disputes that they are to be first referred to as a legitimate *Jirga*. If the *Jirga* is unable to resolve the dispute in a way that would not conflict with Holy Shariah then it should be referred to court if a court exists, otherwise, it should be decided based on views of prominent *Uluma*.¹⁰⁰

While *Layehs* are instructive they do not directly address the fundamental questions of the relationship between state law and Fiqh or legislative power of the state. For insights into possible change in the Taliban's views on those questions, we are left with the Taliban

⁹⁸ The Layeha: Calling the Taleban to Account (Afghanistan Analysts Network) [LINK](#)
p. 4

⁹⁹ The Layeha: Calling the Taleban to Account (Afghanistan Analysts Network) [LINK](#)
p. 9

¹⁰⁰ The Layeha: Calling the Taleban to Account (Afghanistan Analysts Network) [LINK](#)
p. 12.

Charter.¹⁰¹ As stated in the introduction, the Charter was leaked to the press in 2020 during the final stages of the US-Taliban negotiations.¹⁰² Taliban has denied connection with the text,¹⁰³ but its content suggests that, at the very least, it represents the framework of internal debates within the group about those important questions. The fact that the Charter's important provisions are extensively referenced to the verses of the Holy Quran, prophetic tradition, and Sunni-Hanafi classic Fiqh principles suggests the Charter is meant to be persuasive. Therefore, here, I examine its content to understand the possible positions that the group may adopt in the course of developing a new constitution.

The Charter represents a little continuity and a lot of change in the legal views of the group. It retains few provisions from the group's draft Constitution unchanged. The Charter retains several provisions relating to the courts and foreign policy. It defers many important issues to the rules to be made in the future. The Charter defers to the future laws on the question of *dar ul-fatwa*, cultural affairs (art. 144), enjoining good and forbidding wrong (art. 145), military issues (it just says there will be religious forces made up of madrassa graduates and national forces) (art. 85). It also does not make any reference to the rights of the citizen, in a contrast with the group's draft Constitution which incorporated the

¹⁰¹ Da Afghanistan Islami Manshur [Charter of Islamic Emirate of Afghanistan] "the Charter". The text of the Charter was obtained through the TOLONews website at this [LINK](#). Translations of the Charter used here are of the Author.

¹⁰² Taliban Drafts 'Charter' for Future Govt: Document (TOLONews, 13 April 2020) [LINK](#)

¹⁰³ Id.

modified version of the 1964 Constitution's chapter on citizen rights through the Mujahedeen draft Constitution. The Charter adds new provisions, modifies and clarifies some old provisions reflecting the evolution of the group, change of its adversaries, its commitment to the US, and the future of its forces as well as the nature of the document itself (it is not a Constitution, at least not a complete one.) The Charter has chapters on the status of foreign citizens (arts. 70-73), asylum seekers, *muhjeran* (arts. 83-84) and intelligence operation, *istakhbarat* (arts. 134-140), which are clearly included given the prominence of the question of the presence of foreign fighters and foreign proxies in Afghanistan. The Charter also deals with the question of prisoners of war which ostensibly stems from the group's insurgency against the Afghan government (see arts. 110-127).

I briefly discuss some of the provisions which are of relevance to the questions explored in this analysis. Suggesting sensitivity to the issue of madhab plurality in the country, particularly the political empowerment of Shias of Afghanistan, article 2 states Islam to be the religion of Afghanistan *but does not proclaim Hanafi as the country's madhab*. In line with the group's draft Constitution, article 91 of the Charter proclaims Hanafi madhab to be the law applied in the courts. It reads, "in Afghanistan, the entire judiciary is bound to adjudicate correctly based on Hanafi madhab." However, it further adds "the leadership of courts will establish *special courts* for the followers of other madhabs (such as: Shafi, Maliki, Hanabela, Zawaher, and *Shias*) or the mediators

will achieve a settlement between them [the followers of these non-Hanafi madhabs] and then the settlement is approved by a Hanafi judge.”

The Charter technically does not use the term “law” when it explicitly refers to the state legislative power (e.g., See art. 22). It uses the Pashto term *Lazay* which is close in meaning to a bill of rules or *layeha* but I use the term law here. The Charter is not consistent, however; it does use the law and regulations, *Qanun and Muqrrat*, in other places (e.g., See article 7). Using a term other than “*qanun*” or law in grappling with the legislative power of the state is not a new strategy. Both Constitutions prior to the 1964 Constitution used a similar strategy.

Articles 4 and 7 of the Charter contain provisions that amount to a strong repugnancy clause requiring no state legislation to contradict Shari’ah. However, the Charter goes further, in a constitutionally unprecedented move, as it delineates what laws would contradict the rulings of Shari’ah. Article 10 states, “all of those ‘*disbelieving*’ laws which contradict the rulings of Shari’ah, such as: Republic, Democracy, Socialism, and Liberalism, have no place in Afghanistan.” Article 74 states that the Emirate is not bound by those laws of the international community which contradict *Islamic values*. This is more or less in line with the group’s draft Constitution except that it uses the term “value” not Shari’ah or Islamic laws. But Article 74 goes further again and elaborates that such contradictory international laws include “free speech, human rights, civil rights *that go beyond the limits of Shariat*.” Article 79 & 80 limit the application of international to Islamic values

the same way the Taliban's Constitution did but again they use vague terms of value instead of more precise terms of "Shariat".

On the question of tradition, in a tone different than their Codes of Conduct, i.e., *Layehas*, article 12 of Charter states, "all of those traditions and customs that contradict with Shari'ah, such as: giving women as blood money, inheriting wives, and others like these ..., will not be implemented in Afghanistan."

In line with their draft Constitution, article 11 obligates the Emirate "to enforce all the rulings and Shari' laws and to protect the religious values." Article 6 states that "All Afghan citizens are bound by the promulgated Islamic and Shari' principles." In a more aggressive position compared to the Taliban's draft Constitution, the Charter goes one step forward, and in an unprecedented constitutional rule in its article 97 states, "in absence of a shari'a exemption, *the violation of any ruling of Islam is a crime.*"

Like the group's draft Constitution, the courts are proclaimed to be *independent* "administration" within the Emirate (art. 86), however, in a provision that reflects the current reality of limited reach of the Emirate courts and the political nature of some possible disputes, Art. 87 allows the Amir or his deputy to remove a person or an issue from the power of the court.

The Charter retains the basic structure of political power under the group's draft Constitution but elaborates it. However, in the Charter the powers of the Amir are more circumscribed—a development most likely caused by the internal disputes over the question of succession of Mullah Omar. The position of Amir's deputy is also established with powers similar to the Amir, a development likely intended for the dual purpose of sharing executive power and ensuring the possibility of the rule even with the Amir is inaccessible or incapacitated. Another provision which both signals the limitation of Amir's power and marginalizing of the judiciary, a *dar ul-fatwa*, a Center of Islamic Ruling, is envisioned as the last arbiter of questions other than Shari'ah compliance of Emirate's laws. Article 13 states all important decisions, in Emirate, are made by the leadership council, as a political body, and the Uluma council, as the religious body, through consultation. Amir appoints the members of the leadership council from the people of diverse expertise to advise the Amir on political issues (arts. 46 & 47). While article 51 grants legislative powers to the leadership council, article 21 states that all laws of the Emirate are perused by both councils and approved by the Amir or his deputies before they become enforceable (article 21). The Uluma council consists of 50 senior Uluma (art. 61) who are appointed by the Amir since he "has the absolute power to appoint or remove anyone [in the Emirate] (art. 29). The Uluma council reviews the laws for Shari'ah compliance as the final authority (arts. 58, 63, and 64). If the leadership council and Uluma council disagree, on issues other than Shari'ah compliance with the laws, then the issue is referred to *dar ul-fatwa* which will act as the final arbiter (article 14).

The Amir is both head of state and head of government removing the position of head of government envisioned under the group's draft constitution (arts. 23 & 42). Mirroring the views within the classic Sunni-Hanafi legal orthodoxy, the qualifications required by the Amir and his deputy are "Muslim, free, sane, mature, committed and able to implement Islamic laws" (arts 24 and 36). While the group's draft Constitution did not specify the explicit method for selection of a new Amir, due to the Mullah Omar effect, the Charter prescribes two alternative methods: *shura hal wa* and an appointment by the previous Amir as a successor (art. 25). Article 37 conditions the power of the Amir to appoint his deputy to the approval of the *leadership council*. In another limitation on the power of Amir, *the shura ahl hal wa aqa*, i.e., the leadership council, can remove and replace the Amir for a removable offense (Art. 34). While article 40 states the qualifications for members of *shura ahl hal wa aqd*, the text of the article (and article 37) suggests that the leadership council acts as the *shura ahl hal wa aqd* under the Charter. The members of the *shura ahl hal wa aqad*, i.e., leadership council, are as follow: "1) they are just (truthful, religious, ethical, protect themselves from doing the prohibited and inappropriate acts), 2) they are knowledgeable of *political sciences* and are aware of principles of leadership; 3) they have military or political experience (article 40). The Charter does not explicitly state whether these qualifications must be all possessed by each member. In a possible show of sensitivity to the possible role of women in state affairs, the Charter does not explicitly make *manhood* a condition of membership in the leadership council (art.

40) or holding a ministerial position (art. 44). Article 41 states that “it is not required that the *ahl hal wa anq* be elected by public vote but in the absence of Amir it is the obligation of uluma, the knowledgeable ones, and military leaders must gather and appoint a person as the Amir.”

The foregoing analysis of the Charter suggest that in defining their insurgency against the post-2001 order, the anti-democratic, and anti-liberal views of the Taliban have further hardened. Moreover, the post-2001 dynamic of the groups also seem to suggest a shift in the focus on articulating an Islamist constitutional vision in line with the Hanafi-Orthodox Legal views (a task which arguably was attempted by the Uluma council that drafted the group’s constitution) while in power, to remaking the post-2001 society through coercive state institutions into an imagined one where the group’s narrow understanding of classical Hanafi legal texts resonate more. Finally, the analysis of the Charter suggests that the death of the group’s charismatic leader, Mullah Omar, has not tempered the group’s views on participatory governance per se but it has pushed the question of political leadership to the forefront of the group’s constitutional thinking. These conclusions, however, should be taken with a grain of salt because of the unconfirmed relation of the Charter to the group. As far as the peace process is concerned, a topic to which I turn shortly, the analysis of the Charter suggests that the gulf between the constitutional views of the group and the post-2001 constitutional order has only widened since their ousting from the power.

THE PEACE PROCESS AND THE RECKONING WITH POLITICAL ISLAM

Afghanistan has yet to constitutionally resolve the question of political Islam and Islamist politics. The dialectic process that culminated in the 1964 basic formula of a unified legal system and judiciary where state law took precedent over Fiqh and the legislative power was vested in an elective body unfolded between the adherents of a politically neutral Sunni-Hanafi legal orthodoxy and the country's monarchs (and later the ruling coalition which included statist intellectuals). The cascade of Islamist politics culminated in the Mujahedeen Draft Constitution that was never adopted but was later subsumed under the reactionary puritan movement of the Taliban which created their own draft Constitution. The US invasion of Afghanistan reversed that cascade and facilitated the adoption of a Constitution that did not have to deal with political Islam and Islamism—its staunchest supporters, Taliban, and Hizb Islami were both excluded from the process of making the 2004 Constitution. *The post-peace Constitution has to deal with this question. There is no way of avoiding it.*

Taliban's Islamism—the group that remains the most important adherent of political Islam and Islamism in the Afghanistan context—reflects a hybrid approach to the question of Islam and state. On the one hand, the Taliban-brand of Islamism has incorporated the statist tenant of modern Islamism of Afghani, Abduh, and Iranian Revolution, which is a belief in the use of the state as a vehicle for enforcement of Islam's ideals and

visions.¹⁰⁴ *This incorporation took place through natural osmosis between the Mujahedeen movement and the Taliban.* On the other hand, despite being statist, the Taliban has remained strictly traditionalist. It has rejected the other tenet of modern Islamism of Afghani, Abduh, and (to a lesser extent) Iranian revolution, which is a belief in the need to reform the classic Fiqh and to understand the original texts of Islam as broad ethical principles for political, social, cultural and economic life.¹⁰⁵ It is the second belief that has tempered the harsh consequences of strict application of classic Fiqh in modern time and accommodated (or welcomed) the broad principles of democratic governance in most Muslim countries. Taliban's Deobandi influence was a cause of this rejection. Taliban remains a strong adherent of classic Hanafi Fiqh but dropped the political neutrality that underpinned that Fiqh. It is the Taliban's rejection of the second tenet of modern Islamism, *making them statist and traditionalist, modern and reactionary at the same time*, that constitutes their brand of political Islam: harsh, unyielding, and hostile to any state-society relations that would be based on pluralism and democratic principles. The Charter makes this abundantly clear.

For Taliban, it can be surmised from the documents examined here, state law is more or less canonical text of Hanafi *maddhab* as explained by the Uluma trained in those canonical texts, and the coercive power of the

¹⁰⁴ The foregoing analysis of the group Charter and Draft Constitution supports this assertion

¹⁰⁵ For an example of this, See Cesari's explanation of Abduh's views on Fiqh quoted at length in the earlier section of this research. Jocelyne Cesari, *What is Political Islam* (Lynne Rienner Publishers, 2018) P. 29

state is to be used to transform the society along the lines that would resonate with those canonical texts. Those who are not Hanafis are tolerated subject to special arrangements. Hanafis of Afghanistan either voluntarily comply out of religious conviction or they will be forced to comply with the canonical texts of Hanafi madhab because it is the job of the state to transform the society and the citizens into good Muslims/Hanafis. Non-Hanafis occupy a peripheral position in this conception of state-society relationship—certainly not participating in lawmaking or governance. There is no room for democratic lawmaking or democratic governance.

The closest counterpart to the Taliban brand of political Islam is the Iranian Velayat Faqih model, the Guardianship of the Islamic Jurist,¹⁰⁶ however, the Iranian version, compared to the Taliban's version, is tempered to the point that it allows for a circumscribed version of democracy and limited pluralism, largely because of a whole host of corrective elements of Iranian history and society that act as the counterweight to the theocratic pull of Velayat Fqih. *In the course of the peace process in Afghanistan, the question is whether the relatively democratic and pluralistic post-2001 order can be that counterweight to the Taliban's harsher brand of Islamism? Is the post-2001 order robust enough to do that? Is the post-2001 cohesive enough to do that? How*

¹⁰⁶ Some analysts have suggested parallels between the two. For example, Kamran Bokhari, a director at the Center for Global Policy, a Washington-based think tank highlighted that parallel, "Sunni Afghan version of the Islamic Republic of Iran", Frud Bezhan, *Is The Taliban Seeking A 'Sunni Afghan Version' Of Iran?* (RadioLiberty, Oct 02, 2020) [LINK](#)

much influence will the domestic factors of both Taliban's and post-2001 order have relative to international factors in negotiating a basic state-society formula that could replace the 1964 formula? The answers to these questions remain to be seen.

THE OPTIONS ON THE TABLE

The US-sponsored peace agreement was the initial option that synthesized some of the ideas and priorities of the post-2001 order in concrete form.¹⁰⁷ On power-sharing, the US proposal is a mirror of the solution adopted in the Mujahedeen draft Constitution: *a leadership committee that oversees the affairs of the state until elected bodies are formed, and ahead of state and possibly ahead of government agreed to by the main stakeholders through negotiation.*¹⁰⁸ Assuming that the peace agreement is accepted by both parties, whether this arrangement will work this time, or whether the Mujahedeen faith will repeat remain to be seen. The answer will depend on many political factors, both domestics and international.

On the question of the relation between the relation of state law to Islamic laws and legislative power of the state, the US proposal preserves the 1964 constitutional formula: *a unified national legal system and judiciary where state law enacted by the elected bodies takes precedent over Fiqh subject to a repugnancy clause.*¹⁰⁹ This formula is rightly preserved to protect the developments of the past two decades by making sure the rights guaranteed in the Constitution are not further qualified with Shari'ah or Islamic law qualifiers (like they were under

¹⁰⁷ The text of the U.S. proposal for peace in Afghanistan used here was retrieved from the U.S. proposal for peace in Afghanistan (WashingtonPost, March 14, 2021) [LINK](#) hereinafter “the US Proposal”

¹⁰⁸ See the US Proposal, Part Two: Transitional Peace Government and Political Roadmap

¹⁰⁹ See the US Proposal, Part Two: IV. The Judiciary

both Mujahedeen and Taliban draft Constitutions as well other pre-1964 Constitutions). In addition to the 1964 formula, the US proposal keeps a crucial piece from the 2004 Constitution model as well: The Supreme Court is the final *arbiter* on the question of Shari'ah compliance with the law.¹¹⁰ *Uluma* is given a more or less advisory rule through an *uluma* council.¹¹¹ The plan, more or less accurately, articulates the deep core divide that must be bridged for an interim arrangement and later a post-peace constitution to work. Is the Taliban likely to go for it? We simply do not know at this time. An analysis of the Charter presented here suggests that the Taliban's views have hardened against such a compromise over the period that they were away from power. Will they be forced to make a compromise? This question gets us back to the set of questions posed earlier: *whether the relatively democratic and pluralistic post-2001 order can be that counterweight to the Taliban's harsher brand of Islamism? Is the post-2001 order robust enough to do that? Is the post-2001 cohesive enough to do that? How much influence will the domestic factors of (both Taliban's and post-2001 order) have relative to international factors in negotiating a basic state-society formula that could replace the 1964 formula?*

One lesson that history has to add to the US-proposal, however, is that the question of Shari'ah compliance should be dealt with by an elected legislator and not the Supreme Court. No Constitution before the 2004 Constitution considered the judiciary to be the appropriate forum to

¹¹⁰ See the US Proposal, Part Two: IV. The Judiciary

¹¹¹ See the US Proposal, Part Two: V. The High Council for Islamic Jurisprudence

decide on Shari'ah compliance of laws. The lessons from the 16-year run of the 2004 Constitution suggest that it had been a wise rule. The Supreme Court under the 2004 Constitution managed to, more or less, sidestep the question of Shari'ah compliance of laws allowing the political branches to handle the question. This method worked mostly because the state was *not* co-constituted by a traditionalist-Islamist group, i.e., the Taliban. The US-proposal will be forcing the Supreme Court to assume that role and bets the stability of the interim arrangement (and later possibly the post-peace Constitution) on the Supreme Court being able to credibly adjudicate the question of Shari'ah compliance of laws in traditionalist terms. The Supreme Court simply will not be able to do that because those calls are too politically consequential and views of the parties (the adherents of post-2001 order and Taliban) too wide apart on for any judicial forum to be able to make them. The better solution is to empower *the leadership committee* to decide on the Shari'ah compliance of laws with the consultation of *Uluma* council, in the interim, and give the power to elected legislator later, to make political compromise possible and the system robust.

More recently, in the runup to an international conference in Istanbul, Turkey (a conference that is often likened to the faith-setting Bonn conference that ushered in the post-2001 system), reportedly, three different proposals are drafted: a draft peace agreement prepared by the High Council for National Reconciliation (HCNR), and two other draft agreements that are reportedly prepared by the Hibz Islami and Hizb Jamiat Islami, the two leading political parties in the country. The

official texts of none these drafts are made public yet but the initial text of HCNR's draft was leaked to the public.¹¹²

The HCNR's draft agreement is not final and in fact it has been criticized by the senior member of the current government, as both VPs have spoken publicly against it.¹¹³The criticism is mostly targeted toward the proposed political system in the draft. On the issues explored in this research, it does not diverge fundamentally from the US-sponsored draft but provides more details on the ways that the post-2001 civil, political, social, and cultural rights are to be preserved. The HCNR's in its first section on general principles restates the 2004 constitution's repugnancy clause and underscores that the civil, political, social and cultural rights enshrined in the 2004 Constitution must be preserved (section 1, section 2.b.1 of the HCNR's draft). The draft also preserves the current unified legal and judicial system where democratically enacted law are given priority over Fiqh and are implemented by a unified judiciary headed by the Supreme Court subject a repugnancy clause (section 2.b.IV and section 1 of the HCNR's draft). The HCNR's transfers the power of interpreting the Constitution explicitly to a Constitutional Court to be formed by transformation of the current ICSIC in effecting ending the ambiguity over the question of whether the Supreme Court or the ICIS has the power to interpret the constitution (section 2.b.V). However, the

¹¹² The text of the HCNR's draft peace agreement used here is obtained from the 8am news outlet on 13 April 2021 [LINK](#). Translations are of the Author.

¹¹³ See e.g. The VP Danish's Criticism of the draft as reported by the 8am news outlet [LINK](#)

draft does not make it clear whether the power of deciding on the Shiar'ah compliance of legislation, currently granted to the Supreme Court by article 121 of the 2004 Constitution, will remain unchanged or not. This needs to be resolved if further conflicts are to be avoided on how the power of judicial review is to distributed between the Supreme Court and the potential future Constitutional Court. Finally, like the US-sponsored draft, the HCNR's plan only envisions an advisory role for the Uluma through a Shura Fiqh Islami [Islamic Fiqh Assembly] thus persevering the fragmentation of the judicial and legal institutions under the 2004 Constitution. (section 2.b.VI).

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