The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan

From: Saïd Amir Arjomand, State University of New York
To: The Constitutional Commission of Afghanistan
Date: February 6, 2003

1- Religion and Constitutions in International Legal History: After democratic revolutions at the end of eighteenth century, the rational construction of new regimes on the basis of the constitutions of the United States, France and Poland opened a new chapter in the history of mankind. The establishment of modern regimes in the Muslim world began with the promulgation of constitutional monarchy in the Ottoman Empire at the end of nineteenth century. The governments in Iran and Afghanistan were also transformed into constitutional monarchy by adopting new laws and constitutions in the first quarter of the twentieth century. The first constitution of Afghanistan (1923) belongs to the period of modernization and the formation of centralized states, which can be considered the second phase of the international adoption of new constitutions. The constitutions of the third (overlapping) phase, which started with the Russian Revolution and the establishment of communist and fascist regimes that can be described as political religions, were based on ideologies. The spread of new ideologies to the Muslim world began after the Second World War. The first wave of ideologies was based on socialism, nationalism and Marxism. The second wave of ideologies had their roots in Islam, which was supposed to counter the first wave of ideologies, but in fact gave rise (sometimes unintentionally) to the same ideological type of constitutions.

The substitution of Islam for ideologies during this period created numerous unsolvable problems because constitutions are not the proper venue for stating the principles of Islam and expressing religious sentiments and slogans. On the contrary, a constitution is a means for establishing the rule of law, and for delimiting the powers of different branches of government and rights of the people, albeit without denying Islam or contradicting its principles. The last phase in international constitutional history is the present period, which began with the collapse of communism in 1989 and can be called the global age. The constitutions of the global age, like those of other periods, have their own characteristics. In the past half a century, the noble people of Afghanistan have experienced the disastrous ideology of the Marxist government and the ideology of extremist Islamic government of the Taleban. Therefore, it is important that the errors of the ideological constitutions not be repeated. In addition, Afghanistan should learn from the experiences of Eastern Europe in recovering constitutionalism from the ravages of ideology, and doing away with communism by adopting new constitutions and legal systems. By abandoning a strict and extreme Taleban-like interpretation of Islam, the new constitution can become a new model for Muslim countries.

Constitutions of the ideological period suffer from two misconceptions that also spread to some Muslim nations after they gained their independence. The first misconception is that the constitution is a means for defining one's national and religious identity. In fact, however, the objectives of a modern constitution are to create a rational

administrative structure, to identify its duties and responsibilities towards the citizens and to define the rights of the citizens. Constitutions recognize and proclaim the religious and national identity of the people, and proceed to their main objective, which is to define the organization of the state based on the rule of law. A constitution cannot put forward claims for the salvation of mankind in the hereafter. The claim that "Qur'an is our constitution" is nothing but misunderstanding and confusion of categories, just as the extremist Jewish claim that "Torah is our constitution." It is the characteristic of the twentieth-century political ideologies to compete with the sacred books for determining the goals of human life, to change God's religions of salvation in the hereafter into political pseudo-religions that would save human beings in this world. Such characteristics not only have no logical relation with modern constitutions, but they turn away the focus of these constitutions from their primary objectives, namely, the establishment of the rule of law and the protection of the rights of people. Ideological constitutions lost their historical importance and legal validity as they failed to restrict the power of the government and to guarantee the rights of the citizens as a consequence of political religions and their so-called revolutionary goals. Turning Islam into a dominant ideology within the framework of an ideological constitution can neither prove beneficial in ensuring individual rights, nor can it ensure the legal effectiveness of such a constitution. In short, Afghanistan can take advantage of the newest changes in constitutional models for securing the basic rights of people by drawing on the experience of Eastern European countries in ridding themselves of ideological constitutions and in perfecting the legal mechanism for the effective rule of law. In particular, Afghanistan should adopt the idea of a constitutional court as the most up-to-date institution for protecting the basic rights of individuals and for supervising the constitutionality of legislation and administration.

**2- Public Law, Constitutionalism, and the Shari`a in Muslim Countries:** Before the adoption of constitutional forms of governments from the West, the legal systems of Islamic countries were based on two principles: state law (qānun), which served as the basis for public laws and regulations, and the Shari`a (Islamic law), which constituted personal, family and civil law. The fact that Islam allows various interpretation of the Shari'a resulted in the creation of various schools of law (madhhab) that follow their own jurisprudence. Since the Mamluk era in Egypt (1260-1517), judges from the four Sunni schools of law have been appointed for the followers of their respective schools of Islamic law in some Muslim countries. In the Ottoman empire, this traditional system based on legal pluralism was further developed into the millet system, in which non-Muslim religious communities had judicial autonomy, and the Muslims were free to choose their schools of law. The remnants of this system of religious and judiciary autonomy of religious minorities continue to exist in Lebanon. In India, too, after its independence, the Muslim minority of the country was allowed to have certain judiciary autonomy in personal status law. The question that needs to be answered is whether this system, which is based on traditional pluralism, conforms to the conditions of the modern world. We will answer this question at the end of this article.

The constitutions of the era of modernization and state formation in Ottoman empire, Iran, Afghanistan and Egypt correctly distinguished between the Shari'a and state

law (qānun). For instance, the first constitution of Afghanistan (1923) required that the citizens obey both "the rules of the Shari`a" and "the laws of the state" (article 12). Considering this duality, state laws should not contradict the constitution and the principles of the Shari`a. The constitutions of the period implicitly left the determination of the consistency of the laws with the Shari`a to the legislature, except for Iran, which assigned this function to a special group. The Supplementary Fundamental Law of 1907 provided for a committee comprised of five Shi`ite jurists (who has reached the degree of ijtihād) with the power to veto all bills passed by the parliament, but the committee never convened because of opposition by the Shi`ite jurists selected by the Second Majlis (1909-1911). The relationship between the Shari'a and state law became critical during the second phase of the era of ideology as a result of the emergence of the idea of "Shari`a-based Islamic government," and it disrupted the logical structure of the constitutional law of the previous era. There was no historical basis for the idea of Shari`a-based Islamic ideological state, which was put forward apparently to oppose communist ideology, but in reality in imitation of communist constitutions, which considered the dominant ideology to be the foundation of the regime. In the 1979 Constitution of the Islamic Republic of Iran, which is explicitly based on Islam as the dominant ideology, the committee of five Islamic jurists was changed to the Guardian Council (shurā-ye negahbān), being combined with the model of the Constitutional Council in the 1958 Constitution of France. The transformation was adopted without any consideration to the later developments in the French legal system, especially changes regarding human rights. Giving the Guardian Council veto power over parliamentary legislation opened the possibility of political abuse of this entity. As a result, the Council has turned into a tool for political control and abused for depriving the opponents of the regime and the reformists of their rights. The Council, whose primary task was to make sure that all laws were in accordance with the constitution and with the Islamic principles, has been completely derailed from its mission. The primary function of the Guardian Council within the regime of the Islamic Republic currently is to reject presidential candidates and parliament members, and to veto parliamentary bills without giving any justification. This has paralyzed the regime and produced a serious constitutional crisis. (For instance, two years ago, the Council rejected the government's budget on the pretext of being contradictory to the principles of Islam; and last month, the Council rejected a bill passed by the parliament on torture, finding it contradictory to the internal regulations of state prisons!) Thus, we can say without exaggeration that allowing six appointed Islamic jurists to have the monopoly over interpreting the Shari`a in opposition to an elected parliament, is the gravest mistake in the constitutional history of Iran.

It seems unlikely that the same mistake will be repeated in Afghanistan. Some other Muslim countries that have authorized the judiciary or executive powers to determine the consistency of laws with the principles of Islam, or have established Islamic Research Organizations to help with the preparation and drafting of laws. Afghanistan may choose to adopt such a system, and an advisory organization can operate under the authority of the President, or of the parliament (Jirga), or be part of the judiciary power. However, there is no need to mention this issue in the constitution.

3- Lack of Contradiction with the Principles of Islam, Human Rights, Including Freedom of Religion, and the Unity of Judicial Organization and Procedures: The 1964 Constitution can be adopted with some minor changes with respect to declaring the official religion of Afghanistan and the responsibility to protect it. The first clause of Article 2 can be changed to "the official religion of Afghanistan is the sacred religion of Islam" since Islam encompasses both the Hanafi and Ja'fari schools of law. In addition, Article 7 is phrased very precisely and can be used as is, except for replacing "the King" with "the President." The head of the state would thus have the responsibility of "protecting the principles of the sacred religion of Islam" and of being "the guardian of the Constitution," as well as Afghanistan's independence and national unity. With respect to the inaugural oath of the President, Article 15, which would require him "to swear by God to protect the principles of the sacred religion of Islam and defend the Constitution," is precise and can be adopted. Swearing by the holy Qur'an may also be added.

The 1964 Constitution of Afghanistan aptly and precisely describes the legal relevance of the principles of Islam to legislation: "No law can be contradictory to the principles of the sacred religion of Islam and to other values contained in this Constitution" (Article 64). In my opinion, there is no need for changing this article. For instance, adding the phrase "definitive commandments (ahkām qat`iyya) of Islam" will not only fail to eliminate any vagueness, but will result in new ambiguities. The Taleban's interpretation of Islam was based on their reading of the definitive commandments of Islam. It would not be impossible for someone else tomorrow to claim that slavery should not have been abolished because there are definitive rules for it, based on firm traditions, in the Shari`a. The elegance of the second half of the article is that it puts the principles of Islam as a legal source side by side with other values included in the Constitution. Of course, the point here is not to attempt to compare the religion of Islam with rational legal principles, but on the contrary, to bring the high ethical values of Islam to bear on the interpreting of laws according to the Constitution. At this point, it is worth mentioning that other values contained in the Constitution can include the principle of the rule of law and international human rights. For instance, the constitution of Hungary (Article 70) recognizes human rights as a source of law. Thus, the article in question can be reworded as follows: "No law can be contradictory to the principles of Islam, the rule of law, international human rights and other values contained in this Constitution." The advantage of the rephrased article is that, by accepting human rights as a source of law, Afghanistan can defend the human and religious rights of millions of Afghans scattered around the world as refugees and immigrants. In other parts of the constitution, wherever there is a need to restrict an article to conform to the principles of Islam, we can use the overall formula of the 1964 Constitution (Article 102), which states, "within the limits set in the Constitution."

In addition to protecting the rights of the Afghans in other countries, in view of the Qur'anic Verse, "No compulsion in religion," and of the Declaration on Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief, passed by the UN in 1981, and also in order to avoid political misuse of Shari`a punishments for apostasy and blasphemy, which is contrary to public interest and can disrupt national unity, as has been the case recently in Pakistan, Iran and other Muslim countries, the

revised article should also explicitly guarantee freedom of religion as a human right. In other words, the following should also be added to the article: "No citizen of Afghanistan can be persecuted, tortured or punished because of his religious beliefs." The same can alternatively be added to the second clause of Article 2 of the 1964 Constitution.

One of the main objectives of the new Constitution is to rebuild the judicial system as one of the three powers of the political system in Afghanistan. The lesson we should learn from the anarchy in the judicial systems of Afghanistan's two neighboring countries, namely, Pakistan and Iran, where separate courts, such as the Shari`a Bench (in Pakistan) and Revolutionary Courts and the Special Court for the Clergy (in Iran) have been established, is that a unitary judicial system should be created and court procedures should be unified, as required by Article 104 of the 1964 Constitution. A unitary procedure and judicial system should only be assured through the consideration of the general principles of Islamic jurisprudence at the stage of the drafting of laws, especially civil laws. This task should never be left for individual judges to decide, including the Supreme Justice. In addition, the Supreme Court should not have the authority to interpret the Islamic Shari`a, especially if no case is referred to it. Even if there are cases before the Supreme Court, it cannot issue such an opinion because of the existence of the Constitutional Court. If no codified law regarding a case exists, judges could be allowed to follow the principles of Islamic jurisprudence, as foreseen in Article 102 of the 1964 Constitution. Islamic jurisprudence in turn recognizes customary norms and procedures as a residual source of law. Considering the fact that several million of Afghanistan's population are followers of the Ja'fari school of law, and in order to ensure their religious freedom, it is advisable to add "Ja'fari jurisprudence" to the appropriate clauses of Articles 69 and 102:

Article 69- The law consists of bills passed by the two houses of parliament (Jirgas) and signed by the President. "In cases where no positive laws exist, the law will consist of the Hanafi and Ja`fari jurisprudence of the Islamic Shari`a."

Article 102- "If there are no state laws regarding a case, the courts are authorized to issue the verdicts in accordance with the Hanafi or Ja`fari jurisprudence of the Islamic Shari`a, within the limits set in the Constitution."

It would be appropriate to consider the establishment of a consultative/advisory council or board comprising of Islamic jurists and law experts for both the Hanafi and Ja`fari schools of law in the internal laws and regulations of the Supreme Court. The consultative/advisory body could help the judges of the courts in answering questions and solving problems. However, the board should aim at establishing a unitary judicial procedure and system. There is no need to include this point in the Constitution. Providing religious education to Shi`a in schools is also an appropriate step. It should be considered in the laws on national educational and cultural affairs, but there is no need to include this in the Constitution either.

4- The Hanafi and Shi`ite Ja`fari Branches of Islam and the National Unity of Afghanistan: In the early stages of the development of Islamic jurisprudence, namely,

the era of Imam Abu Hanifa, the Hanafi school was at the forefront of developing the rational method in jurisprudence. Early advances in Islamic public law were due to efforts made by Hanafi jurists such as Abu Yosuf, Sheybani, and Qazi Khan. After the Mongol era, Hanafi jurists played an important role in the development of Islamic public law by reconciling Turko-Mongolian law with the Shari`a, and by further elaboration of the principle of public interest (maslahat). (Their important role has not been acknowledged as it should be.) On the other hand, the "gates of ijtihād" (legal reasoning) have been open in Ja`fari school of law. The Ja`fari Shi`a consider reasoning (`aql) the fourth principle of Islamic jurisprudence. Since the Shi`a have been in minority in many Islamic countries for many centuries, they did not pay much attention to public law until the twentieth century, except in Iran where they have been the majority since the Safavid era (1501-1722). With the establishment of the Islamic Republic of Iran, a major disagreement between the two branches of Islam, the Hanafi and the Ja`fari, was eliminated. That is, the principle of public interest (maslahat), which had been rejected in the Ja`fari jurisprudence, was accepted and an Interest Council (majma`-e tashkhis's maslahat), which is one of the most important organs of the Islamic regime, was established in 1989. The Interest Council can approve laws rejected by the Guardian Council as contradictory to the Shari`a on the basis of public interest.

Accepting the concept of public interest in government and legislation has thus reduced the disagreement between the two legal schools considerably. In addition, like their Sunni colleagues, the Shi`ite jurists have recognized the importance of synthetic method (talfiq), as an important concept in Islamic jurisprudence. They have participated in establishing Dar al-Taqrib (an organization to bring Muslims together) since the time of the Shaykh al-Azhar Shaltut. Ayatollah Hasan-`Ali Montazeri in Iran and Shi`ite jurists in other countries have accepted the synthetic principle. Thus, except for a few minor cases of disagreement, such as the laws of inheritance and personal status law, the reconciliation of Hanafi and Ja'fari jurisprudences is not problematic. Bearing this in mind, it is advisable that while drafting new civil laws in Afghanistan, the synthetic principle of Talfiq should be taken advantage of in order to bring the Sunnis and Shi`a closer together and thus to enhance the national unity of Afghanistan. If, in minor cases, reconciliation of the two is not possible, different rules for the Sunni and Shi`ite citizens of Afghanistan should be detailed in the text of the laws in question.

Another possibility that needs to be explored is the establishment of separate courts for the Sunnis and the Shi`ites with respect to personal status law. Here, two important points should be borne in mind: First, the principle of national unity among the Afghans, which has been stressed in several articles of the 1964 Constitution, should have priority over the establishment of such courts. The continuation of the Ottoman millet system in the form of existence of separate courts for the Sunnis, Shi`ites and Christians in Lebanon, does not seem to have contributed to the Lebanese national unity, even though there are other reasons for the civil war as well. Numerous recent bloody religious clashes in Pakistan, especially attacks against the mosques belonging to the Shi`a, are indications of the damage done to national unity by highlighting differences among religious groups. A second point that needs to be taken into consideration is that there are certain problems associated with establishing separate courts. One of the

problems is that such courts lose their status and become like second-rate courts, as was the case in Egypt where such courts were eventually incorporated into civil courts. Of course, in some countries, such courts give women the opportunity to participate in the judicial system, but such participation can be facilitated through civil courts as well. Another problem associated with having separate courts dealing with personal status law is that they are left out of the process of reform of the judiciary system and improved legislation. A good example of such isolation and ossification is that of the Muslims in India, who have not benefited from legal and judicial reforms and continuous legislation. Of course, the advantage of having separate courts is that the minorities have an independent judicial system, and justice is administrated by themselves. But in view of the dangers mentioned above, establishing separate courts can be recommended only if state-appointed judges are likely to be biased and unfair towards the Shi`a, or if it is impossible or difficult for judges to apply different norms to the Hanafis and the Shi`a, even with the codification of differences in detail and after receiving advice from legal experts and Islamic jurists belonging to the consultative board of the Supreme Court or Ministry of Justice.