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## The Constitutional Imagination of the Mujahidin: A History and Translation of Two Constitutions Proposed by Afghan Islamist Militias in the 1990s

Shamshad Pasarlay  
*University of Chicago*

Clark Lombardi  
*University of Washington School of Law, lombardi@uw.edu*

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# **THE CONSTITUTIONAL IMAGINATION OF THE MUJAHIDIN: A HISTORY AND TRANSLATION OF TWO CONSTITUTIONS PROPOSED BY AFGHAN ISLAMIST MILITIAS IN THE 1990S**

Shamshad Pasarlay\* and Clark B. Lombardi\*\*

“[I]t is important sometimes to read and reflect upon constitutions that were fully thought out, drafted and proposed for ratification . . . and were for some reason never enacted.”

--Robert Tsai<sup>1</sup>

## **TABLE OF CONTENTS**

INTRODUCTION.....	284
I. BACKGROUND.....	287
A. Pre-modern Islamic Law and the Evolution of Proto-constitutionalist Theories.....	287
B. The Evolution of Islamic Law in the Modern Era and the Rise of Islamic Constitutions .....	290
II. ISLAM IN MODERN AFGHANISTAN .....	292
A. The Emergence of Sunni and Shi‘ite Islamism in Afghanistan in the 1960s .....	295
B. The Emergence of Shi‘ite Islamism in Afghanistan .....	296
III. THE AFGHAN JIHAD OF 1979–1992 AND DRAFTING PROPOSED ISLAMIST CONSTITUTIONS.....	297
A. The Formation of Sunni Political Parties and the Drafting of their Constitution.....	299
B. Shi‘ite Islamist Constitutionalism: The Harakat-i Islami and Its Draft Constitution.....	303

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<sup>1</sup> ROBERT TSAI, AMERICA’S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY 3 (2014).

## INTRODUCTION

Studying constitutions can do something beyond merely help us understand the *de jure* laws in action within a country or to make predictions about how a particular state is likely to act. Studying constitutions also helps us appreciate the goals of the people who draft constitutions and their perception of the world in which such goals are most likely to be realized. When we study constitutions, we gain insights into the things that constitutional drafters and ratifiers think desirable and the mechanisms that they think are conducive to achieving their desired outcomes. And when we look at a range of constitutions that come from within a particular jurisdiction or a particular constitutional tradition, we can begin to grasp the full range of ways in which people who are associated with that jurisdiction and tradition could realize their shared dreams and aspirations.

Since constitutions first appeared in the Muslim world in the 19th century, Muslims have envisioned the possibility of establishing a modern state that draws upon Islam's rich history of ethical thinking, establishes institutions and procedures which reflect traditional Islamic thinking about procedural fairness and bind themselves to respect normative principles which pious people have discerned through their reflections upon the ramifications of scripture.<sup>2</sup> And Muslims *have* explored different possible "Islamic constitutions." The term "Islamic constitution" can be defined in different ways. Indeed, one of the authors of this work has, in other works, defined "Islamic constitutions" narrowly as those which contain a "shari'a supremacy clause" which prohibits the state from enacting laws inconsistent with the core principles of the shari'a,<sup>3</sup> the term that Muslims use for the divine code of ethical behavior which God has laid down for humans and which they must obey if they wish to be rewarded and saved. Here, however, we use the term "Islamic constitution" more broadly to refer to any constitution in which Muslims try to incorporate the lessons about ethical governance that they believe God has laid down in scripture, and to realize the possibility of Islamically legitimate and practically effective government.

Studying Islamic constitutions<sup>4</sup> in the Muslim world helps to understand the multitude of ways through which a state could, in theory, realize Islam's ideal of ethical governance. In a seminal 2015 article, Martin Loughlin defined the constitutional imagination as "the manner in which constitutions can harness the

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2 See, e.g., Nathan Brown & Mara Revkin, *Islamic Law and Constitutions*, in THE OXFORD HANDBOOK OF ISLAMIC LAW (Anver Emon & Rume Ahmed, eds., 2015); BRUCE RUTHERFORD, EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD (2008); Clark Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 INT'L J. CONST. L. 615 (2013).

3 See Lombardi, *Designing Islamic Constitutions*, *supra* note 2, at 616.

4 Note that there are constitutions in parts of the Muslim world including in the former Soviet republics that can not be recognized as "Islamic constitutions" in the way we define them in this paper.

power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape—and reshape—political reality.”<sup>5</sup> According to Laughlin, “[t]he phrase draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action.”<sup>6</sup> Studying Islamic constitutions thus helps us appreciate the metes and bounds of the Islamic constitutional imagination. Furthermore, if one understands the backgrounds of the people who were responsible for drafting and ratifying a particular constitution and the circumstances in which the drafting and ratification were done, then one can begin to go further and realize how certain types of Muslims may tend to gravitate towards certain types of vision for the Islamically legitimate and practically effective state.

Recognizing the important lessons that scholars might be able to glean from a comparative study of national constitutions in the Islamic world, some scholars have in recent years begun to draw upon databases of English translations of national constitutions currently in force.<sup>7</sup> They have embarked upon projects that compare and typologize the constitutions of countries that purport to be “Islamic” states.<sup>8</sup> Working from the texts of national constitutions in translation, several authors draw a number of conclusions about Islamic constitutionalism and the process of “Constitutional Islamization” which allows constitutional drafters to attempt to realize the ideals of Islamic constitutionalism. There is no space here to thoroughly describe these works or to evaluate the conclusions about the hypotheses that these authors have made. Whatever our concerns about the generalizations made and the conclusions drawn, we appreciate the significant work that the authors of those works have undertaken, and we look forward to future conversations about the Islamic constitutional imagination.

In anticipation of that conversation, we propose in this article to make a narrow point about the project and to argue that those of us who are interested in the project of studying the Islamic constitutional imagination should expand our gaze beyond constitutions that have entered into force and should look, as well, at what Robert Tsai has called “alternative constitutions.”<sup>9</sup> And having made that point, we will provide translations of two such alternative constitutions.

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<sup>5</sup> Martin Loughlin *The Constitutional Imagination*, 78 THE MODERN L. REV. 1, 3 (2015).

<sup>6</sup> *Id.*

<sup>7</sup> The most important of these is the invaluable Constitute Project set up initially by Zachary Elkins and Tom Ginsburg. Its comprehensive database is available at <https://comparativeconstitutionsproject.org/>.

<sup>8</sup> See, e.g., Dawood Ahmed & Moamen Gouda, *Measuring Constitutional Islamization: The Islamic Constitutions Index*, 38 HASTINGS INT’L. & COMP. L. REV. 1 (2015); Dawood Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. OF INT’L. L. 615 (2014).

<sup>9</sup> TSAI, *supra* note 1, at 3.

For those interested in the project of exploring the constitutional imagination within a particular jurisdiction or tradition, it is essential to go beyond the set of constitutions that have actually entered into force in that jurisdiction. Therefore, it is often crucial and useful “to read and reflect upon constitutions that were fully thought out, drafted and proposed for ratification . . . and were for some reason never enacted.”<sup>10</sup> This insight was central to the work of Robert Tsai who argued that American constitutional scholars should pay far more attention than they do to the ideas of “groups that disagreed vehemently with the emerging national constitutional order but whose members, in their own way, remained committed to the rule of law,” thereby opting to draft “alternative” American constitutions.<sup>11</sup> In order to “gain an accurate sense of the [American] constitutional tradition,” Tsai insisted, “it is crucial to develop a feel for the ideological periphery—or more precisely the points of friction between conventional ideas about the American constitution and insurgent theories of law.”<sup>12</sup>

Although they were developed by a scholar who specialized in the American constitutional tradition, these insights are equally relevant to scholars who are interested in understanding the Islamic constitutional tradition. The insights are important to exploring the reasons why Islamic constitutions today look the way that they do and the reasons why, if circumstances change in the future, different countries might make different constitutional choices.

For scholars interested in Islamic constitutionalism as a contested concept, it is very useful to study a group of constitutions that were drafted by Islamic proto-political parties during the 1990s in Afghanistan. From 1979 to 1992 a fractious alliance of Islamic parties united to wage an armed conflict against a Soviet-backed dictatorship. They referred to their struggle as a jihad (holy war) and referred to themselves as mujahidin (holy warriors).<sup>13</sup> In 1992, a coalition of these mujahidin finally defeated the Soviet puppet regime, took control of the capital and struggled to form a government. At that point, parties that had been united against a common enemy had to grapple with the fact that Afghanistan was a diverse country not only in its ethnic composition but also when it came to the people’s understanding of Islam. Although almost all Afghans are Muslim, they are of different sects and even of different factions within a single sect; they have different understandings of Islam

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3–4.

<sup>12</sup> *Id.*

<sup>13</sup> THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 234 (2010); for a detailed discussion of the war, see WILLIAM MALEY, *THE AFGHANISTAN WARS* (2002); LARRY GOODSON, *AFGHANISTAN’S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS AND THE RISE OF THE TALIBAN* (2001).

and different visions of the ways in which a modern state should be structured to ensure that it is “Islamic.”<sup>14</sup>

From 1992 (when the mujahidin ousted the Soviet -backed government and entered Kabul) until 1996 (when the Taliban ousted the mujahidin and established their first “Islamic Emirate”), different groups struggled to draft constitutions that would unite all of the warring factions. Each of these constitutions tried to lay out the blueprint for a state whose institutions and procedures would be acceptable to a broad cross-section of Afghan Muslims and would be recognized as (a) Islamically legitimate, (b) acceptably inclusive, and (c) likely to result in effective governance. We are aware of four constitutions that were produced during that time:

A proposed “mujahidin” constitution for a unitary Sunni state produced by a committee of thinkers selected by Burhanuddin Rabbani’s Sunni Islamist political party- militia, the *Jami‘at Islami*.

A rival constitution for a unitary Sunni state drafted by a leading figure from a rival Sunni Islamist party-militia, Gulbuddin Hekmatyar’s *Hizb-i Islami*;<sup>15</sup>

A proposed constitution for a multi-sectarian Islamic republic published by Shi‘ite party and militia, the *Harakat-i Islami*; and

A rival constitution set forth by the official organs of the *Hizb-i Wahdat-i Islami*, a different Shi‘ite political party-militia.

In this article, we provide the history and translations of two of these constitutions: the mujahidin Constitution and the *Harakat* Constitution. To help provide context for readers, we also provide some background regarding Islamic constitutionalism, the way it evolved in the Afghan context, and the events that gave rise to the Afghan civil wars of 1979 to 2001. We will then describe the actors who drafted and published each of these proposed-but-never-enacted constitutions.

## I. BACKGROUND

### A. *Pre-modern Islamic Law and the Evolution of Proto-constitutionalist Theories*

The Islamic religion evolved from revelations that the Prophet Muhammad received from an angel from the late 6th century to the early 7th century C.E. Muhammad thereafter led a community of followers who tried to live lives that were ethical according to those revelations and according to the personal intuitions of the

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<sup>14</sup> See, e.g., AFGHANISTAN’S ISLAM: FROM CONVERSION TO THE TALIBAN (Nile Green, ed., 2017); see also ASTA OLESEN, ISLAM AND POLITICS IN AFGHANISTAN (1995); OLIVER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN (1990).

<sup>15</sup> It should be noted that the *Hizb-i Islami* draft constitution was officially published in a book written by the leader of the party, Gulbuddin Hekmatyar, in 2007.

Prophet. When the Prophet died in 632 without naming a successor, the Muslim community disagreed on crucial questions of religion and of politics.<sup>16</sup> The Muslim community debated about whom it should trust to guide it regarding questions of religion and ethics and whom it should recognize as the political leader of the community. Within 200 years, disagreements about these questions caused the community to split into two sects. The majority of Muslims embraced a version of Islam that came to be known as Sunni Islam. A minority embraced Shi'ite Islam.

During the pre-modern period, both Sunnis and Shi'ites accepted that questions of religion and ethics could be answered in a trustworthy manner only by scholars trained in a very complex method of scriptural and logical analysis. The method was similar in both sects, though not exactly the same. Each generation of Sunni scholars would train a new generation and certify the most promising of the young generation to serve as religious and ethical advisors and teachers for the following generation.<sup>17</sup> Through this process, successive generations of credentialed Sunni '*ulama* (scholars) were minted. The leading scholars within each generation published works which encapsulated the settled views of Sunni Islam along with the most recent Sunni scholarly opinions on disputed ethical questions.<sup>18</sup> Similarly, successive generations of Shi'ite scholars developed for the Shi'ite community Shi'ite ethical doctrines, and they published works which identified the areas where Shi'ite doctrine was settled as well as the areas where reasonable people were allowed to disagree.

Until the modern era, within both the Sunni and the Shi'ite sects, the '*ulama* were recognized as having unique insights into God's commands to humans. The Sunni and Shi'ite '*ulama* themselves did not always agree, however, about what God had commanded.<sup>19</sup> Both taught that God had laid down a handful of rules unambiguously in scripture and had clearly said that he did not want humans ever to act in ways that would harm society's ability to enjoy five social "goods."<sup>20</sup> At the same time, they asserted that these rules and principles provided only limited guidance. With respect to many issues, even the best trained scholars could provide, at most, a "best guess" as to what God wanted people to do. Thus, it was understood that well trained scholars could reasonably disagree on what God wanted people to do.<sup>21</sup>

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16 For more details, see generally Wael Hallaq, *Shari'at: Theory, Practice, Transformation* (2009); see also Bernard Weiss, *The Spirit of Islamic Law* (1998).

17 See, e.g., Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari'at into Egyptian Constitutional Law*, chapters 1 & 2 (2006).

18 See generally Mohammad Fadel, *The Social Logic of Taqlid and the Rise of the Mukhtasar*, 3 *ISLAMIC L. & SOCIETY* 193 (1996).

19 Aron, Zysow, *The Economy of Certainty* (PhD. Dissertation, Harvard University, 1984), on file with the authors; see also Weiss, *The Spirit*, *supra* note 15, chapter 7.

20 These "goods," according to a majority of scholars, included religion, life, intellect, lineage and property.

21 Zysow, *The Economy*, *supra* note 18, at chapter 5; see also Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 *AM. J. COMP. L.* 199, 201–202 (1978).

Within the Sunni tradition four “schools of law” emerged, each of which taught a slightly different set of rules for ethical behavior.<sup>22</sup> Within the Shi‘ite tradition, there was only one school of law, but it was understood that scholars within the school could (and would) disagree regularly about how, precisely, God wanted people to act. Each Sunni school of law recognized the other schools as having identified plausible interpretations of God’s moral law.<sup>23</sup> And similarly, within the Shi‘ite tradition, scholars agreed to disagree on many questions of ethical behavior.<sup>24</sup>

Insisting that no scholar could say with certainty that his understanding of God’s law was in all respects correct and recognizing at the same time that society could not survive without embracing a single, predictable body of rules, Islamic scholars struggled to develop a legal theory to explain why and how a ruler could be permitted to require his subjects uniformly to act in a way that might not be correct.<sup>25</sup>

During the first 500 years of Islamic history, Sunni scholars experimented with a number of answers to this question and proposed a number of different theories about the nature of legitimate rule. By the 13th century C.E., most appear to have embraced a theory called the theory of *siyasa shar‘iyya*, which held that any ruler who commanded sufficient force to control a territory had the right to be the ruler and to impose laws of his own choosing.<sup>26</sup> Under this theory, a ruler could make laws in one of two ways. First, he could import the rules proposed by one of the competing schools of law. That is to say, he could pick the doctrines of one school (or scholar) to be the official school of his realm and then instruct courts to resolve disputes by applying the precedents of that school. Or second, he could enact a statute of his own choosing, subject to the following conditions: (1) the statute could not compel people to violate one of the few rules that the scholars agreed had been unambiguously laid down in scripture; and (2) the statute could not harm society by preventing it from enjoying one of the five recognized goals of the law.<sup>27</sup> Until the early modern era, Sunnis dominated the majority of the Muslim world, and many Sunni rulers tried explicitly to ensure that their regimes and laws were legitimate according to this Sunni political theory. When a major Shi‘ite empire finally emerged in the 16th century, rulers and scholars seemed implicitly to accept the logic of that theory even though it developed in the Sunni context.

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22 See generally CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF LAW, 9<sup>TH</sup>-10<sup>TH</sup> CENTURIES C.E. (1997); see also Wael Hallaq, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW, chapter 7 (2005).

23 LOMBARDI, STATE LAW, *supra* note 16, at chapter 2.

24 Clark will add a cite here: Possibly the following: Liyakat Takim, Shi‘ism Revisited: Ijtihad and Reformation in Contemporary Times, chapter 2 (2021).

25 *Id.* chapter 3.

26 Frank Vogel, “Siyāsa: (3) In the sense of siyāsa shar‘iyya,” in EI2, vol. IX, 694–696; Bernard Lewis, *Siyāsa*, in IN THE QUEST OF AN ISLAMIC HUMANISM: ARABIC AND ISLAMIC STUDIES IN HONOR OF MOHAMED EL-WOWAIHI (A.H. Green, ed., 1984).

27 LOMBARDI, STATE LAW, *supra* note 16, at 47–50.



*B. The Evolution of Islamic Law in the Modern Era and the Rise of Islamic Constitutions*

In the modern era, within Sunni communities, social changes—including the rise of public education and the introduction of the printing press—facilitated the growth of movements which challenged the ‘*ulamas*’ monopoly on questions of religion and ethics and, more pointedly, on the question of whether a state’s statutes satisfied the two conditions for legitimacy according to the theory of *siyasa shar‘iyya*.<sup>28</sup> To be sure, there were (and up to the present day there continue to be) traditionally trained scholars who used and taught the traditional methods of reasoning. And many Muslims continued to hold these traditional ‘*ulama*’ as the highest authority on questions of religion, ethics, and state legitimacy. Alongside the classical ‘*ulama*’, however, competitors sprang up. Most importantly, a new class of Islamic “modernist” intellectuals appeared, embracing non-traditional methods of scriptural analysis and, inevitably, reached novel conclusions about what God had required, prohibited, or permitted.<sup>29</sup> Asserting that they were not bound by the precedents of any traditional school—and sometimes incorporating elements of utilitarianism, comparative law theory, and sociolegal methodology—these modernists reached very different conclusions than traditionalists about how the state should resolve disputes in the modern era and what types of Islamic statutes were permissible.<sup>30</sup>

Modernism’s flexibility led modernist Islamic intellectuals in very different directions. Some proposed unprecedented, socially progressive, and politically liberal interpretations of God’s moral command. Other modernist intellectuals, free to depart from the traditional precedents of the school and from the traditional approach to ethical interpretation, argued that the traditional interpretation was not conservative *enough*. In their opinion, the traditional schools had permitted too many departures from the prophetic practice. They thus proposed new, socially reactionary—and sometimes politically authoritarian—interpretations of God’s law.<sup>31</sup>

As these developments were taking place, constitutions began to appear in the Muslim world. As the 20th century progressed, there came to be growing consensus in majority Sunni states that the constitution of a Sunni-majority country should include a provision codifying the principle of *siyasa shar‘iyya*.<sup>32</sup> That is to say, it should allow for a secular government (meaning people who were not trained scholars) but it should bar any government not only from violating liberal rights but

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<sup>28</sup> *Id.* at 59–60.

<sup>29</sup> *Id.* at 73.

<sup>30</sup> *Id.* at 80–99.

<sup>31</sup> For more information on this point and how it developed in the Afghan context, see ROY, *SUPRA* NOTE 14.

<sup>32</sup> Ahmed & Ginsburg, *supra* note 7; Brown and Revkin, *supra* note 2.

also from acting in a fashion that could not be reconciled with the core principles of Islamic law—usually understood by modernists to include both rules announced clearly in scripture and the overarchingly implied principle that human behavior should try to promote the “goals of the law.”

As Islamic constitutions began to be drafted, Sunnis disagreed about who should be trusted to police the state’s compliance with core Islamic principles.<sup>33</sup> Among Sunnis who continued to trust the classically trained *‘ulama* to the exclusion of all others, state law should have been subject to review and approval by classically trained scholars. Among Sunni modernists, who did not believe that modern Muslims should defer to the classically trained *‘ulama*, Muslim judges trained in secular law schools—or even individuals, participating in the democratic process and expressing their right to evaluate Islamic law for themselves—had the authority to evaluate the “Islamic-ness” of legislation.<sup>34</sup> Thus, Sunni Islamic constitutions increasingly shared common rights provisions and a common substantive requirement that state law respect core norms. But they established different institutions and mechanisms to ensure that state law respected those rights and Islamic provisions.

In the modern world, Shi‘ite thinking about constitutionalism came to focus on a different issue. Although modernist intellectuals did appear in majority Shi‘ite communities, the majority of Shi‘ites seem to have retained respect for the classically trained, traditional *‘ulama*.<sup>35</sup> Through the 21st century, Shi‘ites continued to assume that the traditionalist *‘ulama* were uniquely positioned to identify the core elements of God’s command and to decide when a state law was impermissibly inconsistent with those core elements. Although Shi‘ite theorists, unlike Sunni theorists, were in agreement about whose interpretation of Islamic law bound the state, they came to disagree on a different question: Should those authoritative interpreters (the traditionalist *‘ulama*) be given policymaking roles in the government?

As the 20th century progressed, a number of Shi‘ite jurists continued to maintain a “quietist” political platform that implicitly adopted the logic of the Sunni theory of *siyasa shar‘iyya*—that executive and legislative power should rest with secular authorities who had amassed power and had been trained to use it effectively. These jurists also believed that the secular authorities should be given significant autonomy to establish uniform rules for the people. Thus, the job of the *‘ulama* was an important but limited one: to instruct people in the proper way to analyze God’s

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33 Lombardi, *Designing Islamic Constitutions*, *supra* note 2.

34 For a helpful survey of these institutions across the Muslim world, *see id.*

35 MOHSIN KADIVAR, NAZARIYA HA-YE DAWLAT DAR FIQH-E SHI‘A [THEORIES OF STATE IN SHI‘ITE JURISPRUDENCE] (1396) [1997]; *see also* Saïd Amir Arjomand, *Islamic Constitutionalism*, 3 ANNU. REV. L. & SOC. SCI. 115, 117–119 (2007).

law and to police the outer boundaries of the ruler's discretionary law.<sup>36</sup> These jurists recognized the limits of their authority. Because there were many questions on which the jurists had no definitive and unanimous answer as to God's law, they defined their role in legitimating state law primarily as identifying those few questions on which there was, in fact, a definitive answer and denouncing any law that indisputably required people to violate a definitive rule. This authority was to be used cautiously and from a position as advisors or judges and not from a position of executive or legislative authority.<sup>37</sup>

Against this position, a number of leading Shi'ite clerics in the second half of the 20th century, most notably the Iranian cleric Ayatollah Khomeini, argued that the *'ulama's* authoritative ethical insight allowed clerics—and indeed, it *required* them—to play an active role in forming the state's policies.<sup>38</sup> Espousing a principle called *Velayat al-Faqih* (Guardianship of the Jurist), Khomeini insisted that the class of *'ulama* should do more than merely speak out when a secular ruler did something that was obviously *wrong*. Rather, adherents of *Velayat al-Faqih* believed the *'ulama* should take positions in the executive and legislative branch to ensure that the government did things that were probably *right*.<sup>39</sup>

The Shi'ite scholars who have continued to embrace the quietist position look up to Ayatollah Khomeini who had students and admirers in almost every country.<sup>40</sup> When Ayatollah Khomeini successfully led an Islamic revolution that installed a clerical government in Iran (thus implementing the principle of *Velayat al-Faqih*), many Shi'ites grew to embrace his alternative vision.

## II. ISLAM IN MODERN AFGHANISTAN

The nation-state of Afghanistan emerged in the 19th and early 20th centuries. Although the territories that fell within its borders were religiously diverse and contained a number of Shi'ite regions, the country had been dominated for centuries by Sunni rulers.<sup>41</sup> The traditional Sunni *'ulama* controlled religious politics and had

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36 See e.g., Mohammad Kalantari, *The Shi'i Clergy and Perceived Opportunity Structures: Political Activism in Iran, Iraq, and Lebanon*, 48 BRIT. J. MIDDLE E. STUD. 241, 245 (2021).

37 *Id.*

38 On Khomeini's views, see IMAM KHOMEINI, ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI (1941–1980) (trans. Hamid Algar, 1981); Hamid Mavani, *Ayatullah Khomeini's Concept of Governance (Wilayat Al-Faqih) and the Classical Shi'i Doctrine of Imamate*, 47 MIDDLE E. STUD. 807 (2011).

39 Mavani, *supra* note 38.

40 On Khomeini's views, see AL-SAYYID ABU AL-QASIM AL-MUSAWI AL-KHUMAYNI, PROLEGOMENA TO THE QUR'AN (trans., Abdulaziz Sachedina, 1998).

41 For more on the political history of Afghanistan, see LOUIS DUPREE, AFGHANISTAN (1973); JONATHAN LEE, AFGHANISTAN: A HISTORY FROM 1260 TO THE PRESENT (2018).

determined the content of Islamic law the state had to apply.<sup>42</sup> In early 20th century Afghanistan, as in other parts of the Muslim world, however, modern Islamists began to appear in the cities as a new generation of Afghans started to engage with the teachings of modernist Islamic intellectuals (which the Afghans called *roshan fikran* or, if singular, *roshanfikir*).<sup>43</sup>

In Afghanistan, Islamic modernists first emerged during the reign of King Habibullah Khan (1901–19).<sup>44</sup> Modernists became increasingly influential during the reign of King Amanullah Khan (1919–29), convincing him to adopt legislation which permitted (and sometimes required) behavior that the traditionalist *‘ulama* deemed ethically suspect.<sup>45</sup> Inspired by his modernist Islamic advisors, Amanullah directed courts in many areas of the law to stop their traditional practice of resolving disputes by reasoning out rules of decision on a case-by-case basis and working from the precedents of the classical Hanafi school of doctrine. Amanullah instead instructed the courts to apply Islamic statutes drafted by committees of modernist intellectuals.<sup>46</sup> Deeply disturbed by this break from tradition—and highly offended by some of the modernist interpretations of Islamic law that were integrated into the new statutes—a number of conservative factions, encouraged by the traditional *‘ulama*, revolted against Amanullah and his rule.<sup>47</sup> After that first revolt, Amanullah amended his new constitution in a way that implied (and arguably required) state laws going forward to respect Islam as understood by traditional *‘ulama* trained in the doctrines of the Hanafi school of law. This meant that the courts had to stop acting upon modernist understandings of Islam that departed from traditional Hanafi views.<sup>48</sup> A few years later, feeling that Amanullah was ignoring his promise, the

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42 OLESEN, *supra* note 13, at 36; *see also* SENZIL NAWID, RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN, 1919-29: KING AMAN-ALLAH AND THE AFGHAN ULAMA, chapter 2 (1999).

43 ROY, *supra* note 14, at 69.

44 For a background of these Afghan modernists, *see* FAIZ AHMED, AFGHANISTAN RISING: ISLAMIC LAW AND STATECRAFT BETWEEN THE OTTOMAN AND BRITISH EMPIRES (2017); on early modernist trends in Afghanistan, *see* Nile Green, *The Trans-Border Traffic of Afghan Modernism: Afghanistan and the Indian “Urdusphere”*, 53 COMP. STUD. SOCIETY & HIST. 479 (2011).

45 *See, e.g.*, NAWID, *supra* note 40.

46 For a comprehensive list of these “Islamic statutes” that courts were required to apply, *see* LEON POULLADA, REFORM AND REBELLION IN AFGHANISTAN, 1919-1929: KING AMANULLAH’S FAILURE TO MODERNIZE A TRIBAL SOCIETY 99–103 (1973).

47 Dupree, *supra* note 40, chapter 20; Senzil Nawid, *The Khost Rebellion: The Reaction of Afghan Clerical and Tribal Forces to Social Change*, 56 REV. OF DEPART. OF ASIAN STUD. & DEPART. OF STUD. & RSCH. ON AFRICA & ARAB COUNTRIES 311, 311 (1996); *see also* Shamshad Pasarlay, *The Making and the Breaking of Constitutions in Afghanistan*, 40 ARIZ. J. INT’L. & COMP. L. 59, 71 (2023).

48 OLESEN, *supra* note 13, at 138–144; on the amendments to the constitution, *see* Shamshad Pasarlay, *Crafting Amendments during Political Upheaval: Amendment Models and Constitutional Stability in Afghanistan*, in THE ARCHITECTURE OF CONSTITUTIONAL AMENDMENTS: LAW, HISTORY, POLITICS (Richard Albert, ed., 2023).

conservative factions, again egged on by the traditional *'ulama*, revolted and deposed the king.<sup>49</sup>

Under the reign of Amanullah's successor, Nadir Shah (1930–1933), a new constitution was ratified in 1931, and the traditionalist *'ulama* regained their role as the primary public voices on questions of Islam. This included their authority to resolve questions about the legitimacy of the government and legal disputes on a case-by-case basis (just as common law countries left many legal issues to be decided on a case-by-case basis by judges).<sup>50</sup> The 1931 Constitution codified the *'ulama*'s restored role, stating that all cases in the Islamic courts should be resolved on the basis of the Hanafi jurisprudence.<sup>51</sup>

Recognizing that the *'ulama* could not be displaced from their central roles in shaping Afghans' views about state legitimacy or establishing the rules that would regulate much of the day-to-day social and economic life of Afghans, the Afghan state took a new approach. In the mid-1930s, the state embarked upon a project to incrementally bureaucratize the *'ulama* and transform them into civil servants who would function at the behest of the state. And at the same time, it began to establish modern secular universities teaching secular subjects such as engineering, science, education, literature, and foreign languages.<sup>52</sup>

The Afghan government designed the new educational programs with two goals in mind. First, they sought to produce a new cadre of elite Sunni *'ulama* with the capacity (and hopefully the eagerness) to develop and institutionalize a moderate, modernist-inflected understanding of Islam. Second, they desired to create a secular, educated class of Afghans, who would be predisposed to embrace the new understanding of Islam and would use their skills to develop a new country.<sup>53</sup> Correspondingly, the 1964 Constitution opened up the political landscape and legalized political parties which the state hoped would be used by progressive, liberal, modernist Afghan elites.<sup>54</sup> But not all Islamists were the products of the

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49 Pasaaray, *Crafting Amendments*, *supra* note 46, at 142–143; for a detailed discussion of the rebellion, see POULLADA, *supra* note 44, at 160–195.

50 VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION, 1880-1946*, 295–296 (1969); *see also* MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN: A STUDY OF CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY* (1997).

51 *See* Afg. Const. of 1931, art. 88. For a history of the drafting of the 1931 Constitution, *see* Shamshad Pasaaray, *Rethinking Afghanistan's Longest-lived Constitution: The 1931 Constitution through the Lens of Constitutional Endurance and Performance Literature*, 10 ELON L. REV. 283 (2018).

52 Abdul Satar Sirat, *Sharia and Islamic Education in Modern Afghanistan*, 23 MIDDLE EAST J. 217, 217; GILLES DORRONSORO, *REVOLUTIONS UNENDING: AFGHANISTAN, 1979 TO THE PRESENT* 50 (2005); OLESEN, *supra* note 13, at 186–190.

53 Olesen, *supra* note 13, at 188.

54 For a complete discussion of the politics of that time, *see* Ralph Magnus, *The Constitution of 1964: A Decade of Political Experimentation*, in *AFGHANISTAN IN THE 1970S* (Louis Dupree & Linette Albert, eds., 1974); *see also* Ralph Magnus, *The Ideology and Organization of Royalist Revolutions: A Comparative Study of Iran's White Revolution and Afghanistan's New Democracy* (PhD. Dissertation, University of California Berkeley, 1970), on file with the authors.

official, state-sponsored centers of religious learning. Many were trained in traditional *madrastas* (schools of traditional Islamic knowledge) which continued to operate throughout the country.<sup>55</sup>

*A. The Emergence of Sunni and Shi'ite Islamism in Afghanistan in the 1960s*

In the 20th century, many Muslim countries saw the rise of movements that Roxanne Euben and Muhammad Qasim Zaman have described as “Islamist.”<sup>56</sup> They use this term to refer to a politically engaged group of Muslims who were inspired by Islamic modernism’s call to examine Islamic scriptures with fresh eyes—a development that permits (but does not require) them to depart from some of the understandings and ethical teachings of traditionalist Islam as taught by *‘ulama* who were committed to the classical Sunni schools of legal doctrine.<sup>57</sup>

Within the state religious teaching institutions, specifically within the Shari‘a faculty of Kabul University, some of the Sunni faculty and students were being exposed to modernist ideas that migrated from Egypt and other parts of the Muslim world into Afghanistan.<sup>58</sup> These Islamists were inspired by modernism’s call to reevaluate old assumptions and to recommit to the goal of establishing a state in which people were able (and encouraged) to follow an Islamic way of life. At the same time, they were repelled by the progressive conclusions of the state’s preferred liberal modernists.<sup>59</sup> Thus, contrary to what the state had hoped, the official “government *madrastas* . . . in fact . . . produce[ed] the Islamists who were the most antagonistic towards the central authority”—the state<sup>60</sup>—and who wanted to topple it through violent action. Similarly, within the “secular” faculties of the state universities (such as the engineering and medical faculties), religious study groups formed using modernist methods in the service of conservative, even reactionary, visions of the ideal religious state.<sup>61</sup> These groups were similarly aware, and supportive, of the conservative movements of Islamic revival that were emerging and becoming powerful in other parts of the Muslim world, such as Egypt, Pakistan, and Iran.<sup>62</sup> By the 1960s, this new class of religious scholars and pious technocrats,

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<sup>55</sup> DORRONSORO, *supra* note 50, at 50.

<sup>56</sup> See generally Roxanne Euben & Muhammad Qasim Zaman, *Introduction*, in PRINCETON READINGS IN ISLAMIST THOUGHT: TEXTS AND CONTEXTS FROM AL-BANNA TO BIN LADEN (Roxanne Euben & Muhammad Qasim Zaman, eds., 2009).

<sup>57</sup> *Id.*

<sup>58</sup> MOHAMMAD IKRAM ANDESHMAND, NOHZAT HAI ISALMI AFGHANISTAN [AFGHANISTAN’S ISLAMIST MOVEMENTS] (1392 [2013]).

<sup>59</sup> OLESEN, *supra* note 13, at 227–250; ROY, *supra* note 13, at chapter 4.

<sup>60</sup> DORRONSORO, *supra* note 50, at 50. Italics original.

<sup>61</sup> See, e.g., Tahir Amin, *Afghan Resistance: Past Present, and Future*, 24 ASIAN SURVEY 373, 376–377 (1984).

<sup>62</sup> See generally Andeshmand, *Afghanistan’s Islamist Movements*, *supra* note 57.

who we will call the “Islamists,” had become politically active in the country and formed organized proto-political parties.<sup>63</sup>

Initially, the founders of the Islamist movement did not seem to participate in political activities; however, they made their circles aware of several Muslim political parties that were operating in other regions of the Muslim world—specifically the Muslim Brotherhood in Egypt.<sup>64</sup> After the leftist Peoples Democratic Party of Afghanistan (PDPA) began to take advantage of the expanded political space provided under the 1964 Constitution, the Islamists, too, sprang into political action and stretched their reach to the campus of Kabul University and other *madrasas* around the country.<sup>65</sup> At that point, Burhanuddin Rabbani, Abdul Rab Rasool Sayyaf, Sebghatullah Mojaddadi, Mohammad Musa Tawana, and other prominent members—who would later lead the mujahidin parties—joined the Islamist movement.<sup>66</sup> As the Islamist movement became politically more active and disruptive towards the mid-1970s, the government arrested its apparent founder, Ghulam Moham mad Niazi, and other key members.<sup>67</sup> Thereafter, Rabbani became the leader of the movement and named it *Jami‘at-i Islami-ye Afghanistan* (Islamic Society of Afghanistan, hereinafter the *Jami‘at*).<sup>68</sup>

In short, the Afghan government attempted during the 1950s and 60s to reform education with the goal of producing a new elite class of Sunni religious scholars and citizens aware of the modernist challenge to traditional Islam and eager to embrace liberal modernist understandings of Islam. Although this project made significant strides, it also led to significant backlash from a variety of different communities, each with its own reason to be skeptical of the government program. And this backlash grew ever more intense as the government came under the influence of socialists supported by the Soviet Union, who tried to impose even more aggressive projects of state centralization, economic centralization, and social reform.

### B. *The Emergence of Shi‘ite Islamism in Afghanistan*

While these developments were unfolding within the politically dominant Sunni communities of Afghanistan, the minority Shi‘ite community was also

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63 See ROY, *supra* note 13, chapter 4; see also Shah M. Tarzi, *Politics of Afghan Resistance Movement: Cleavages, Disunity, and Fragmentation*, 31 ASIAN SURVEY 479 (1991).

64 David Edwards, *Summoning Muslims: Print, Politics, and Religious Ideology in Afghanistan*, 52 THE J. ASIAN STUD. 609, 612 (1993).

65 Amin, *supra* note 60, at 377.

66 *Id.* at 376; ROY, *supra* note 13, at 70.

67 Mohammad Anwar Khan, *The Emergence of Religious Parties in Afghanistan*, in AFGHANISTAN AND THE FRONTIER 19 (F. Marwat and S. Kakakhel, eds., 1993).

68 HAFIZULLAH EMADI, DYNAMICS OF POLITICAL DEVELOPMENT IN AFGHANISTAN: THE BRITISH, RUSSIAN, AND AMERICAN INVASIONS 131 (2010); OLESEN, *supra* note 13, at 231.

evolving. While a form of Shi'ite modernism and political activism appeared in Afghanistan in the 1950s and was, for a brief time, politically important, most Afghan Shi'ites retained a strong respect for the traditional Shi'ite *'ulama* and tended to defer to their traditionalist understanding of Islam.<sup>69</sup> Within the Afghan Shi'ite *'ulama*, the leading Shi'ites were acutely aware of their vulnerability as a religious minority in a majority-Sunni society. As the Afghan government in the 1950s and 60s began cautiously to open up political space and allow for political organization, a group of politicized Shi'ites began to call on the state to address (and redress) a history of oppression by Sunni rulers and the Sunni majority.<sup>70</sup> These Shi'ite groups were committed to encouraging a self-conscious identity among Afghanistan's Shi'ites and to gaining power for that religious community—or at the very least, to gaining some autonomy.<sup>71</sup>

In short, Shi'ite political groups wanted to ensure that they (1) had some share of power in making national decisions and (2) some measure of autonomy to reject the rules favored by the Sunni majority and, instead, to act in accordance with Shi'ite ethical norms, as taught by their *'ulama* trained in the great centers of Shi'ite learning in Iran and Iraq.<sup>72</sup> The quest, however, experienced serious drawbacks due to disagreements between the politically radical and cautious wings of the *'ulama* in Hazarajat and elsewhere—a contest that bred civil war within the Shi'ite stronghold for years.<sup>73</sup>

Although some within Sunni and Shi'ite community embraced unprecedented experiments in intrusive Islamic government as a way to impose a properly “Islamic” lifestyle throughout the country, others within each of these communities tried to synthesize traditional and modern visions of an Islamic society. These latter groups envisioned a society where people, with encouragement from a pious government, could in many respects be trusted with respect to many issues, to regulate themselves.

### III. THE AFGHAN JIHAD OF 1979–1992 AND DRAFTING PROPOSED ISLAMIST CONSTITUTIONS

The Afghan jihad of 1979–1992, waged in response to the Soviet invasion of the country and its installed government, sparked a commitment within

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69 For these developments, see NIAMATULLAH IBRAHIMI, *THE HAZARAS AND THE AFGHAN STATE: REBELLION, EXCLUSION AND THE STRUGGLE FOR RECOGNITION* 109–114 (2017); see also David Edwards, *The Evolution of Shi'i Political Dissent in Afghanistan*, in *SHI'ISM AND SOCIAL PROTEST* 214 (Juan Cole & Nikki Keddie, eds., 1986).

70 IBRAHIMI, *supra* note 60, at 105–106; see also SAYED ASKAR MOUSAVI, *THE HAZARAS OF AFGHANISTAN: AN HISTORICAL, CULTURAL, ECONOMIC AND POLITICAL STUDY*, chapter 7 (1997).

71 IBRAHIMI, *supra* note 60, at 105–106

72 *Id.* at 110–111.

73 Robert Canfield, *New Trends among the Hazaras: From “The Amity of Wolves” to “The Practice of Brotherhood,”* 37 *IRANIAN STUD.* 241, 243, 249 (2004); see also IBRAHIMI, *supra* note 60, chapter 5.



Afghanistan to maintain (or establish) a self-consciously Islamic society. While some Muslims looked to traditional scholars for guidance and others looked to modernists, almost all distrusted the increasingly powerful governments. These governments were ever more intrusively imposing top-down programs of “modernization” that seemed insufficiently attentive both to the goal of ensuring respect for Islam and, inevitably, to their obligation to respect Islamic law.<sup>74</sup>

A series of military coups in the 1970s led to the dissolution of the relatively cautious Afghan monarchy and the establishment of a series of authoritarian nationalist governments who pursued increasingly aggressive policies of top-down economic and social modernization. Facing widespread resistance, a government led by the Afghan communist party invited the Soviet army to enter Afghanistan and to fight the growing insurgency.<sup>75</sup> Among the fiercest and best-organized opponents of the new government policies and the Soviet invasion were Sunni Islamist political parties, and new organizations formed by politicized Shi‘ite Islamists. The Sunni and Shi‘ite Islamists eventually organized militias that entered into shaky alliances with each other to fight the Soviet-backed government of Afghanistan.<sup>76</sup>

After the alliance of Sunni Islamist parties, alongside some allied Shi‘ite political militias, forced the Soviet withdrawal and toppled the Afghan government, the alliances began to fray rapidly.<sup>77</sup> A triumphant alliance of Shi‘ite and Sunni parties were suddenly forced to grapple with the fact that they had different understandings about the ideal Islamic society—both in terms of how it would be elected and structured as well as in terms of the rules that it would impose upon society.<sup>78</sup>

Their debates led to the development of multiple draft constitutions. Each reflected a different vision of the Islamic state in a diverse Islamic country, a country which contained different religious sects with many competing ideological factions within those sects.<sup>79</sup> Among these was a proposed Sunni constitution for the mujahidin government that was produced in 1993 by Burhanuddin Rabbani’s *Jami‘at* party.<sup>80</sup> Dissatisfaction with this constitution led to plans of drafting an

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<sup>74</sup> OLESEN, *supra* note 13, at chapters 7 & 8.

<sup>75</sup> AMIN SAIKAL, *MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* 194–197 (2004). For a detailed history of the Soviet Union’s involvement and invasion, see ANTHONY ARNOLD, *AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE* (1981).

<sup>76</sup> SAIKAL, *supra* note 66, chapters 8 & 9; LEE, *supra* note 39, chapter 13.

<sup>77</sup> For the disasters that the collapse of each of these alliances caused, see Goodson, *supra* note 12; see also AMIN SAIKAL & WILLIAM MALEY, *REGIME CHANGE IN AFGHANISTAN: FOREIGN INTERVENTION AND THE POLITICS OF LEGITIMACY* (1991).

<sup>78</sup> OLESEN, *supra* note 13, at 290–292.

<sup>79</sup> For more details on these constitutions, see Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis through the Lens of Coordination and Deferral Theory* (PhD Dissertation, University of Washington, 2016), on file with the authors.

<sup>80</sup> For a complete exploration of process that produced this constitution, see Shamshad Pasarlay, *Islam and the Sharia in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective*, 3 *INDON. J. INT’L. & COMP. L.* 183 (2014).

alternative Sunni constitution by other mujahidin parties. Disturbed by the debates which led to the production of the Sunni draft constitutions—and the lack of any concern to ensure Shi‘ites had a guaranteed role in the national government (or even credible guarantees of autonomy within Afghanistan, whose leaders were likely to be Sunni Islamists)—the *Hizb-i Wahdat*, a Shi‘ite political party-militia that was part of the mujahidin alliance proposed an alternative constitution for a more inclusive, multi-sectarian federal Islamic “republic.”<sup>81</sup> And as an alternative to the alternative, the *Harakat-i Islami* had already written a draft constitution in the 1980s, which it hoped would be incorporated into the mujahidin government’s new constitution.

#### A. *The Formation of Sunni Political Parties and the Drafting of their Constitution*

In the 1970s, the Islamists remained largely aloof from politics but “noted with anxiety the degree to which [their archrivals,] the communists, . . . were infiltrating the state machine.”<sup>82</sup> By 1973, the Afghan communist party, the PDPA, had become so emboldened that it helped Mohammad Daoud Khan stage a coup and topple the monarchy.<sup>83</sup> Daoud was “a man of secular outlook whose support came from the communists, [and] was in every respect totally and implacably opposed to the Islamists.”<sup>84</sup> Daoud’s regime (1973–1978) placed communists in positions of authority and violently suppressed the Islamist movement and its leaders. Some Islamist leaders—including Rabbani, Hekmatyar, Sayyaf and Mojaddadi—fled to Peshawar, Pakistan, where the Pakistani political and military establishments received them with open arms,<sup>85</sup> “provid[ing them]. . . with basic military training, cash and weapons” and encouraging them to immediately begin a coordinated insurgency against the Afghan government.<sup>86</sup>

While some of the exiled Islamists were enthusiastic about this project, others counseled delay. Disagreement led Hekmatyar to separate from Rabbani and lead the radical faction *Hizb-i Islami-ye Afghanistan* (hereinafter the *Hizb*), which immediately began military activities.<sup>87</sup> But Rabbani rallied many other senior Islamists and remained the head of the larger *Jami‘at*, which bided its time.<sup>88</sup>

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81 See Shamshad Pasarlay, *Shi‘i Constitutionalism in Afghanistan: A Tale of Two Draft Constitutions*, 20 AUSTRALIAN J. ASIAN L. 277 (2020).

82 ROY, *supra* note 13, at 74.

83 Mohammad Hasan Kakar, *The Fall of the Afghan Monarchy in 1973*, 9 INT’L. J. OF MIDDLE E. STUD. 195, 199 (1978).

84 ROY, *supra* note 13, at 74.

85 LEE, *supra* note 39, at 586; EMADI, *supra* note 59, at 133.

86 LEE, *supra* note 39, at 586.

87 ROY, *supra* note 13, at 75; EMADI, *supra* note 59, at 131.

88 ROY, *supra* note 13, at 75;

While the Sunni Islamist opposition was organizing itself in Pakistan,<sup>89</sup> the Afghan communists were consolidating their control within the new government. Having backed President Daoud's coup in 1973, the PDPA was no longer content to stay behind the scenes. In 1978, it staged a bloody coup and ousted Daoud.<sup>90</sup> Failing to realize how weak it was in "legitimacy, administrative capacity and popular support,"<sup>91</sup> the PDPA began to forcibly impose an ill-advised Marxist-Leninist socio-political program of total economic and social reform. This program proved mystifying to most Afghans and repugnant to the vast majority of Afghans who actually understood it.<sup>92</sup> In 1979, as revolts began to break out throughout the countryside, the Soviet Union invaded Afghanistan to ensure the PDPA's survival.<sup>93</sup>

The Soviet invasion prompted several countries, including the U.S., Saudi Arabia, and Pakistan, to pour money and weapons into the Islamists' hands. And those Islamists who had previously counseled patience decided to prosecute what they described as a *jihad* (holy war) against the Kabul government and its Soviet backers.<sup>94</sup> As its military successes began to grow, the Sunni Islamist movement fragmented into several factions, which became known jointly as the Sunni mujahidin (holy warriors) parties. Each had fighters on the ground and enjoyed foreign support. These parties included the *Jami'at*, founded by Rabbani; the *Hizb*, led by Hekmatyar; the *Ittehad-i Islami* (Islamic Unity) founded by Sayyaf; the *Harakat-i Inqilab-i Islami* (Islamic Revolutionary Movement) founded by Mohammad Nabi Mohammadi; the *Mahaz-i Milli-ye Islami* (National Islamic Movement) founded by Sayed Ahmad Gillani; and the *Jabha-i Nejat-i Milli-ye Islami* (Islamic Salvation Front) founded by Mojaddidi.<sup>95</sup>

Although the Sunni mujahidin parties were united by their opposition to the communist government and its Soviet allies and by their desire for some type of Islamic state, they did not share a common vision for what that next Afghan state should look like.<sup>96</sup> In 1989, when the Soviets withdrew their troops from Afghanistan and the fall of the communist government seemed imminent, the leaders of the rival Sunni mujahidin parties began to jockey for power within the alliance, each with the goal of shaping the next state in its preferred form.<sup>97</sup>

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89 SAIKAL, MODERN AFGHANISTAN, *supra* note 66, chapter 8.

90 LEE, *supra* note 39, at 593–394.

91 MODERN AFGHANISTAN, *supra* note 66, at 188.

92 *Id.*

93 *Id.* at 194; *see also* JOHN FULLERTON, THE SOVIET OCCUPATION OF AFGHANISTAN (2012).

94 *See generally* ANTONIO GIUSTOZZI, WAR, POLITICS, AND SOCIETY IN AFGHANISTAN: 1978-1992 (2000).

95 Nazif Shahrani, *Introduction: Marxist "Revolution" and Islamic Resistance in Afghanistan*, in *REVOLUTIONS & REBELLIONS IN AFGHANISTAN: ANTHROPOLOGICAL PERSPECTIVES* 45–46 (Nazif Shahrani & Robert Canfield eds., 1984).

96 *Id.* 45–47; *see also* OLESEN, *supra* note 13, at 281–292.

97 GOODSON, *supra* note 12, at 70–73.

While the Sunni mujahidin squabbled among themselves (and with their allies in Shi'ite militias), the communist government in Kabul was able to survive. Eventually, in 1992, the Sunni mujahidin leaders captured Kabul and tried to form an interim government.<sup>98</sup> According to their initial agreement, the mujahidin leaders agreed that the interim government would formally be headed for two months by Mojaddidi, and then for four months by Rabbani.<sup>99</sup> Immense power during this six-month period was exercised by a fifty-man leadership council (*Shura-ye Rahbari*) which included representatives from each of the mujahidin parties.<sup>100</sup> And among the important tasks assigned to the leadership council was the responsibility for drawing up plans for “a permanent government.”<sup>101</sup>

The squabbling mujahidin parties were profoundly ineffective at governance. When Rabbani's four-month period as head of the mujahidin government came to an end, the mujahidin parties had not agreed to the structure of a permanent government. But Rabbani did not step down.<sup>102</sup> Rabbani's decision infuriated the leaders of rival parties within the mujahidin alliance and led, ultimately, to a fratricidal civil war between the rival factions. After an initial round of violence in which thousands of civilians died,<sup>103</sup> the main Sunni mujahidin factions agreed in March 1993 to a new power-sharing agreement under which Rabbani's term as president of Afghanistan was extended. But, as a concession, Hekmatyar was given enhanced powers as prime minister.<sup>104</sup> Under their joint government, the mujahidin parties were given eight months to draft a new constitution that was acceptable to all factions.<sup>105</sup>

Although the agreement ushered in a period of relative peace in Kabul, Rabbani's rivals never trusted him or his party, the *Jami'at*. Rabbani's most implacable rival, Hekmatyar, never even came to Kabul.<sup>106</sup> Instead, in his capacity as “prime minister,” he unilaterally appointed cabinet ministers from a variety of allied Sunni mujahidin parties and convened cabinet sessions in his stronghold to the east of Kabul—creating, in essence, a shadow government which appeared ready, at the opportune moment, to replace Rabbani's. In mid-1993, the tensions between

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98 *Id.* at 73; OLESEN, *supra* note 13, at 292.

99 ABDUL HAMEED MUBAREZ, HAQAYIQ WA TAHLIL-I WAQAI-YE SIYASI AFGHANISTAN: AZ SUQOT-I SALTANAT TA ZUHUR-I TALIBAN [THE REALITY AND ANALYSIS OF POLITICAL DEVELOPMENTS IN AFGHANISTAN: FROM THE FALL OF THE MONARCHY TO THE RISE OF THE TALIBAN] 70 (1378) [1999].

100 GOODSON, *supra* note 12, at 73; SAIKAL, MODERN AFGHANISTAN, *supra* note 66, at 214.

101 GOODSON, *supra* note 12, at 73–74.

102 SAIKAL, MODERN AFGHANISTAN, *supra* note 66, at 214.

103 *Id.* at 214–216; *see also* LEE, *supra* note 39, at 625.

104 LEE, *supra* note 39, at 625–626.

105 GOODSON, *supra* note 12, at 74; Olesen, *supra* note 13, at 292–294; MUBAREZ, *supra* note 97, at 78.

106 LEE, *supra* note 39, at 625.

Rabbani's *Jami'at* and Hekmatyar's *Hizb* (and its allies) broke into open warfare, beginning in Kabul but soon spilling out to other parts of the country.<sup>107</sup>

Unsurprisingly, in this environment Rabbani refused to honor his obligation to work with all the other mujahidin parties to establish an inclusive constitutional drafting commission. Rabbani instead appointed a forty-four-member Commission that included no representatives from the *Hizb* or any of the powerful Shi'ite factions.<sup>108</sup> Predictably, the constitution-making process produced a draft constitution that established a strong president and a relatively weaker prime minister.<sup>109</sup> It is this constitution that is translated in this paper.

Hekmatyar predictably rejected the Commission's draft constitution on the grounds that it allowed the president's party—the *Jami'at*—to dominate all governance decisions. Hekmatyar proposed instead that the powers of the prime minister be enhanced. But the *Jami'at* rejected the proposed amendments, arguing that the proposed semi-presidential system would allow the prime minister's party (which at that time was the *Hizb*) to dominate the government.<sup>110</sup>

The members of some smaller mujahidin parties, including a number of Shi'ite parties, proposed that executive power should be vested in neither the president nor the prime minister; instead, it should be granted to a governing council with representatives from all the major mujahidin parties.<sup>111</sup> But neither Rabbani's *Jami'at* nor Hekmatyar's *Hizb* were willing to embrace this solution. Each cherished the power that it expected to wield in a presidential or semi-presidential government. More importantly, neither of these powerful Sunni Islamist factions wanted to offer Shi'ites a significant voice in government.<sup>112</sup>

Unable to reach agreement on a draft constitution, the *Jami'at*-led coalition, the *Hizb*-led coalition, and the Shi'ite parties each retreated to their strongholds and waged war against each other. By 1994, Afghanistan had descended completely into chaos. And at that point a new Islamist movement, the Taliban, emerged. Formed by students who were studying at Islamic madrasas in the countryside, the Taliban were outraged by the self-serving behavior of the existing mujahidin parties.<sup>113</sup> Through a process that remains murky, the Taliban gained access to enough weapons and training that they were able to take control quickly over most of the country.

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107 MUBAREZ, *supra* note 97, at 70–75; LEE, *supra* note 39, at 626.

108 Pasarlay, *Islam and the Sharia*, *supra* note 71.

109 Anwar Iqbal, *Afghanistan's draft constitution comes under fire*, UPI (July 18, 1992) <https://www.upi.com/Archives/1992/07/18/Afghanistans-draft-constitution-comes-under-fire/7594711432000/>.

110 Pasarlay, *The Making and the Breaking*, *supra* note 45, at 92.

111 Iqbal, *supra* note 108.

112 Canfield, *supra* note 64, at 254–258; OLESEN, *supra* note 13, at 291;

113 For a history and origins of the Taliban, see AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2000); *Fundamentalism Reborn?: Afghanistan Under the Taliban* (William Maley, ed., 1988); *THE TALIBAN AND THE CRISIS OF AFGHANISTAN* (Robert Crews & Amin Tarzi, eds., 2008).

*B. Shi'ite Islamist Constitutionalism: The Harakat-i Islami and Its Draft Constitution*

In the late 1970s, when the Sunni mujahidin parties based in Pakistan were arming themselves and forming their fractious military resistance to the Communist government in Kabul, Shi'ites in the Hazarajat region were organizing their own armed resistance to the communist regime.<sup>114</sup> In the fall of 1979, less than a year after the communist coup, Shi'ite leaders established a political organization that sought to make Hazarajat a self-governing region.<sup>115</sup> This quickly formed *Shura-ye Ittefaq Islami-ye Afghanistan* (Afghanistan's United Islamic Council, hereinafter the *Shura*) forced all government forces and officials out of Hazarajat and established in its place a "mini-state" which provided "education, communication and health services to its citizens; levied taxes; distributed identity cards; and imposed mandatory military service."<sup>116</sup>

Appalled by the Afghan government's alliance with the explicitly atheist Soviet Union and by the disruptive social and economic reforms that the Afghan government was trying to impose, a number of Shi'ite clerics supported the *Shura*. Among these was Sayed Ali Behishti, a well-known Khu'ist cleric. Behishti had been educated in one of the great Shi'ite seminaries of Iraq and was appointed to be the head of the *Shura*.<sup>117</sup>

Behishti's decision to accept a leadership post in the *Shura* was quite remarkable. Khu'ists believed that in the normal course of events, Shi'ite *'ulama* should avoid public political activities and confine themselves to Islamic "teaching and preaching."<sup>118</sup> That is to say, Khu'ists and students like Behishti thought that, normally, scholars should focus on advising the Muslim faithful on questions of God's law. If the state chose to use uncoded Shi'ite law as the rule of decision in certain types of cases, a cleric could, of course, serve as a judge or jurisconsult. Or if the state wanted to confirm that a proposed statute did not violate core principles of Shi'ite Islamic law, it could seek the opinion of a cleric. But in the vast range of areas in which reasonable Shi'ites could disagree about God's will for regulating the state, Khu'ists insisted that the decision about what to do (and what the law should say) must be left to secular leaders.<sup>119</sup>

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<sup>114</sup> Canfield, *supra* note 64, at 247–248.

<sup>115</sup> Ibrahim, *supra* note 60, chapter 4; Edwards, *supra* note 57, at 222–223; Kristian Berg Harpviken. Political Mobilization among the Hazara of Afghanistan: 1978-1992, 36 (Department of Sociology, University of Oslo, 1996), available at, <https://www.prio.org/publications/4615>; IBRAHIMI, *supra* note 60, at chapter 4.

<sup>116</sup> IBRAHIMI, *supra* note 60, at 120.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 122.

<sup>119</sup> *Id.*

As a Khu‘ist, Behishti was only willing to move from a role as teacher and advisor into politics because, for him, unprecedented circumstances temporarily required this. To Behishti and other Khu‘ist clerics in the *Shura*, the communist coup and the Soviet invasion of their Muslim lands constituted an extraordinarily dangerous environment of sociopolitical upheaval—one that was extremely dangerous to Shi‘ite society. In such a situation, clerics could—and were, arguably, required to—set aside their policy of abstaining from political office to do whatever they could to help defend society, even if that meant taking positions of political leadership.<sup>120</sup> With the approval of Behishti, the *Shura* leaders “concentrated their efforts on defending and securing control of the liberated areas of the Hazarajat until the establishment of an ‘Islamic republic’ in the country.”<sup>121</sup> Behishti offered (and the Khu‘ist on the *Shura* accepted) clerical participation in political policy making only on the implied understanding that after the emergency, the clerics would retreat from active engagement in politics and return to their traditional role of advising on questions of God’s law and of identifying for the public a few “red lines” that a secular government must not cross if it wanted to describe itself as Islamic.<sup>122</sup>

Over time, the *Shura*’s political quietism and its restrained ambition frustrated the growing number of radical Khomeinist jurists. The Khomeinists argued that Shi‘ite jurists had no choice but to actively establish and participate in an Islamic state committed to ensuring that all citizens followed God’s law as interpreted by the clerics. As a result, an internal conflict between the two camps engulfed the Shi‘ite mainland.<sup>123</sup> In the early 1980s, when the Islamic Republic of Iran began to “export” its brand of “Islamic Revolution” to other parts of the Shi‘ite world, the Khomeinists in Hazarajat bolstered their position and formed several notable political organizations to challenge the *Shura*.<sup>124</sup> Afghan Shi‘ites who resided in Iran or had gone there to study poured into Hazarajat, and by the mid-1980s, the Khomeinists had grown so powerful that they ousted the *Shura* and gained control of the internal Shi‘ite politics.<sup>125</sup>

The fall of the *Shura* did not, however, spell the end of Khu‘ism in Afghanistan. The *Harakat-i Islami* was one of the first Shi‘ite political parties that emerged in the early 1980s. It was formed in early 1979 in Qom, Iran, by a group of pro-Khu‘i Shi‘ite jurists led by Sheikh Asef Mohsini.<sup>126</sup> Like Behishti, Mohsini had also been

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120 The extreme version of this proposition was propounded by the Khomeinists in Afghanistan.

121 IBRAHIMI, *supra* note 60, at 120.

122 *Id.*

123 Canfield, *supra* note 64, at 247–250; MOUSAVI, *supra* note 61, at chapters 7 & 8.

124 See Hafizullah Emadi, *Exporting Iran’s Revolution: The Radicalization of the Shiite Movement in Afghanistan*, 31 MIDDLE E. STUD. 1 (1995).

125 Emadi, *Dynamics*, *supra* note 67, at 143–144.

126 BASIR AHMAD DAWLATABADI, SHINAS-NAMA-YE AHZAB WAS JIRYANAT-E SIYASI-YE AFGHANISTAN [INTRODUCTION TO THE POLITICAL MOVEMENTS AND PARTIES OF AFGHANISTAN] 260 (1371) [1992].

a student of Khu‘i and championed Khu‘i’s views within the *Harakat* movement.<sup>127</sup> Its founding charter declared that its primary goal was to establish “a just Islamic republic based on the lifegiving laws of the Quran, the Sunna, wisdom and thought.”<sup>128</sup> Thus, fighting for the restoration of Islam and liberating the Muslims of Afghanistan from the Afghan communists and foreign invaders were the party’s top priorities.<sup>129</sup> But this meant something very different to the Khu‘ists than it meant to Khomeini in neighboring Iran. Like the *Shura*, the *Harakat* charter, in fact, implicitly encouraged jurists to surrender control of the territories it had captured by force to an “Islamic republic” once it was formed and to retreat to their basic tasks of teaching, preaching, and policing the handful of Islamic “red-lines” that elected political leaders could not transgress when regulating in the public interest.<sup>130</sup>

In the wake of the pro-Khomeini parties’ relentless onslaught against the Khu‘ists, Mohsini’s *Harakat* moved to Pakistan and headquartered in the city of Quetta. There, Mohsini “began to develop closer ties to Pakistan and [the] Peshawar-based [Sunni] mujahedin group.”<sup>131</sup> This new alliance and proximity to Pakistan ensured that the *Harakat* could remain active in Afghan Shi‘ite politics after the triumph of the Iran-backed Islamists in Hazarajat.

The *Harakat* was an ethnically diverse national Shi‘ite party trying to conceptualize and sell to its Sunni allies a vision of a multi-sectarian, unitary Islamic state in which senior Sunni and Shi‘ite clerics would play only a significant supervisory role in the state through the institution of a special Council on Codification.<sup>132</sup> This Council would identify the issues on which Islamic law was settled among all sects, among all Sunni, and among Shi‘ites. The law would also have required each sect to perform the actions that its clerics on the Council had, respectively, identified as obligations under Islamic law. With respect to unresolved legal questions on which reasonable people could disagree, the *Harakat* constitution permitted politicians—who more often than not lacked clerical training—to exercise their judgment as to what rule would best promote social welfare.<sup>133</sup>

The *Harakat* constitution is, in short, a Khu‘ist revisioning of Khomeini’s Islamic Republic in neighboring Iran—a republic where clerics not only staff supervisory bodies like the Council of Codification but also place one of their own in a position of Supreme Leader with extensive powers unilaterally to regulate, adjudicate, and make policy decisions on unsettled matters of Islamic law.

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127 Roy, *supra* note 14, at 146

128 The *Harakat* Charter produced in *id.*, at 261–269.

129 *Id.*

130 IBRAHIMI, *supra* note 60, at 120.

131 *Id.*, at 157.

132 See the Constitution of *Harakat* Party (1980), chapter 6.

133 *Id.*



**DRAFT OF THE CONSTITUTION OF THE ISLAMIC  
REPUBLIC OF AFGHANISTAN (TARH-I MOSAWIDA-YE  
QANUN-I ASSASI-YE JUMHURI-YE ISLAMI-YE  
AFGHANISTAN)**

Published in 1990

By

The Harakat-i Islami Afghanistan (Islamic Movement of Afghanistan)

## EXPLANATION AND PREAMBLE

The Legislative Drafting Commission of the Academic Council of the Islamic Movement of Afghanistan has prepared a draft constitution for Afghanistan which was reviewed by several experts in the field. After several changes were made to the draft constitution, the constitution is now published as a “draft” so that it is reviewed by experts, and productive comments and feedbacks are made to improve the draft constitution. Although defending all of the articles of this draft constitution is not possible at this moment, we wish to draw the readers’ attention to some of the most important aspects of this draft constitution.

- 1- We have made mention of the Ja‘fari maddhab (school) in this draft constitution which may surprise or even upset some of our Sunni brothers. However, it is reasonable that we be more realistic than attach ourselves to our emotions (and deprive a large swath of the population from rights). In Afghanistan, several million people follow the Ja‘fari maddhab. If the Ja‘fari population of the country do not approve of the new constitution, the constitution will be nothing but a piece of paper in the eyes of these people. Afghanistan’s past constitutions granted no protection to the Ja‘fari Muslims of the country. These constitutions afforded protection to non-Muslims under the law, but they did not grant similar guarantees to the Ja‘fari people of the country. This constituted a serious violation of the rights of the Ja‘fari Muslims. Afghanistan’s Ja‘fari population always practice their religious rituals, so it is prudent to grant protections to this school in the constitution of Afghanistan.
- 2- Emphasis on the rule of Islam: This emphasis is indicative of the factual situations prevalent in the country. Islam is the legitimate [and the right] religion of God, and it is an important feature of the unity of our nation.
- 3- Emphasis on Liberty: Emphasis on liberty is first of all indicative of the fact that liberty is the natural right of all human beings. Secondly, liberty is an important tool that can prevent dictatorial governments that have been prevalent in Afghanistan. Finally, liberty forms an important and solid pillar for the independence and development of our nation.
- 4- Although we have not limited the number of political parties in Afghanistan, the experience of the country since the revolution [referring to the 1973 coup that brought down the Afghan monarchy]

has shown that a large number of political parties are dangerous in Afghanistan. Therefore, if only three political parties are given the right to operate in Afghanistan, it will be better that two of these parties be Sunni and one of them should be a Shi'a political party.

- 5- In this draft constitution, we have not granted any immunities to the President and the members of the National Assembly. This is because granting immunities to these state officials is contrary to Islamic justice and against sound reason. If a deed or speech is contrary to law, it should be the same for everyone. Additionally, distinction and discrimination between the people and their representatives are wrong.
- 6- In this draft constitution, we have mentioned and defined a Council of Codification (of Islamic law/fiqh) which many will find unprecedented and surprising. However, this Council is important because the people do not elect their representatives based on their knowledge, expertise and piety; instead, representatives are elected in accordance with social relations and ethnic considerations. These representatives usually lack the required religious knowledge and piety. Under the current conditions where an absolute majority of our people are illiterate, there is no urgent fix to this problem. Furthermore, the extraction (and articulation) of jurisprudential issues (fiqh) can only be done by well-trained scholars of Islamic law. Therefore, there is no other way but establishing the Council of Codification to assist the Islamic system of government in legislative affairs.
- 7- The one term limit for presidents written in this constitution is for the purpose of preventing the president from unlawful exertion of influence on democracy.
- 8- We have written that the President shall be elected with the votes of the people, and the prime minister be elected by the National Assembly. This is a better option, but we do not insist on this method of electing the heads of state and government. It is possible that both the President and the prime minister be elected by the people. It is also possible that both heads be elected by the National Assembly.
- 9- In the draft constitution, the President does not have the power to appoint or remove the prime minister and other ministers. This is for the purpose of decentralizing executive power because granting all power to one individual will cause corruption and dictatorship.
- 10- In the draft constitution, some of the President's power is given to the Council of Codification. We have done so to observe the guidance of the sharia because presidents may likely lack knowledge of the Islamic sharia.

- 11- Emphasis on non-interference by foreigners is because their interference cause division and insecurity.
- 12- We invite the readers to read [the book] “A Picture of Islamic Governance in Afghanistan” to better understand this draft constitution.

Finally, we are prepared to listen to the views of the experts and the public. We will be happy to answer any questions as well. We are looking forward to the peoples’ suggestions and recommendations.

## CHAPTER ONE: GENERAL PROVISIONS

### Article 1

The government of Afghanistan is an Islamic republic which is the desire of the Muslims of the world; and our nation has accepted and approved it [the republican system] in the course of its past eleven years of bloody war [struggle] against domestic coup plotters and the Soviet occupation.

### Article 2

The destiny of the people shall be in their own hands; and no one shall deprive the nation [the people] of this God given right or put it in the service of an individual or groups. It shall be the people who should exercise and benefit from their sovereignty which is God’s blessings and gift to mankind.

### Article 3

In the Islamic Republic of Afghanistan, the country shall be administered by the President and members of the National Assembly (*wolesi jirga*) who shall be elected by the people in free, secret, general and direct elections.

### Article 4

Islam shall be the official religion of the state. For Sunnis (the ahl al-Sunna) in Afghanistan, the rules of Islamic law (foro‘at)<sup>1</sup> shall be extracted

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<sup>1</sup> Rules of behavior that are derived from the scriptures. Technically there are two different types of rules. The osul written in the scripture and the foro‘ that classically trained scholars extrapolate from the osul through a myriad of different interpretive approaches including using juristic logic.

[from scripture] in accordance with the [doctrines/methods of the] Hanafi school; and for *Shi'as* in Afghanistan, Islamic rules shall be extracted in accordance with the doctrines of the Ja'fari school.<sup>2</sup> Other religions shall be free provided that they do not disrupt security and public order.

#### Article 5

All laws and regulations shall be adopted in accordance with Islamic standards [or criteria] (*mawazin*). Laws shall be void if they contradict the instructions (*dastorat*) of Islam.<sup>3</sup>

#### Article 6

Pashto and Dari shall be the official languages of the country. All official state documents, letters and accounts shall be written in these two languages. Because the Quran and Islamic jurisprudence (*fiqh*) and teachings are in Arabic language, Arabic shall be taught at all different educational levels.

#### Article 7

The calendar year of the country shall be based upon the migration of The Noble Prophet (PBUH) [the Muslim Hijra Calendar], the Solar calendar, and the Lunar calendar, weekly off days, Fridays and other holidays shall be regulated by law.

#### Article 8

The flag of Afghanistan shall be in black, red, and green colors juxtaposed from top to bottom horizontally on equal size. In the middle of the flag the sign of the Islamic Republic shall be printed.

#### Article 9

Afghanistan shall be an independent, unitary and indivisible state. The administration of the country shall be based on the principle of centralization, and Kabul shall be its capital.

#### Article 10

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<sup>2</sup> Shi'as only recognize one school of jurisprudence, the Jafari school.

<sup>3</sup> Compare this language with the language in article 5 of the mujahidin constitution.

All forms of privileges and discrimination between our people shall be prohibited. Everyone shall be equal before the law.

## CHAPTER TWO: GOALS AND MOTIVES

### Article 11

Creating a suitable environment for the development of moral virtues based on belief and piety [religious righteousness], strengthening general public awareness by using such instruments as radio television, commanding [encouraging/dawat] the people to perform good [the virtue] and forbidding the evil (*amr bil ma'rof wa nahi 'an al-mukir*), preaching an Islamic culture on the path to God (*ila ala Allah*) and fighting moral corruption and restraining moral deviations shall be the duties of the state.<sup>4</sup>

### Article 12

The state shall prevent all forms of intellectual and social despotism and economic monopoly.

### Article 13

Providing free education to all, combating illiteracy, establishing research centers and utilizing the natural talents of the country shall be the duties of the state.

### Article 14

Respecting human dignity, protecting political, social, and economic freedoms and facilitating suitable conditions for the participation of the people in political, social, economic and cultural self-determination shall be the duties of the state.

### Article 15

Eliminating ethnic, racial, linguistic, sectarian and geographical discrimination, facilitating equal opportunities for everyone in intellectual and

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<sup>4</sup> Compare this article with article 9 of the mujahidin constitution.

material affairs, and striving in achieving national unity and strengthening Islamic brotherhood shall be the duties of the state.

#### Article 16

The state shall have the duty to create a just administrative system, maintain judicial security, preserve individual rights before the law and eliminate all forms of monopoly and privilege in administrative system.

#### Article 17

The state shall have the duty to create a just economic system based on the values (*arzish ha*) of Islam, eliminate poverty and facilitate housing for the needy and the indigent.

#### Article 18

The state shall have the duty to protect the independence, territorial integrity, the Islamic republican system and the achievements of the Islamic revolution.

#### Article 19

The state shall aspire for the unity of Islamic countries for the purposes of creating a unified Islamic nation, generating a unified front against colonial forces and reasonably supporting Islamic independent movements.

#### Article 20

The state shall promote the medical system, create healthcare centers to protect the health of the people and combat various diseases specially those related to the children's health.

#### Article 21

The state shall have the duty to facilitate the making and flourishing of families and protect them based on the teachings (*talimat*) of Islam. The state shall support women to obtain and realize their legitimate Islamic rights.

### CHAPTER THREE: THE RIGHTS OF THE PEOPLE

#### Article 22

All citizens of Afghanistan, including men and women, without any discrimination shall be equal before the law and shall enjoy political, social, economic and cultural rights in accordance with the standards/criteria (*zawabit*) of Islam. Law shall protect all citizens equally. Rights and freedoms bestowed upon human beings by the sacred sharia shall not be limited or taken away, even by legislation.

#### Article 23

Freedom of speech and expression as well as social, political and cultural freedoms shall be the natural rights of the people. The people shall benefit from these rights provided that they do not harm others' freedom, public security, national interest and the standards/criteria (*zawabit*) of Islam.

#### Article 24

Everyone who has the citizenship of Afghanistan shall be considered an Afghan national.

#### Article 25

Muslims of other countries shall have the right to become the citizen of Afghanistan [obtain Afghan nationality], and until they do not accept other citizenship, they shall be considered Afghani [Afghan national].

#### Article 26

No Afghan's nationality shall be taken away unless demanded by the person concerned.

#### Article 27

Innocence is the original state. No one shall be considered a criminal until convicted by a final decision of an authoritative court.

#### Article 28

No act shall be considered a crime unless defined by a law adopted prior to the date the offense is committed. No person can be punished but in



accordance with the decision of an authoritative court and in conformity with the law adopted before the date the offense was committed.

#### Article 29

No person shall be pursued, arrested or detained but in accordance with provisions of law.

#### Article 30

Crime shall be a personal action and [its commitment] shall not affect another person.

#### Article 31

Every person upon arrest can seek a defense attorney to defend his rights or to defend his case [offense] for which he is accused under the law.

#### Article 32

Seeking justice shall be the right of every individual. Everyone shall have the right to litigation before the courts. No one shall be prevented from litigating in the courts of justice. Parties to a dispute shall have the right to choose a defense lawyer to litigate their cases.

#### Article 33

Exiling the people from their residential areas shall be completely forbidden except in situations stipulated in the law.

#### Article 34

All forms of torture for the purpose of obtaining confession and obliging a person to testify or take an oath shall be prohibited. Any statement, testimony, oath or confession obtained from an accused or another person by these means shall be invalid.

#### Article 35

Torturing and degrading of the arrested and detained individuals shall be prohibited. Violators shall be prosecuted in accordance with the law.

Article 36

No citizen of Afghanistan accused of a crime shall be extradited to a foreign state.

Article 37

Status [position], life, property, residence and the profession of the people shall be immune from violation except in situations provided for in the law or by the order of an authoritative court.

Article 38

The expropriation of moveable and immovable property of the people shall be prohibited except in situations provided for in the law or the order of an authoritative court.

Article 39

Entering the residence of the people shall be prohibited except in accordance with the order of a court. Law shall punish violators.

Article 40

The confidentiality and freedom of correspondence and communication whether in the form of letters or through telephone, telegraph and other means, shall be immune from invasion.

Article 41

Freedom of expression and thought shall be immune from violation. Every Afghan shall have the right to express their thoughts through speech, writing, illustration or other means, by observing the provisions of the law. Every Afghan shall have the right to print or publish topics without prior submission to the state authorities in accordance with the law.

Article 42

Permission for establishing printing presses and social media outlets shall only be given to the Afghan state and its nationals. Permission for the publication of foreign materials as well as granting this right to foreigners

shall take place based on the [peaceful] relations of the governments. Establishing post offices and radio television shall be the exclusive right of the state.

#### Article 43

Searching and auctioning the property of the people shall be prohibited except in accordance with the law and order of an authoritative court.

#### Article 44

Foreign states and non-Muslim nationals shall not have the right to purchase and possess immovable property in Afghanistan. The right of the Muslims of other countries [who reside in Afghanistan] to own and possess immovable property shall only be granted if it causes no political harm. The sale of real estate to the diplomatic missions of foreign countries shall be permissible provided that it does not cause political harm.

#### Article 45

The citizens of Afghanistan shall have the right to un-armed assembly and protest to achieve legitimate and peaceful purposes.

#### Article 46

Establishing political, religious, class and academic associations in support of material and intellectual goals shall be permissible to all Afghans provided that:

1. the goals and activities of the parties [or associations] do not contradict Islamic values (*arzish ha*),
2. the establishment of the associations is not against the interests of the county, the Muslim community and national unity,
3. the organization and financial sources of the parties are transparent, and
4. the parties shall not be related to a foreign country or have a foreign source of support.

#### Article 47

Dissolving political parties shall be prohibited except by the decision of the founder, in accordance with the provisions of the law or a decision of an

authoritative court.

#### Article 48

Choosing a profession which is not in contradiction with the teachings (*talimat*) of Islam or the public interest shall be permissible. The state shall have the duty to create a suitable working environment within its financial capacity.

#### Article 49

Each individual and family shall have the right to fair housing proportionate to their needs. The state shall have the duty to provide housing for the people within its financial capacity.

#### Article 50

Education and training in all intellectual and material areas shall be the right of the people of Afghanistan. The state shall have the duty to provide and facilitate free education to the entire nation. The state shall also have the duty to facilitate free higher education based on the needs of the society. Primary education shall be mandatory, and this mandate is of particular emphasis in the villages. Afghan nationals shall have the right to establish technical and academic institutions, and the state shall not prevent such activities. The method of establishing educational institutions shall be regulated by law.

#### Article 51

The state shall be obliged to facilitate literacy programs throughout the country and eliminate illiteracy. The state shall encourage and promote the establishment of literacy centers throughout the country, so that in the future illiteracy becomes illegal.

#### Article 52

The state shall be obliged to protect and guarantee the rights of women in all areas in accordance with Islamic standards (*mawazin*). The state shall protect the human dignity of women, so that they are not subjected to the men's inordinate desires. The state shall also pay special attention to the protection of the family.

### Article 53

The following classes of the community shall have the right to benefit from social security, and the state shall sponsor them from public budget.

1. the retirees,
2. the disabled and the elderly who do not have the ability to work,
3. deserted children,
4. people affected by natural disasters who have lost everything.

The state shall encourage the wealthy members of the society to help the needy communities. In case the state is unable to provide financial and other support, it shall encourage the rich, investors and businesses to provide help. Law shall regulate the method of such assistance.

### Article 54

No tax shall be levied except in accordance with the law.

### Article 55

Debt shall not limit a person's freedom or deprive them of their liberties. Law shall regulate the mode and means of recovering a debt.

### Article 56

All male nationals of Afghanistan who have completed 21 years of age shall be obliged to perform military service. Law shall regulate all affairs related to military service.

### Article 57

All nationals of Afghanistan, including men and women, who have reached puberty, shall have freedom of choice, except when the law has required the permission of the guardian, or the person suffers from mental health. Every adult person shall have the right to be employed by the state, except in areas that the law has prohibited.

### Article 58

Every Afghan shall have the right to travel or reside in any part of the

country except in the regions prohibited by the law. Every Afghan shall have the right to travel abroad and return home except to countries that the law prohibits travel to. The state shall not have the authority to prevent the entry of the Afghans to their country even in cases where they do not possess a passport.

#### Article 59

The state shall be obliged to support the freedom, independence, national unity and the territorial integrity of the county, and this shall be the duty of each individual as well. No one shall have the right to harm these ideals in the name of their protected rights.

### CHAPTER FOUR: THE GOVERNMENTAL BRANCHES AND THEIR FUNCTIONS

#### Article 60

The governing branches in the Islamic Republic of Afghanistan include the legislative branch, the executive branch and the judicial branch. These three branches shall be independent from each other. This Constitution and other laws shall regulate the relationship among these branches.

#### Article 61

The activities of the three branches of the government shall be structured as follows:

1. legislative power shall be exercised by the National Assembly, which shall be elected by the people, and by the Council of Codification [of Islamic law], which shall be comprised of the 'ulama [religious scholars],<sup>5</sup>
2. executive power shall be exercised by the President and the cabinet of ministers, and
3. judicial power shall be exercised by the Supreme Court and other courts.

### CHAPTER FIVE:

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<sup>5</sup> The Council of Codification of Islamic Law, which is defined later, seems to share legislative power with the National Assembly, an elected body. The Council of Codification, in other words, seemed like an upper chamber of the legislature.

## THE LEGISLATIVE BRANCH—THE NATIONAL ASSEMBLY

## Article 62

The National Assembly shall manifest the will of the people.

## Article 63

The members of the National Assembly shall be elected for four years by the people through general, free and secret elections. The winning threshold for the National Assembly election shall be the plurality [of votes cast]. Law shall regulate the requirements of the voters and the candidates.

## Article 64

From each one hundred thousand people, one individual shall be elected to the National Assembly.

## Article 65

Elections for each term of the National Assembly shall be held at least one month before the end of the term of the sitting National Assembly so that the country will have an Assembly all the time.

## Article 66

The Council of Codification (of Islamic law) [*Majles-i Tadwin*] shall be the organ that will resolve disputes related to the National Assembly elections. The Council of Codification (of Islamic law) shall have the authority to convene and supervise elections to the National Assembly. If the Council of Codification is not established for the first term of the National Assembly elections, law shall determine a proper organ to supervise elections.

## Article 67

Representatives in the National Assembly shall take an oath in the first session and sign the text of the oath.

## Article 68

The immunities of the representatives of the people related to their activities and speeches in the National Assembly shall be like the immunities

of all ordinary people; as long as the representatives do not violate the law, they shall not be prosecuted or pursued by law enforcement; in other cases, they would be punished in accordance with the laws of the country.

Article 69

Law shall regulate the prosecution and trial of the members of the National Assembly.

Article 70

The quorum for the sessions of the National Assembly shall be official [and complete] with the presence of the two-thirds of its members except in cases where this Constitution and other laws define a different quorum.

Article 71

The election of the president of the National Assembly, the number of its commissions, their terms of work, duration of the sessions and other affairs related to the work of the National Assembly shall be regulated by the internal regulation of the Assembly.

Article 72

The sessions of the National Assembly shall be open and broadcast by radios and newspapers to the people. In special occasions and on the request of the members of the Assembly, it can hold secret sessions.

Article 73

If the majority of the members of the National Assembly summon the President and other officials to National Assembly, these officials shall appear in the Assembly and offer necessary explanations.

Article 74

If in situations of emergency such as war and military occupation, the elections of one district or the entire country is postponed, the sitting Assembly shall continue its work.

Article 75



The National Assembly shall have the right to investigate all matters related to the country [and the government].

#### Article 76

The National Assembly shall approve all treaties and agreements that the government enters into with other countries.

#### Article 77

For the purposes of resolving the affairs of the state, the National Assembly shall have the right to make laws provided that these laws are not repugnant to Islam and this Constitution. If the Council of the Codification (of Islamic law) determines a provision as inconsistent with Islam, that provision shall become void.

#### Article 78

The National Assembly cannot [shall not have the right to] enact and repeal Islamic rulings [*akham*]; the codification of Islamic rulings [*ahkam*] shall be the duty of the Council of the Codification (of Islamic law).<sup>6</sup>

#### Article 79

When there is a dispute [about the meaning of a law], the National Assembly shall have the right to explain and interpret positive (*wazi'i*) law. The Council of the Codification (of Islamic law) shall be the organ responsible for [interpreting and determining the content of] Islamic law. Both of these institutions shall have the right to interpret the Constitution.

#### Article 80

The National Assembly shall approve laws and governmental decrees. Proposals for law-making shall be made by a minimum of ten members of the Assembly.

#### Article 81

Declaring state of emergency in parts or throughout the country shall be

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<sup>6</sup> The rulings of Islam (*ahkam*) here refer to the norms of Islam that scholars (the '*ulama*') have extracted from scripture through a myriad of interpretive approaches.

subject to the approval of the National Assembly.

#### Article 82

Granting and obtaining loans or international humanitarian assistance shall be subject to the approval of the National Assembly.

#### Article 83

Appointing international experts and granting permission for the establishment of economic industries to foreigners shall be subject to the approval of the National Assembly.

#### Article 84

Overseeing the national budget shall be the duty of the National Assembly; the government shall submit the budget for approval to the National Assembly.

#### Article 85

The head of the ministers [equivalent to prime minister] shall obtain a vote of confidence for each of his ministers [entire cabinet].

#### Article 86

The government can obtain a vote of confidence [approval] from the National Assembly if faced with disputes or decisions about important matters.

#### Article 87

Every representative of the people shall have the right to question cabinet ministers about their duties. The ministers shall be obliged to provide answers within one week.

#### Article 88

The National Assembly shall have the power to impeach the council of ministers [the government] or any of the individual ministers. Impeachment shall take place when the request for questioning a minister is signed by ten members of the National Assembly. The council of ministers or the minister

against whom impeachment proceedings are initiated shall appear in the Assembly within one week and answer the representatives' questions and then request a vote of confidence. The National Assembly shall have the power to issue a vote of no-confidence if the ministers (or the minister) do not show up in the Assembly or find their answers unsatisfactory. This provision shall also apply to the President and the head of ministers. However, determining the incapability of the President to remain in office shall take place with the approval two-thirds of the members of the Assembly.

#### Article 89

Everyone shall have the right to petition to the National Assembly about all branches of the government. The Assembly shall take necessary measures to address them.

#### Article 90

Every representative shall be responsible to the entire nation and shall have the right to express their views on every matter.

#### Article 91

The right of representation shall be related to the person who wins the election and shall not be transferred to another person [no one else can be sent to the National Assembly instead of the person who wins elections].

#### Article 92

The members of the National Assembly shall not engage in other occupations. Government officials cannot be nominated to the National Assembly membership.

#### Article 93

The senate (*mishrano jirga*), the upper house, shall be removed from the basic organization of the state because it is an unproductive institution.<sup>7</sup>

### CHAPTER SIX:

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<sup>7</sup> The Council of Codification described in chapter six effectively functions as another chamber of the National Assembly (the legislature).

## MAJLIS-I TADWIN (THE COUNCIL OF CODIFICATION OF ISLAMIC LAW/ FIQH)

### Article 94

Based on monotheistic (oneness of God) worldview (*Jahan bini Tawhidi*), matters related to the organization [of the state] and the legislature (*tashri'i*) is the exclusive realm of God. No one shall have the right to legislate and issue commandments but based on God's authorization (permission). An Islamic government shall be based on the laws of the sharia (*qawanin-i Shari'i*).<sup>8</sup> Therefore, the Council of Codification (of Islamic law) shall have the duty to codify rulings (*ahkam*) of the sharia in accordance with the Hanafi and Ja'fari schools of jurisprudence (*fiqh*) and declare them to the executive and the judicial branches.<sup>9</sup>

### Article 95

All laws of the sharia (*qawanin shari'i*) shall be codified and proclaimed by the Council of Codification. The ratification of the Council of Codification shall not require the subsequent approval of the National Assembly. This is because members of the National Assembly usually do not possess the needed expertise in Islamic law.

### Article 96

If the Council of Codification determines that a positive (state) law (*qanun wazi'i*)<sup>10</sup> is repugnant to Islam, it can and must nullify it. However, laws passed by the National Assembly does not require the approval of the Council of Codification.

### Article 97

Vetting candidates for presidential elections shall be the duty of the

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<sup>8</sup> This is a unique language that does not come from the classical Islamic tradition. The term *qawanin-i Shari'i* does not appear in Islamic legal discourse until the modern era in the late 19<sup>th</sup> early 20<sup>th</sup> century. The term, as used in this article, however, should not be confusing. In this article, it refers to all rules of the sharia, not the positive laws of the state.

<sup>9</sup> What this means is that there are some rules that are identified unambiguously in authentic scripture which are the *osul*. There are also rules that the majority of schools draw by analogy and other interpretive approaches from the scriptures (or from the *osul*). When this article uses the term rulings of the sharia in accordance with Hanafi and Ja'fari jurisprudence, it refers to both categories of rules.

<sup>10</sup> *Qanun wazi'i* is used here to distinguish it from the *qawanin-i Shari'i* (Islamic law proper) the codification of which the prerogative of the Council of Codification alone.

Council of Codification. The Council shall also have the power to oversee presidential elections.

#### Article 98

The status and position of the Council of Codification shall be the same as that of the National Assembly, and both of these institutions shall comprise the legislative branch.

#### Article 99

The Council of Codification shall approve the declaration war and peace by the President.

#### Article 100

The Council of Codification shall have the power to forgive or reduce punishments of those convicted of crimes.

#### Article 101

The head of the Supreme Court (the Chief Justice) shall be appointed and removed by the Council of Codification. Changes (amendments) to this Constitution shall be put for a referendum by the Council of Codification after they are approved by this Council and the National Assembly.

#### Article 102

The Council of Codification shall have a minimum of 15 and a maximum of 21 members who shall be elected for five years. The reelection of the members shall be permitted.

#### Article 103

Two-thirds of the members of the Council of Codification shall be Hanafi 'ulama and one-third shall be Ja'fari 'ulama.

#### Article 104

Those who elect members of the Council of Codification shall be people of Islamic sciences and shall have gained religious knowledge for at least 10 years as attested by a court of law.

#### Article 105

Candidates to the Council of Codification shall have the following requirements:

1. shall have completed 40 years of age,
2. shall have sufficient knowledge of sharia sciences,
3. shall be just and perform religious obligations,
4. shall have a good background and character; and
5. shall be thoughtful and have managing abilities.

#### Article 106

The decision of the Council of Codification shall be made with the approval of two-thirds of its members.

#### Article 107

The majority of Sunni members of the Council of Codification shall resolve matters related to the Hanafi school (madhhab), and the majority of the Shi'a members shall resolve matters related to Ja'fari school (madhhab).

#### Article 108

The Chief Justice or his designated representatives shall pursue charges of misconduct of the member of the Council of Codification. Members of the Council of Codification shall have no privileges before the law, and in the event of committing a crime [they shall not enjoy special privileges].

#### Article 109

Members of the Council of Codification shall take an oath in the presence of the President, the Chief Justice and the president of the National Assembly. Law shall regulate the method of the oath.

### CHAPTER SEVEN: THE EXECUTIVE BRANCH THE PRESIDENCY

#### Article 110

The President as the coordinator of the three branches of the government and the head of the executive branch shall be elected by the people for a term of four years.

#### Article 111

A person shall not be president for two consecutive terms, but the election of a person as president for multiple non-constant terms shall be permissible.

#### Article 112

Law shall regulate matters related to presidential elections. The Council of Codification shall supervise presidential elections. For the first presidential election, if the Council of Codification is not established, law shall determine another organ to supervise presidential elections.

#### Article 113

Candidates for the presidency shall formally inform the people and the Council of Codification of their nomination before the start of election. Candidates shall not engage in any electoral campaign without the permission of the Council of Codification.

#### Article 114

Candidates for president shall have the following qualifications:

1. shall be a devoted Muslim,
2. shall be loyal to the Islamic republican system,
3. shall possess a good background,
4. shall be aware of the political process and affairs,
5. shall possess Islamic management and executive abilities,
6. shall not be less than forty years and more than sixty-five years of age,
7. shall be an Afghan national,
8. shall not be disabled and incapable of performing the duty of the office of president, and
9. shall be a male.

#### Article 115

The election of the new president shall take place at least one month prior

to the expiration of the term of the sitting president. However, the new elected president shall occupy office after the expiration of the term of the current president.

#### Article 116

The president-elect, before anything else, shall take an oath in the National Assembly in the presence of the members of the Council of Codification and the Chief Justice.

#### Article 117

The President, the head of ministers [the prime minister] and all other ministers shall be responsible to the National Assembly for the duties that the law has granted them. Law shall regulate the investigation of any misconduct by these officials in this respect.

#### Article 118

The President shall have the following duties and authorities:

1. signing laws passed by the National Assembly and presenting them to the executive officials,
2. signing regulations passed by the Council of Ministers,
3. supervising the correct application of laws,
4. regulating the relationship among the three branches of the government,
5. strengthening national unity and protecting public interests,
6. accepting the credential letters of foreign envoys and diplomatic delegates,
7. forming the cabinet under his leadership,
8. appointing commanders of ground and air forces as well as the army chief of staff after consultation with the head of ministers,
9. appointing ambassadors to foreign countries after the proposal of the Ministry of Foreign Affairs,
10. appointing ministers based on the proposal of the head of ministers,
11. appointing political delegates to international organization after the proposal of the Ministry of Foreign Affairs,
12. signing international treaties and agreements with other governments after the approval of the National Assembly,
13. appointing two vice-presidents,



- 14.bestowing governmental medals to those deserving,
- 15.dispatching envoys and political delegates to foreign countries after consultation with the head of ministers, and
- 16.declaring war and peace after consultation with the head of ministers and the approval of the Council of Codification.

#### Article 119

The President or any other organ shall not have the right to dissolve the National Assembly and the Council of Codification.

#### Article 120

The President shall not have the right to appoint the head of the ministers (the prime minister). The head of the ministers shall be appointed by the approval of two-thirds majority of the members of the National Assembly. The removal of the head of the ministers shall take place with the majority of votes of the National Assembly.

#### Article 121

If the President resigns, he should present his resignation to the National Assembly. The National Assembly shall also have the power to remove the President by two-thirds majority if the President does not possess [or loses] any of the qualifications listed in Article 114 of tis Constitution.

#### Article 122

In the events of the death, resignation, sacking, absence or sickness of the President for more than two months, or after the end of his term with no elections held, the duties of the President shall be transferred to an interim council of presidency. This Council shall be comprised of the head of the ministers and the Chief Justice. The Interim Presidential Council shall be obliged to take measures to hold new elections within two months.

**Comment:** if the President is ill for two months, but his doctors believe that he can recover in another month, the Interim Presidential Council cannot hold elections within that month [it should wait for the President's recovery]. However, if the President does not recover for another month, preparations for new elections shall be made.

#### Article 123

Investigating accusations of crimes by the President shall be within the authorities of the judiciary. There shall be no exception in implementing the laws, and justice shall be equal for all. Law shall regulate the method of investigating accusations of crimes by the President.

### CHAPTER SEVEN: THE CABINET

#### Article 124

The head of the ministers (the prime minister) shall head the cabinet of ministers and execute laws and regulations with the cooperation of other ministers.

#### Article 125

The head of ministers shall appoint other ministers and present them to the National Assembly to obtain a vote of confidence.

#### Article 126

Law shall regulate the number and the qualifications of the ministers and the powers of the head of the ministers.

#### Article 126

The head of the ministers shall have the power to dismiss or replace some of the ministers, but dismissing more than a third of the ministers shall be subject to the approval of the National Assembly.

#### Article 128

The head of the ministers shall be appointed for a four-year term. The second term appointment of the same person as the head of the ministers shall be permissible. However, a consecutive third term shall not be permitted, a non-consecutive third term shall be allowed.

#### Article 129

Ministers shall be responsible to the National Assembly and to the head of

the ministers.

#### Article 130

The cabinet of ministers as a whole as well as individual ministers shall have the right to enact regulations to perform their tasks provided that such regulations do not contradict the sharia and the interests of the people.

#### Article 131

The head of the ministers shall obtain a vote of confidence once again after the formation of a new National Assembly.

#### Article 132

The head of the ministers and other ministers of the cabinet shall first of all take an oath in the presence of the representatives of the people after receiving a vote of confidence.

#### Article 133

Courts and the Attorney General's Office shall prosecute accusation of crimes by the ministers. However, the Attorney General shall inform the President of the prosecution and the initiation of legal proceedings against the head of the ministers.

#### Article 134

The head of the ministers shall appoint a deputy from amongst the ministers to perform his duties in case of the death, resignation, illness or absence of the head of the ministers.

#### Article 135

The President, the head of the ministers, ministers, heads of independent institutions and judges shall not have other occupations. Teaching in academic institutions and research shall be exceptions to this rule.

#### Article 136

A commission comprised of the Chief Justice, the President and members of the National Assembly shall review the wealth of the President, head of the

ministers, ministers, head of the Supreme Court and the Attorney General before and after the term of their office.

#### Article 137

The National Assembly, the President, the head of the ministers, ministers, the Chief Justice, the Attorney General and high-ranking military officials shall not engaged in any advantageous transaction with the government. Law shall provide further details in this respect.

#### Article 138

Ministers shall be Muslim, capable of performing religious obligations and shall be experts in their fields.

#### Article 139

Proportional to the Shi'a population of Afghanistan, ministers shall be appointed from the Afghan Shi'as.

### CHAPTER NINE: THE JUDICIARY

#### Article 140

The judiciary shall be an independent branch and shall preserve justice and protect individual and social rights based on the teachings and orders (*dastorat*) of Islam. The judiciary shall also be the enforcer of hudud [crimes for which Islamic law provides specific and fixed punishments] and Ta'zirat [crimes for which Islamic law does not specify any punishments but is left to the ruler to prescribe the penalties].

#### Article 141

The judiciary shall have the political duties and powers:

1. resolving individual disputes, petitions and complaints,
2. maintaining and promoting justice,
3. protecting general rights,
4. discovering crimes, pursuing and punishing criminals by executing hudud and Ta'zir punishments,

5. forming the necessary organization and establishing the needed structure to promote judicial affairs,
6. preparing judicial regulations and presenting them to the National Assembly for approval,
7. appointing, removing and transferring knowledgeable and just judges,
8. establishing courts all over the country for both [the Hanafi and the Ja'fari] madhhabs,
9. invalidating [removing] state laws that are repugnant to Islam and Islamizing the courts, and
10. establishing an inspection center to prevent judges from taking bribes and punishing corrupt judges.

#### Article 142

The minister of justice shall be appointed from amongst religious scholars; he should have the responsibility for maintaining the judiciary's relationship with the executive.

#### Article 143

The president of the Supreme Court shall be appointed from amongst the first-grade [highly qualified] religious scholars and shall not be less than 40 years of age. Law shall define the qualifications of the president of the Supreme Court and other justices.

#### Article 144

The term of the presidency of the Supreme Court shall be 5 years. The appointment of the president of the Supreme Court for further terms shall be permissible. Law shall regulate the term limits of other justices. The Chief Justice shall not be removed without a reasonable cause.

#### Article 145

Trials in courts shall be held openly, and every individual shall have the right to attend the proceedings, except in cases the judge considers the open session harmful, or the applicant requests the secrecy of trials.

#### Article 146

The decision of courts shall be based on law and shall be registered in the

official registry.

#### Article 147

In cases, a judge does not find a rule in the laws of the state to resolve a case; he should request the Council of Codification for a religious fatwa [opinion of Islamic law] to resolve the case.

#### Article 148

The rulings of the Hanafi fiqh (jurisprudence) shall apply to all the Hanafi populations and the rulings of the Ja'fari fiqh shall apply to all the Shi'a populations. In case a dispute is between two individuals of different madhhabs (schools of Islamic law), the plaintiff shall have the choice to determine whether to go before a Hanafi or a Ja'fari judge.

#### Article 149

If a judge purposefully or by mistake harms an individual, he shall be responsible to provide compensation. If the judge is not at fault, the state shall pay the compensation and rehabilitate the victim.

#### Article 150

Convicting for crimes and executing punishments shall only take place through the authoritative courts after completion of the required procedure. No other organ shall have the right to punish individuals. No organ shall have the right to prevent the execution of the decision of the courts. Breaching the decision of the courts shall be impermissible except in cases specified by law.

#### Article 151

Lower courts should avoid issuing a decision in cases that involve severe punishments. They shall write their opinions and submit them to the higher judicial authorities so that the right decision is made.

#### Article 152

The judicial branch shall have the power to form a general inspection center to adjudicate rights and oversee all officials and governmental organs. Law shall regulate further details on the duties of this center.

CHAPTER TEN:  
THE ARMY AND THE ARMED FORCES

Article 153

The armed forces of Afghanistan shall be formed and trained on the basis of moral education and in accordance with Islamic law (*huquq-i Islami*)<sup>11</sup> to protect and defend Islamic jihad.

Article 154

The duties of the armed forces are as follows:

1. defending the sacred religion of Islam,
2. defending the independence and territorial integrity of the country,
3. defending the Muslims of Afghanistan,
4. defending the Islamic republican system, and
5. delivering humanitarian aid provided that it does not harm military duties and training.

Article 155

Islamic education, fiqh and moral instructions shall be taught to all members of the armed forces.

Article 156

No foreigner shall be accepted to perform in the military and in the security forces.

Article 157

Any form of exploitation of soldiers shall be prohibited. High-ranking military official shall not have the right to exploit the services of soldiers.

Article 158

When the economic situation of the country improves, the recruitment of soldiers shall take place voluntarily not forcefully.

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<sup>11</sup> Here, *huquq-i Islami* apparently refers to rulings of the sharia not "Islamic state law."

Article 159

Law shall determine the means of the dismissal, appointment and promotion of the military officials.

Article 160

The armed forces shall be obliged to provide the necessary military education to all the people so that they obtain the ability to defend Islam and the country if situations demand it. Military education shall be made mandatory for university students and for other governmental officials.

Article 161

Establishing any foreign military bases in Afghanistan shall be prohibited.

CHAPTER ELEVEN:  
FOREIGN POLICY

Article 163

The foreign policy of the country shall be free and non-aligned. Afghanistan shall not participate in any Eastern or Western military alliances.

Article 164

Preserving the independence of the country and its territorial integrity, protecting the Muslims of the world notwithstanding the position of their government and maintaining friendly relations with non-belligerent states shall form the most important aspects of the foreign policy of Afghanistan.

Article 165

Any agreement that brings foreign occupation over the country's natural resources, culture, military, and economy or harms the sovereignty of the country and Islam shall be prohibited.

Article 166

The Islamic Republic of Afghanistan, within its abilities, shall support all



Islamic freedom movements.

Article 167

The state shall offer asylum to anyone who seeks political asylum in accordance with the provisions of the law.

Article 168

The Islamic Republic of Afghanistan shall strive for closer ties and unity among Muslim countries. The Islamic Republic of Afghanistan shall condemn the division of Muslim countries, but it shall not interfere in the domestic affairs of other countries nor shall it allow other countries to interfere in the affairs of Afghanistan.

Article 169

In obtaining free foreign aid and loans, no foreign influence and pressure shall be accepted.

CHAPTER TWELVE:  
THE ECONOMIC SYSTEM

Article 170

The economic system of the Islamic Republic of Afghanistan shall be the Islamic economic system that opposes Capitalism, Communism, and Socialism. These systems have been tested, and the humanity has been harmed by them. The Islamic economic system is based on individual, social and governmental property and guarantees human dignity and social justice.

Article 171

The state shall be obliged to utilize all material and intellectual resources to satisfy the basic needs of the nation and provide jobs and avoid the monopolization of wealth in the hands of small number of individuals.

Article 172

The promotion of agriculture and ranching, the development of industries, which is very necessary, and other important needs of the society is not

possible without the utilization of economic sciences. Therefore, the state shall be obliged to pay special attention to the promotion of sciences and the training of experts in these areas.

#### Article 173

Economic programs shall not be focused on some provinces, but the state shall maintain a balance in such programs. The governmental resources shall be divided on the basis of the population of the provinces and the consideration of the natural conditions so that the entire nation benefits from public resources. Necessary steps shall be taken to prevent big cities from attracting the entire wealth of the nation which creates more problems.

#### Article 174

The state shall encourage the people to promote agricultural and industrial produce. The state shall not create obstacles in this respect by passing laws and regulations that would prevent the economic development of the country; instead, the state shall perform an oversight function so that such produces are not monopolized in the hand of a few. Law shall regulate the method of such encouragement.

#### Article 175

The domination and monopoly of foreigners over the economy of the country shall be prohibited.

#### Article 176

Individual property obtained through legitimate means shall be inviolable, but if the property is obtained through illegitimate means, such as treachery and illegitimate transaction, the state shall expropriate it, and if possible, shall return the property to its original owner; otherwise, the concerned property shall be considered part of the Islamic treasury (*bait al-mal*). Law shall define the limits and matters related to treachery and illegitimate transaction.

#### Article 177

Harming others, hoarding, usury and other transactions that are religiously invalid shall be prohibited. Law shall provide further details in this respect.

#### Article 179

The state shall avoid making excessive expenses (prodigality) in all aspects and shall adopt moderation in expenses, and it shall encourage others in this respect—especially in regards to the administrative system, the organization of ministries and their budget. Islam has also prohibited excessive expenses in individual and national economy.

#### Article 179

Mass production industries, mines, banks, factories, electricity, radio television, telegraph and telephone, airline services, railways, communication, major dams and the like shall be public property owned by the state.

#### Article 180

The state shall not monopolize foreign trade, but monopolizing some commercial items by the state shall be permissible after the approval of the Council of Codification and the National Assembly.

#### Article 181

The lands (property) of the death, land without owners, rivers, mountains, valleys, deserts, forests and lands that are owned illegally and lands whose owners are not clear shall be in the possession of the state and be part of the Islamic treasury; they shall be used in a way that secures public interest. Law shall provide further details.

#### Article 182

Any action that pollutes the environment shall be prohibited. Protecting the environment shall be the duty of everyone.

#### Article 183

The state shall levy fair taxes after the approval of the legislature [the National Assembly and the Council of Codification] in order to meet its needs. Law shall determine the limits of such taxes.

#### Article 184

All state revenue shall be submitted to the state treasury.

Article 185

The state shall have the right to oversee public endowments (awqaf).

CHAPTER THIRTEEN:  
MISCELLANEOUS PROVISIONS

Article 186

[The National] Radio Television shall be free in its broadcasting and shall not be under the control of the government.

Article 187

The broadcasting of immoral programs shall be strictly prohibited, and anything that benefits the religion and the people shall be broadcast. Such movies shall also be broadcast in theatres also.

Article 188

The state shall have the responsibility to pay the same amount of attention to the madrasas (religious schools) that it has paid to the universities, and it shall promote religious sciences.

Article 189

Governmental positions shall be given on the basis of knowledge, piety, and ability.

Article 190

The division of provinces and districts shall take place on the basis of population which was not the case in the past.

Article 191

Sectarian extremism and misconceptions shall be prohibited. Law shall determine further details in this regard.

Article 192

Any foreigner who enters Afghanistan shall respect the official moral [codes] of Afghanistan.

Article 193

No person in any position shall be immune, and the Islamic judicial provisions shall be executed in the same manner for all.

Article 194

Teaching the beliefs, provisions and Islamic morals based on the *madhhab* of the student in all levels of education shall be mandatory. They shall also be taught to the members and officials of the military.

# THE FUNDAMENTAL PRINCIPLES OF THE ISLAMIC STATE OF AFGHANISTAN (OSUL-I ASSASI-YE DAWLAT-I ISLAMI-YE AFGHANISTAN)

## CHAPTER ONE: GENERAL PRINCIPLES

### Article 1

Afghanistan is an Islamic State, free, independent, unitary, and indivisible.

### Article 2

The [political] order (*nizam*) of the Islamic state of Afghanistan is founded on the basis of the [following] Quranic text, there is no command except for Allah, God (*án al-hukum o ila li la*).

### Article 3

The religion of Afghanistan is the sacred (*moqadas*) religion of Islam.

### Article 4

The Official madhhab of Afghanistan is the Hanafi school (madhhab).

### Article 5

The Islamic sharia (*shari‘at-i Islami*) is the only (*yagana*) source (*masdar*) of legislation in Afghanistan. All aspects of the social and individual life of the people should be regulated in the light of the life-giving teachings (*taalim*) of Islam. No laws and regulations can ever be passed that contradict the basics (*asasat*) of the sharia.<sup>1</sup>

### Article 6

The Islamic State of Afghanistan is founded on the political, social, cultural, and economic institutions in accordance with the principles (*osul*) and standards (*mawazin*) of Islam [or Islamic criteria]. The law-making procedures [pr method] (*rawish*) and the regulation of the welfare of national life should be regulated in accordance with Quran and the Sunna, based on the Hanafi jurisprudence (*fiqh*)

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<sup>1</sup> Note: nearly all of Afghanistan's other constitutions use a different language in requiring the state to respect Islamic law in drafting legislation. That language reads as follows: "no law shall be repugnant to the basics of Islam." The mujahidin constitution is the first in Afghanistan to include this new language – one that is found in a vast majority of Arab constitutions. Notably, when the Taliban drafted their constitution in 1998, they seemed to have borrowed this language written in article 5 of this Constitution. See article 5 of the Taliban Constitution (1998), translated in ALEX STRICK VAN LINSCHOTEN & FELIZ KUEHN, THE TALIBAN READER: WAR, ISLAM AND POLITICS 337 (2018).

## Article 7

The Islamic State of Afghanistan submits labor (job) to those who deserve it (and are worthy of), and religious piety (*taqwa*) is the first requirement of legal capacity (*ahliyat*).

## Article 8

The right of the people to political, social, cultural, and economic self-determination [and autonomy] should be secured by the elected council of nation's representatives in accordance with the standards [or criteria] (*mawazin*) of the Islamic sharia.

## Article 9

The Islamic State of Afghanistan considers commanding the good [performing the right] (virtue) (*amr bil ma'rof*) and forbidding the evil (*nahi az mukir*) the duty of the people against each other and the reciprocal duty of the state and the people. Law shall regulate the scope and requirements of this duty.<sup>2</sup>

## Article 10

The training of Muslim individuals, Muslim family, the establishment of an Islamic society and the protection of the unity of the Muslim nation as well as the ultimate spread of Islamic teachings is the main responsibility of the Islamic State of Afghanistan.

## Article 11

Pashto and Dari should be the official languages of Afghanistan. Laws, regulations, legislative documents, teaching materials, publications and media should be regulated by the state on the basis of the official languages. Local languages can be used in media and communication and teachings in the area they are spoken. The state should take effective measures to improve local languages.

## Article 12

By designing and implementing special programs, the Islamic State of Afghanistan should improve [and facilitating the learning of] the Arabic language, which is the language of the Quran, Islamic sciences, and education.

## Article 13

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<sup>2</sup> The duty to invite to do the good and prevent the evil is known as "Hisba" in Islamic law. Scholars define Hisba as including the ordering of the "good" when the good is abandoned as well as the prohibiting of the "bad" or the "evil" when the evil is widespread. *See, e.g.,* MICHAEL COOK, FORBIDDING WRONG IN ISLAM: AN INTRODUCTION (2003); MICHAEL COOK COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT (2006); *see also* HUSSEIN ALI AGRAMA, QUESTIONING SECULARISM: ISLAM, SOVEREIGNTY, AND THE RULE OF LAW IN MODERN EGYPT, chapter 1 (2012).

The official calendar of the state is based on the migration of the noble Prophet, Muhammad [the Muslim Hijra Calendar].<sup>3</sup> Both the Solar and the Lunar calendars are equally valid. The work of the state offices shall be based on the Lunar calendar. Fridays shall be public holidays. Law shall regulate other holidays.

#### Article 14

The administration of the Islamic State of Afghanistan is based on the principle of centralization, and its capital is the city of Kabul.

#### Article 15

The flag of the Islamic State of Afghanistan is made up of three parts, with black, white, and green colors juxtaposed in a rectangular shape from left to right vertically. The length of every colors shall be twice the size of their width, stretched from bottom to the top. In the middle of the flag, the sign of an emblem and a pulpit in golden color shall be carved in which shall be encircled by two smaller flags. At the top of emblem, the holy word (*kalima*), Allahu Akbar (God is Great), shall be written. This shall be enclosed from two sides by sheaves of wheat; on the top of this, the (*kalima-i-Tayyiba*) shall be written.<sup>4</sup> This phrase shall be enclosed with two swords located as one cutting the other and the sheaves of wheat shall enclose it from two sides. Law shall regulate the definition and size of the flag and the national insignia.

#### Article 16

Family comprises the fundamental unit of the Islamic society. The state shall adopt necessary laws, regulations, and other needed programs in accordance with Islamic law and ethics (moral) to facilitate matters related to family, its organization and preservation and to strengthen family relations.

### CHAPTER TWO: FUNDAMENTAL RIGHTS AND DUTIES OF THE PEOPLE

#### Article 17

In accordance with Islamic standards [or criteria] (*mawazin*), all Afghans, without any discrimination and privilege, have equal rights and duties before the law.

#### Article 18

Liberty is the natural right of human beings. Liberty shall have no limits unless affecting the freedom of others as well as public security and the interests and the

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<sup>3</sup> The origins of this calendar dates to September 622 CE when Prophet Muhammad embarked on a journey to Medina from Mecca. This marked the Prophet's "Hijra" or "migration" and later became the Muslim calendar of Hijra.

<sup>4</sup> The Kalima-i Tayyiba reads as follows: There is no one worthy of worship but Allah (God), and Muhammad is the messenger Allah.



principles (*osul*) and regulations (*moqararat*) of Islam. The scope of the right to liberty shall be regulated by law.

#### Article 19

Every Afghan has the right to elect and be elected in accordance with the provisions of the Islamic sharia. The requirements and the way of exercising this right shall be regulated by law.

#### Article 20

Innocence is the original state. Any person accused of a crime shall be considered innocent until proven guilty by the order of an authoritative court.

#### Article 21

No act shall be considered a crime unless defined so by the rulings (*ahkam*) of the Islamic sharia or a law promulgated before the commitment of the offense.

#### Article 22

No individual shall be punished for a crime without the order of an authoritative court of law. No individual shall be punished for a crime without the rulings (*ahkam*) of Islamic sharia and the laws of the state, promulgated before the commitment of the crime.

#### Article 23

No individual shall be pursued or arrested but in accordance with the provisions of the law.

#### Article 24

No individual shall be detained without the order and permission of an authoritative court and in accordance with the provisions of law.

#### Article 25

Crime is a personal act. Investigation, arrest and detention of a person accused of a crime and the execution of punishments shall not incriminate another person.

#### Article 26

Obtaining a confession or testimony from an individual accused of a crime or from another individual by means of compulsion, threats or torture shall be prohibited. Confession or testimony obtained from the accused by the use of the above-mentioned instruments shall be invalid.

#### Article 27

In case the responsible official [prosecutor/police] tortures or orders the torture of the accused or other person in order to obtain a confession and testimony, the said official should be prosecuted in accordance with the provisions of law.

#### Article 28

The accused shall have the right to defend themselves either personally or through a defense lawyer in accordance with the provisions of the law.

#### Article 29

Every Afghan shall be entitled to travel and settle in any part of the country, but in areas forbidden by the law.

#### Article 30

Every Afghan shall be entitled to travel outside Afghanistan and return to it accordance with the provisions of the law.

#### Article 31

No Afghan shall be deprived of the Afghan nationality unless provided by law. No Afghan can hold dual nationality. Law shall regulate the status of the frontier tribes.<sup>5</sup>

#### Article 32

Freedom and confidentiality of correspondence and communications of individuals, whether in the form of letters or via telephone, telegraph or other means, shall be secured from intrusion. The state shall not have the right to inspect personal correspondence and communications, unless authorized by a court in accordance with the provisions of the law.

#### Article 33

Personal residences shall be immune from intrusion and trespassing. No one, including state officials, shall have the right to enter a personal residence or search it without the owner's permission, order of an authoritative court or other situations defined in the law.

#### Article 34

Freedom of thought and expression are immune from intrusion within the limits of the Islamic sharia. Every Afghan shall have the right to express their thoughts

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<sup>5</sup> The frontier tribes refer to a number of Pashtun tribes that inhabit the region between the Afghanistan and Pakistan borders. Historically, the Afghan government had offered certain services, such as boarding schools, to these tribes who reside inside the modern borders of Pakistan. The "law" in this article of the Constitution apparently refers to the status of these tribes inside Afghanistan and what services and privileges they should be entitled to.

through speech, writing, illustrations and other means in accordance with the provisions of the law.

#### Article 35

The people of Afghanistan shall have the right to protest and assembly and can hold unarmed demonstrations for attaining legitimate and peaceful purposes without disturbing public peace in accordance with the law.

#### Article 36

Property shall be protected against intrusion and trespassing. No one's property shall be confiscated or expropriated without an authoritative court's order and in accordance with the provisions of the law. Courts shall hear and resolve complaints about forceful transfer of property.

#### Article 37

Work is the right and duty of every Afghan who has the ability to perform it. The relationship between the employers and the employees shall be regulated by law. The prohibition of forced labor shall not prevent the implementation of laws passed to regulate collective activities and secure public interest.

#### Article 38

Ranks [promotion], privileges and titles given to people during the war or before the enforcement of this Constitution shall be reviewed and decided by a special authoritative commission.

#### Article 39

Promoting education shall be mandatory; the state shall have the duty to promote free mandatory primary education, develop and provide free secondary and professional education. A separate law within the limits of the Islamic sharia shall regulate the education of girls.

#### Article 40

No one should turn himself into an instrument of harm for others and the national interests using the rights enshrined in this Constitution.

#### Article 41

Securing the achievements of the jihad, defending the Islamic State and protecting the national honor shall be the duty of each member of the nation. All Afghan nationals are obliged to perform military service in accordance with the provisions of law.

#### Article 42

It is the duty of every Afghan to completely respect the laws of Islam in individual, family, and social life; follow the provisions of this Constitution; respect public order and safety and protect the interests of the Islamic State.

Article 43

The sharia (Islamic) Hijab (Dress) shall be mandatory.

Article 44

The people of Afghanistan shall have the right to establish special religious schools (*madrastas*). The State should unify their curricula.

Article 45

Schools and professional institutions shall be established with the permission of the government. The government shall have the right to control and oversee the curriculum of these educational institutions.

CHAPTER THREE:  
THE HIGH COUNCIL (SHURA-YE 'ĀLI)

Article 46

The High Council is a temporary assembly, comprised of seventy members who, in addition to making necessary laws until the election of the permanent Council, oversee the activities of other branches of the government.

Article 47

The members of the High Council shall include leaders, religious scholars ('Ulama), commanders and jihad personalities in a way in which all provinces are represented.

Article 48

The method of the work and the procedures of the High Council shall be regulated by its internal rules.

Article 49

The High Council shall have a president, a deputy, and a secretariat.

Article 50

The duties and authorities of the High Council shall include the following:

1. Ratifying laws for the interim period.
2. Overseeing the legality of the activities of other branches of the government.

3. Resolving disputed matters [disputes between the branches of the government].
4. Ratifying plans and organizing the ordinary and developmental budget of the state.
5. Deciding on matters related to war and peace in coordination with the Council of Ministers under the authority of the president of the state.
6. Ratifying international treaties at the government level in coordination with the Council of Ministers.
7. Ratifying the policy of the government.
8. Impeaching members of the government [ministers].
9. Protecting the goals and achievements of jihad.
10. Ratifying, granting, and accepting loans and free assistance to and from foreign states and international organizations.
11. Granting authorization for the establishment of large companies and industry to foreign nationals.
12. Appointing the new president in cases of the death and resignation of the president of the state within one month. In this period the vice-president acts as the president of the state.

#### CHAPTER FOUR: THE PRESIDENT OF THE STATE

##### Article 51

The President shall be the head of the Islamic State of Afghanistan, exercising authorities in the executive, legislative and judicial fields according to the provisions of this Constitution and other laws of the State.

##### Article 52

The President shall be a Muslim male follower of the Hanafi school, a citizen of Afghanistan, Muslim and born to Afghan parents.

##### Article 53

The President is the top authority [official] in exercising his legal authorities.

##### Article 54

The duties and authorities of the President shall include the following:

1. Commanding the national army [being commander in chief].
2. Appointing and dismissing the vice-presidents. The number of vice-presidents shall not be more than 4.
3. Transferring some of his powers to the vice-presidents and the prime minister.
4. Accepting the recommended cabinet of the prime minister after the approval of the High Council.
5. Appointing the chief justice.
6. Appointing justices of the Supreme Court with the advice [and recommendation] of the chief justice.
7. Accepting the appointment and dismissal of judges.
8. Accepting the promotion and retirement of the high-ranking state officials in accordance with law.
9. Appointing the heads of the political missions of Afghanistan to foreign states as well as to international organizations and accepting their credentials.
10. Bestowing medals, insignias and honorary titles in accordance with the provisions of the law.
11. Declaring war and peace after the endorsement of the National Assembly.
12. Acting as the Islamic State of Afghanistan in the international community at the level of states.
13. Ratifying laws and issuing legislative decrees.
14. Signing international treaties and agreements after the endorsement of the High Council.
15. Proclaiming general elections after the decision of the Electoral Commission. Elections will be conducted in accordance with sharia law.
16. Referring to the public opinion in order to resolve important matters and issuing decrees in this respect in accordance with the decision of the High Council.
17. Reducing and pardoning penalties in accordance with the provisions of the sharia.
18. Ratifying the ordinary and developmental budget of the state.
19. Convening the extra-ordinary session of the Cabinet of Ministers on important issues which do not come under daily affairs.
20. Bestowing Afghan nationality in accordance with law.

21. Inviting, inaugurating and ending the sessions of the High Council.

22. Granting official permission to print money and distributing it based on the recommendation of the government in accordance with law.

23. Proclaiming and terminating the state of emergency with the endorsement of the High Council in accordance with law.

#### Article 55

The salary of the President and his possession in public property shall be regulated by law.

#### Article 56

The President cannot buy governmental and public property either for himself or his family. The President cannot engage in an advantageous business with the state.

#### Article 57

The President shall be responsible to the High Council.

#### Article 58

In the absence of the President, one of vice-presidents to whom power is delegated shall act as the president.

#### Article 59

The President and the prime minister shall have the same responsibilities before the law as those of other ordinary citizens.

#### Article 60

In situations of the death or resignation of the prime minister, the President shall have the duty to introduce another person as the prime minister to the High Council within fifteen days.

### CHAPTER FIVE: THE GOVERNMENT

#### Article 61

The government is the supreme executive and administrative organ of the state. The government is comprised of a prime minister, deputy prime ministers and ministers. Law shall regulate the number and duties of ministers.

#### Article 62

The head of the government (the prime minister) shall be a Muslim, male, follower of the Hanafi school (*madhhab*) and born to Muslim parents.

#### Article 63

A suitable salary shall be determined for the prime minister and other ministers in accordance with a law.

#### Article 64

The prime minister as the head of the government shall have the following authorities:

1. Acting as the head of the government.
2. Serving as the highest authority at the level of the government in accordance with the law.
3. The Cabinet of Ministers acts under the authority of the prime minister as a single unit.
4. Recommending the appointment and dismissal of deputy prime ministers to the president.
5. Transferring some of his powers to deputy prime ministers.
6. Representing the country at government level in international meetings.
7. Signing international agreements at the government level.
8. Overseeing the administration and the regulation of the affairs and activities of ministries and independent administrative units within the structure of the government.
9. Accepting the appointment, promotion, retirement, and dismissal of state officials in accordance with law.

#### Article 65

The duties and authorities of the government includes the following:

1. Implementing the domestic and foreign policies of the Country in accordance with the law.
2. Arranging the activities and procedures of the ministries, independent administrative units, and related offices.
3. Taking necessary measures regarding executive and administrative affairs in accordance with the law, regulations, and decisions of the High Council.
4. Drafting and preparing laws and regulations.



5. Designing and preparing the state budget and presenting it to the High Council.
6. Designing and implementing economic and social developmental programs and plans for reconstruction.
7. Protecting and controlling the affairs of banks, governmental infrastructure and preventing inflation.
8. Regulating matters related to domestic and foreign loans with the endorsement of the High Council.
9. Maintaining public security and order in the entire country.
10. Signing agreements and treaties with other states and international agencies.
11. Taking necessary measures to eradicate moral and administrative corruption.
12. Implementing the *Hijab* in accordance with the sharia.
13. Providing suitable condition for the improvement of academic, intellectual and [personality characters] in light of the teachings and values (*arzish ha*) of Islam.
14. Strengthening and generalizing Islamic brotherhood (*Ōkhowat*), national unity and fortifying a spirit of cooperation among the people.
15. Organizing the Islamic army and strengthening it with the instruction of the state.
16. Regulating matters related to the survivors of the martyrs, the disabled and the orphanages.
17. Regulating matters related to the return of the refugees and providing suitable condition for their preliminary residence and welfare.
18. Providing and preparing the conditions for election in accordance with this Constitution.
19. The government as the executive organ of the state is responsible for its functions to the High Council for a period of time.
20. Implementing the final decisions of courts.
21. Designing, implementing, and regulating the curriculum of educational institutions in accordance with the Islamic standards [criteria] (*mawazin*).
22. Protecting public and private property from illegal possession.
23. Attracting free loans from and cooperation with other countries and international agencies for the reconstruction of the country.

#### Article 66

The appointment and dismissal of ministers shall take place with the recommendation of the prime minister, endorsement of the High Council and approval of the president.

#### Article 67

Members of the government cannot perform duties in other state-owned enterprises or engage in a profitable business with the state during their term of offices.

#### Article 68

Law should regulate the rights and obligations of state employees.

#### Article 69

Discovery of crimes shall be the duty of the police, and investigation and filing the case against the accused in the court shall be the responsibility of the Attorney General's Office in accordance with the provisions of the law.

### CHAPTER SIX: THE JUDICIARY

#### Article 70

The judiciary shall be an independent organ of the state. The judiciary shall be comprised of one Supreme Court, and other related courts. Law shall regulate the organization and authorities of the judiciary.

#### Article 71

Courts shall be independent in their decisions and shall be obliged to issue rulings based on the sharia and maintain justice in their decisions.

#### Article 72

The final decisions of the courts must be implemented, except for decisions on death penalty which requires the ratification of the President.

#### Article 73

In the courts of the Islamic State of Afghanistan, trials shall be held in public. In situations clarified by law, the court shall hold secret trials when it considers it to be necessary, but the pronouncement of judicial decisions shall be open in all cases.

#### Article 74

The President shall appoint the head of the judiciary [the Chief Justice] by considering his capacity and experience. The heads and deputies of the chambers of the Supreme Court shall be appointed by the President at the recommendation of the head of the judiciary based on their religiosity, knowledge, piety and experience in judicial and legal matters.

#### Article 75

Judges shall be appointed at the recommendations of the Supreme Court and approval of the President.

#### Article 76

In case a judge is accused of a crime or corruption, the Supreme Court shall review the case against the judge. After the defense of the judge is heard, if the Supreme Court determines that the accusation is valid, it shall recommend to the President that the said judge be dismissed. After the President's approval, the accused judge shall be removed.

#### Article 77

No law or authority shall exclude any case or legal matter from the jurisdiction of the judicial organ and submit it to a different authority (institution).

#### Article 78

Judges shall not be members of political parties as long as they are in office.

#### Article 79

The budget of the Supreme Court shall be prepared by the High Council of the Supreme Court, and the government shall submit it to the High Council of the Islamic State for approval.

#### Article 80

The law that applies to other employees of the State should also apply to the judges and employees of the judiciary.

#### Article 81

The authority of the judicial branch shall include jurisdiction over all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court.

#### Article 82

Transfer, promotion, punishment, and proposals for retirement of judges shall be within the authority of the Supreme Court in accordance with the provisions of law.

### Article 83

The Chief Justice and other judges shall not engage in any profitable business with the State as long as they are in office.

### Article 84

A chamber of fatwa [Islamic legal opinions] (*Ihtisab* which will also issue fataws) shall be established within the structure of the Supreme Court.

## CHAPTER SEVEN: LOCAL COUNCILS

### Article 85

From an administrative point of view, the Islamic state of Afghanistan is divided into administrative units of provinces, districts and local counties which shall be supported and administered by the government.

### Article 86

Each administrative unit shall have an authoritative council. The method of the election and authorities of these councils shall be regulated by law.

### Article 87

Administrative councils shall be established on the recommendation of the government, endorsement of the High Council and approval of the President.

## CHAPTER EIGHT: COUNCILS

### Article 88

The economic system of the Islamic State of Afghanistan shall be based on individual (private), public and governmental property. The state should encourage and protect economic development in all the three areas in accordance with law and effective programs.

### Article 89

- 1) The state shall be obliged to strengthen and develop the Islamic treasury (*bait al-mal*) and observe Islamic principles in making expenses.
- 2) The collection and distribution of almsgiving (*zakat*) and tithe (*'usr*) shall be regulated by a special law.

- 3) It shall be the duty of the state to eradicate all types of interest and usury (*riba*) based transactions.

#### Article 90

The state shall use all the natural resources of the country to secure economic self-sufficiency to eradicate backwardness and increase the standard of the lives of the people by designing effective economic and social developmental programs in accordance with the principles of the sharia.

#### Article 91

In Afghanistan matters related to underground resources, mines, forests and unoccupied grasslands, basic energy resources, historical relics, communication establishments, huge dams and harbors, railroads, large enterprises and the radio television establishment, airports and other similar resources shall be regulated by a separate law with due consideration to the supreme interests of the country and the principles (*osul*) of the sharia. Law shall regulate private investment for the purpose of the usage of forests, grasslands, energy resources and the sale of communication instruments.

#### Article 92

In Afghanistan the activities of the agencies of foreign banks and foreign incorporations shall be regulated in accordance the principles (*osul*) of the sharia and the laws of the state.

#### Article 93

It shall be the duty of the state to modify and adjust the banking system and bring it in line with the Islamic system of economics.

#### Article 94

The state shall encourage and widen the activities of the productive and distributive enterprises in accordance with the standars/criteria (*zawabit*) of Islam through related organs.

#### Article 95

The state shall, for the purpose of reclamation, progress, spread of agriculture and increase in agricultural products and herding and in accordance with the provisions of law, provide technical and financial support to the farmers, landowners and herders. The state shall help in establishing agricultural, mechanized, mixed and private farms, the construction of new (*virgin*) and old lands (*wasteland*) and the growth and progress of the irrigational system by responsible administration.

#### Article 96

The state shall protect and encourage domestic and foreign private investment for the purposes of economic development in areas of industry, commerce, construction, agriculture and public service in accordance with law.

#### Article 97

Law shall regulate the method of the sale of immovable property to [foreign] political agencies and persons.

#### Article 98

The state shall support all types of lawful private and public property. Every individual shall be the lawful owner of his legitimate work and profession. The lawful property of a person shall be protected against trespassing. The expropriation of property shall take place in accordance with law and the decision of an authoritative court. The acquisition of property shall take place only for the purpose of securing public interest and exchange for sufficient and justifiable compensation.

#### Article 99

In the Islamic State of Afghanistan, tax shall be levied in accordance with the sharia law, social justice and standardized measures. Afghan nationals and foreign citizens shall pay taxes to the state in accordance with law.

#### Article 100

The state, for the purpose of the protection of national wealth and a rational usage of resources, through the responsible organs, shall take necessary measures and prevent environmental pollution.

### CHAPTER NINE: FOREIGN POLICY

#### Article 101

In light of the glorious (*arjdar*) teachings of Islam, the foreign policy of Afghanistan shall be based on human values, national interest, political independence, territorial integrity, effective and constructive role in preserving the international peace and international cooperation.

#### Article 102

The Islamic State of Afghanistan shall observe and support the UN Charter, the Organization of Islamic Conference, Non-Aligned Movement, the Universal Declaration of Human Rights and other accepted principles and rules provided that they do not contradict with the principles (*osul*) of Islam and national interests.

## Article 103

The Islamic State of Afghanistan wishes to establish, expand, and maintain friendly relationship with all nations of the world, particularly with the nations which have supported the rightful cause of the Afghan people in fourteen years of jihad, in the observance of the rights of each other and the limits provided by Islamic sharia.

## Article 104

Based on [the principle of] good neighborliness, the Islamic State of Afghanistan wishes for further support and cooperation among neighboring countries and strives for the strength of the Islamic brotherhood and unity within the Islamic world.

## Article 105

The Islamic State of Afghanistan shall follow the policy of positive and active neutrality and the free judgment of international disputes.

## Article 106

The Islamic State of Afghanistan shall respect the rights of all Muslim nations of the world within the limits provided by Islamic sharia, and it shall condemn any type of violations of their rights and intrusion of their freedom.

## Article 107

The Islamic State of Afghanistan, for the purpose of securing and protecting human rights for the entire individuals of the human community, shall support the rightful cause of the victim nations for their freedom and wishes for the rational and peaceful resolution of regional disputes within the limits provided by standards of Islamic justice. The state shall condemn all sorts of aggression.

## Article 108

The Islamic State of Afghanistan shall support the world's powerful nations' plans for eradicating nuclear and mass killing weapons.

## Article 109

The Islamic State of Afghanistan shall protect its citizens abroad and secure their Islamic rights.

## CHAPTER TEN: MISCELLANEOUS PROVISIONS

### Article 110

Any amendments, reduction and addition to this Constitution shall take place on the recommendation of the president, the Council of Ministers or one third of the members of the High Council and the collective ratification of the sessions of the Council of Ministers.

### Article 111

With the promulgation of this Constitution, the constitution of the previous regime shall be completely invalid.

### Article 112

Changing this Constitution shall be the authority of the High Council.

### Article 113

The provisions of the laws promulgated before the ratification of this Constitution shall remain in force if they do not contradict the provisions and values of this Constitution.

### Article 114

This Constitution, which is organized in ten chapters and one hundred and fourteen articles, shall come into force after the date of signature of the President and publication in the official gazette.