Non-Violation Of Islamic Law Under The Afghan Constitution

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Abstract

The Afghan Constitution of 2004 has imposed two sets of limits on rule making in the country. On the one hand, the rules made ought to meet the Islamic limits and, on the other hand, they have to satisfy the human rights and democracy limits as stated in international law. Firstly, as for the Islamic limits, it will be shown that "non-violation", rather than compliance, is meant. Secondly, the content and scope of the Islamic limits are dealt with. Thirdly, it is argued that no official religion is designated, though two Muslim jurisprudential schools are introduced for relevant cases. Fourthly, two pertinent authorities are introduced and discussed. That is, the Supreme Court and the Independent Commission for the supervision of implementation of the Constitution are established in order to undertake the duties of monitoring, respectively, "compliance" with and "implementation" of constitutional provisions, while a third issue of "interpretation" of the provisions has been remained ambiguous and, hence, creating controversies. Fifthly, it shall be shown that certain requirements of the second set of limits, in particular that of the rule of law, is the main pillar of the whole constitutional system. Thus, it cannot be readily undermined. Sixthly, the resulting conundrum of satisfying

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both sets of limits will be introduced. Finally, an attempt will be made to find a way out of the conundrum.

Keywords: Afghan Constitution of 2004, Constitutional Background, Non-Violation of Islamic Law, Human Rights and Democracy

1. Introduction

Ordinary legislation refers to the type of law making, by representatives of the people, which is performed within the boundaries set out by the higher law, i.e. the Constitution of a country. Afghanistan is no exception to this.

The Afghan Constitution of 2004 has set out, in various Articles, those limits within which the ordinary laws, by the National Assembly, are supposed to be legislated. Two main sets of limits are discernible in the provisions of the Constitutions (2004). The first set may be referred to as the "Islamic limits", to which Articles 2 and 33 of the Constitution explicitly refer, and the second as the "human rights and democracy limits", explicitly indicated by Article 7 of the Constitution and its Second Chapter, in particular Articles 58 and 59. The afore-mentioned limits lay very well bare the combinational nature of the Afghan Constitution. Indeed, the writers of the Constitutions have done their best to gather the traditional, in this case the Muslim heritage, and the modern provisions under the same roof.[2]

This chapter attempts to elucidate the Islamic limit, i.e. the non-violation provisions of the Constitution, which is imposed on the process of ordinary legislating. This limit is dealt with in both its own right and in relation to another constitutional limit on legislation. On this basis, we shall, first, refer to all the Articles of the Constitution (2004) that in one way or another define Islamic boundaries of the constitutional system, and will single out the most important provision relating to the ordinary law making amongst them, namely Article 3. Secondly, the historical background and connotation of Article 3 will be explained. The previous Constitution of the Country (1964) also included an Article (No. 64) according to which no ordinary law could be repugnant to the basic principles of the sacred religion of Islam. The meaning and implications of Article 3 of the existing Constitution will be explored in contrast to that of Article 64 of the previous. Thirdly, one of the significant institutional aspects

2. See, for instance, S. Alex Constantin et al. (eds), Selected Proceedings of The Annual Canadian Law Student Conference, Windsor, (Windsor Review of Legal and Social Issues in Association with The Windsor Faculty of Law 2010) 32.

of the Constitutional provisions in this regard, i.e. the monitoring authority over the applications of Article 3, will be examined. Fourthly, we shall turn to the relationship between the two afore-mentioned sets of constitutional limits on the ordinary legislation, and endeavour to lay bare their conceptual interplay. The main question will be whether or not they are congruous. Finally, in conclusion, an analysis of the mentioned relationship will be put forth in order to make a balance between the two main constitutional limits on legislation.

2. Related Articles

There are fourteen Articles amongst the provisions of the Constitution (2004) that set out, directly or indirectly, the Islamic non-violation requirements to be met by the whole legal-political system. It is worth noting at the outset that the provisions which will be discussed below indicate that the requirement of being Islamic and the ensuing limits required by it are all democratically put in force. The reason lies in the fact that, on 4th January 2004, the majority of the Afghan eligible voters, via their representatives in *Louyi Jarga*,[3] enacted them. That is, the provisions derive their validity from the popular will.

Article 1 explicitly states, *inter alia*, that Afghanistan is an Islamic republic, immediately after which, in Article 2, the sacred religion of Islam is declared as the religion of the Islamic republic state of Afghanistan. Article 3 requires that, in Afghanistan, no law may contravene the beliefs and rulings of the sacred religion of Islam.

Article 35, while recognising the right of the people to form political parties, imposes certain limits on this right. The first condition, stated in the first Item of this Article, requires that political parties' manifesto and charter do not contravene rulings of the sacred religion of Islam, or texts and values enshrined in the Constitution. Article 45, in another field, requires the state to devise and implement a unified educational curriculum on the basis of rulings of the sacred religion of Islam, national culture, as well as academic principles, and develop religious subjects curriculum for schools on the basis of existing Islamic sects in Afghanistan. Article 54 commits the state to take measures to eliminate family traditions contrary to rulings of the sacred religion of Islam. According to Article 62 (1), the President should be, *inter alia*, a Muslim, who, based on Article 63, ought to take an oath, before assuming the office, by which s/he has a duty,

3. The national assembly of the country comprising heads of all ethnics.

among other things, to obey and protect the sacred religion of Islam, and respect and supervise the implementation of the Constitution as well as other laws. The Ministers of the government also, by Article 74, take an oath, according to which they have to, *inter alia*, protect the sacred religion of Islam, respect the Constitution and other laws of Afghanistan, and safeguard the rights of citizens. Further, the Oath that the members of the Supreme Court ought to similarly take indicates almost the same: "to attain righteousness and justice in accordance with rulings of the sacred religion of Islam, texts of this Constitution as well as other laws of Afghanistan" (Article 119).

Article 121 deals with the monitoring of the compliance of all laws and regulations with the Constitution (including Article 3) and their interpretations. We will explore this Article in detail in section four of this chapter. Also, Article 130 refers to those judicial cases for which no rule can be found within the legal system of the country. Although, in this Article, rulings of the *Hanafī* School of jurisprudence are mentioned as the source of trial of these cases, two important qualifications are added to the recourse to this source. That is, courts ought to settle those cases within the constitutional limits and in a way that attains justice in the best manner. Further, Article 131 for the first time allows courts to try cases related to personal status, and also cases for which no rule can be found within the legal system, belonging to the followers of *Shī`ī* School of jurisprudence in accordance with the *Shī`ī* rulings.[4] Section 2 of the Personal Status Law (2009)[5] of the country embodies the provisions embedded in this Article.

Finally, according to Article 149, provisions relating to the principles of adherence to the rulings of the sacred religion of Islam as well as the Islamic republic system shall not be amended.

Having mentioned all the constitutional provisions relating to the Islamic aspect of the legal and political system of the country, it should be noted that Articles 3 of the Constitution (2004) defines the core substantive element of this aspect, particularly with regard to ordinary legislation. Other provisions enshrined in other Articles of the Constitution are either embodiments or applications of this core substance in a particular field, or they point to a formal (institutional/ procedural) aspect of the Islamic dimension of the Constitution. Accordingly, in the next section, we will focus on Article 3, which directly relates to the subject

4. Amin Tarzi , "Islam and Constitutionalism in Afghanistan" [2012] 5 (2) Journal of Persianate Studies 239.

5. See the Official Gazette, No. 988, Dated 27th July 2009.

matter of this chapter.

3. Background and Implications of Article 3

Article 3 of the Constitution of 2004 does not specify an unprecedented or brand new restriction on the content of the ordinary laws of the land. This kind of restriction was already provided for by Article 64 of the Constitution of 1964.[6] Article 64 stated, amongst other things, that "[t]here shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values enshrined in this Constitution."[7]

Now, it is necessary, first, to read the text of Article 3 of the Constitution of 2004 in contrast with that of Article 64 of the previous Constitution. We will then examine the meaning and implications of Article 3 independently in more details.

The wording of Article 3 is as follows: "[i]n Afghanistan, no law may contravene the beliefs and rulings of the sacred religion of Islam". The main difference between Article 64 (1964) and Article 3 (2004) relates to the qualification added to the sacred religion in each of the Articles. More precisely, the difference, due to different qualifications, relates to that part of the sacred religion which should not be violated by ordinary law making. Article 64 required the laws not to contravene the "basic principles" of the sacred religion, whereas Article 3 compels them not to violate the "beliefs and rulings"[8] of the religion. First, it should be noted that these two qualifications did not existed in the draft which the Constitutional Drafting Commission had prepared and was reconsidered by the Constitutional Review Commission. It was the *Louyi Jarga* that, in its compromise with the Islamist faction, added them.[9] Secondly, the "basic principles" evidently refer to the roots of the religion (i.e. *asāsāt*, *usūl al-dīn* or *usūl al-i`tiqādāt*[10]) and by this Article

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6. Constitution of the Kingdom of Afghanistan 1964, the Official Gazette, No. 12, Dated 3rd October 1964.

7. It is worth mentioning that, even prior to this, Article 65 of the Constitution of 1931 had provided that "Provisions passed by the National Assembly should not contravene the canons of the true religion of Islam or the policy of the country." Constitution of Afghanistan (Fundamental Principles of the Government of Afghanistan), 1310 A.P. (1931), Published Date: 13th December 1932. For further studies in this regard, see Mohammad Hashim Kamali, Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary (E. J. Brill 1985).

8. mu`taqadāt wa ahkām (معتقدات و احکام)

9. See, for instance, Tarzi, "Islam and Constitutionalism in Afghanistan", p 239; and Ramin S. Moschtaghi, "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between Them", in Rainer Grote & Tilmann J. Röder (eds), Constitutionalism in Islamic Countries: between Upheaval and Continuity (OUP 2012) 684-85.

10. Usāl al-dān includes the fundamental beliefs of Islam: e.g. belief in the one and only God, belief in the prophet-

64 determined a small limited set of rules which the legislature should take care not to infringe upon. In contrast, the concept of "beliefs and rulings" points to both the roots and branches (branches stand in contrast with roots (*asāsāt* or *usūl*), hence, they are called *furū` al-dīn* or *ahkām*[11]) of the religion and, accordingly, lays down a larger number of rules to be observed, or to be more precise, not to be violated. With this explication, we have evidently equated "beliefs" (in Article 3) with "roots (*asāsāt* or *usūl al-dīn*)". There is a good reason for this. Either "beliefs" should be read as a repetition of or synonym for "rulings" (next to it), which is absurd, or it is bound to imply an independent meaning other than "rulings" (i.e. branches of the religion). The only alternative meaning would be "basic principles" (i.e. roots of the religion or *usūl al-dīn*) of the religion.[12]

On this basis, ordinary legislation under the Constitution of 1964 had left a broader room for manoeuvre in terms of non-violation of the sacred religion. Under the previous Constitution, the ordinary law could comply with the religious principles while diverging from the rulings inferred from those principles up to the time of enactment of a new law. The content of this law could have not been thought of by any Muslim jurist before. The proposed content could have been a result of new interpretation and independent reasoning (*ijtihād*) of the religious sources. Thus, under the previous Constitution, *ijtihād* had in principle a more serious place in the ordinary law making process and could prevent a formalistic or mechanical application of the religious principles.[13] Indeed, it seems that

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hood of Muhammad (pbuh) and belief in the Resurrection (the Day of Judgment)

11. Furū` al-dīn means all normative rules that have been, and still being, inferred from the Islamic sources over the last thirteen hundred years or so. Although, at the beginning, sharī`a and fiqh were used to indicate understanding of the whole religion (i.e. dīn), they were later used as indicating the set of normative rules, that is, those rules that guide Muslim conducts. Nowadays, when the term ahkām or shari`a or fiqh is used, they are meant to indicate the Islamic set of normative rules. Only recently, some scholars have begun to distinguish between sharī`a and fiqh (see, for instance, Mohammad Hashim Kamali, Sharia Law (One World Publications 2008) Ch.s 2-3. By sharī`a, it seems, they mean the "Islamic sources" (al-adilla or manābi`: i.e. at least the Qur'ān and the Sunna), hence, they take these sources as sacred and unchangeable, whereas different understanding of those sources (as defined as fiqh) are considered as humane, contextual and changeable. Khaled Abou El Fadl, Reasoning with God: Reclaiming Shari'ah in the Modern Age (Rowman & Littlefield 2014) xxxii; Khaled Abou El Fadl, "Islam and the State: A Short History" in Khaled M. Abou El Fadl, Said Arjomand, Nathan Brown et al. (eds), Democracy and Islam in the New Constitution of Afghanistan, (RAND 2003) 13-14.

12. See, for example, Anver M. Emon, "To Most Likely Know the Law: Objectivity, Authority, and Interpretation in Islamic Law" (2009) 4 (4) Hebraic Political Studies 415, 440, (especially as at pp 425-427).

13. Khaled M. Abou El Fadl, , Said Arjomand, Nathan Brown et al. (eds), Democracy and Islam in the New Constitution of Afghanistan, (RAND 2003) 4.

the *Louyi Jarga* members at that time intended to expand modern ideas and material within the legal system, a propensity that was in place in 1923 as well.[14] However, in contrast, the existing Constitution of 2004 has in principle taken this opportunity away; to wit, the laws which are being drafted under this Constitution may not fly in the face of the already inferred rules and rulings of the religion (i.e. *ahkām* or *furū` al-dīn*).[15] That is why a number of scholars have put forth the idea of flexible interpretation of (or *ijtihād* in) the religious provisions so as to narrow the gap between two groups of constitutional provisions (i.e. those of the Islamic and the modern).[16]

Apart from the substantive evolution of the non-violation constitutional clause since 1964, we may now focus independently on the meaning of Article 3. The first point to make is that this Article explicitly requires the laws "not to violate" the Islamic rulings. In other words, it does not necessitate them to "comply with" these rulings.[17] The language of the Article is negative, rather than positive. Therefore, the "not to violate" qualification denotes a negative requirement, whereas "to comply with" qualification denotes a positive requirement. This no doubt makes a huge difference in the process of law making. On the basis of the negative requirement, the law makers are under a duty only to make sure that none of the existing rulings are infringed by their enactments, even though their new law cannot be directly traced backed to or be approved by any of the existing rulings. In other words, the law makers are not under a duty to show certain Islamic rulings in support of their legislation. The burden of proof, of violation of an Islamic ruling, is on the shoulder of those who claim that a piece of legislation has violated a specific ruling.[18] Therefore, it may be said that there is an approval

14. See Tarzi, "Islam and Constitutionalism in Afghanistan", p 222.

15. Alexander Their, "The Making of a Constitution in Afghanistan" (2006) 51 New York Law School Law Review 578.

16. See Andrew Finkelman, "The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan Constitutional Development Process, 2002-2004" (2005) Al Nakhlah (The Fletcher School's online journal on Southwest Asia and Islamic Civilization) < http://fletcher.tufts.edu/~/ media/Fletcher/Microsites/al%20 Nakhlah/ archives/pdfs/finkelman %202. pdf> accessed on 21 June 2018.

17. The constitutions of countries like Egypt and Pakistan have taken the "compliance" approach. See, for instance, Clark B. Lombardi, "Designing Islamic Constitutions: Past trends and options for a democratic future" [2013] 11(3) International Journal of Constitutional Law. The Iranian Constitution of 1979 (as amended in 1989) is not clear on this point, though its provisions may be interpreted as indicating a non-violation approach, see, Mohsen Kadivar, "Shar`e Shawraye Nigahban Dar Barabare Qanune Majlis" ("Shar` of the Council of Guardians against the Law of the Parliament") (2003) 30 Aftab Magazine <http://www.kadivar.com/?p=5746> accessed on 12 September 2015.

18. "al-bayyinatu `alā al-mudda`ī"

by the existing rulings of the sacred religion, but it is a negative, rather than a positive, one. In contrast, according to the positive requirement, the legislature ought to make sure that there is a precedent, in one way or another, in the pre-existing rulings for what they want to enact. The positive approach (compliance) narrows the legislative horizon, whereas the negative approach (non-violation) broadens it.

Secondly, the Constitution of 2004 has not named, in Article 3, any of the Islamic jurisprudential Schools (*Sunnī* or *Shī`ī*). Even the *Hanafī* School which was mentioned in Article 2 of the Constitution of 1964[19] is now removed from Article 2 of the current Constitution which states that "the sacred religion of Islam is the religion of the Islamic Republic of Afghanistan."[20] None of the 1964 and 2004 Constitutions declares *Hanafī* School as the official Sect of the country. Article 2 of the 1964 Constitution states: "[t]he religion of Afghanistan is the sacred religion of Islam. Religious rites by the state shall be performed in accordance with rulings of the *Hanafī* School …". Only the last phrase on the performance of religious rites has not been inserted into the 2004 Constitution. Unlike those two Constitutions, the 1931 Constitution makes the *Hanafī* School as the official religion of the country. According to Article 1 of the Constitution (1931), "The religion of Afghanistan is the sacred religion of Islam, and the official religion and that of the population in general is the *Hanafī* school."[21] Therefore, two interpretations may be put forward as to the requirements of this Article. First, it may be said that only the common and overlapping parts of all jurisprudential schools should not be violated. By this, the door will be closed to an anarchical situation of presenting various contending jurisprudential interpretations of Article 3 in the process of legislation, hence, the legislature and the relevant drafting institutions may be practically more able to meet the requirements of the non-violation of Islamic law clause. This could be called the narrow interpretation of Article 3. Secondly,

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19. "Islam is the sacred religion of Afghanistan. Religious rites performed by the state shall be according to the provisions of the Hanafāmazhab. Those nationals who do not follow the religion of Islam are free to practice their religion within the limits determined by laws for public decency order."

20. The deletion could be attributed to the National Assembly inclination to strike a balance between various factions and parts of the society, see Tarzi, "Islam and Constitutionalism in Afghanistan", p 220; and Barnett R. Rubin, "Crafting a Constitution for Afghanistan" in Said Amir Arjomand (ed), Constitutional Politics in the Middle East: With special reference to Turkey, Iraq, Iran and Afghanistan (Hart Publishing 2008) 57,156.

21. The Constitution of Afghanistan, 1310 A.P. (1931), Published Date: 13th December 1932. See Ramin S. Moschtaghi, "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between Them", p 692.

it may be claimed that, looking from a legislative perspective, enough care should be taken so as not to violate rulings of any of the Islamic jurisprudential Schools. This could be called the broad interpretation of Article 3. Prima facie, the latter interpretation might seem too heavy a duty for law makers to bear. Nevertheless, it can bring about a more inclusive law making policy. That is, in order for the legislature to adhere to requirements of Article 3, in the sense mentioned above, they would ultimately be lead to adopt an extra-sectarian perspective on law. On the other hand, this enables law makers to recourse to wider resources of various jurisprudential Schools in the process of drafting and passing all of laws.[22] Therefore, even if a law may have violated a ruling of one School, it may be the case that it has not violated the ruling of another School on the similar subject. For instance, the marriage of a virgin girl who has reached an age of enough maturity and wisdom without the consent of her father, grandfather, or guardian is not allowed under the preponderant interpretation of *Jafarī* School, whereas it is allowed under the *Hanafī* School.[23] If the legislation is of the latter kind, which is the case at the moment in the Afghan Civil Code, it has not violated Islamic rulings.

Thirdly, how should we read the word "beliefs" in Article 3? As just mentioned, at the beginning of this section, in order for "beliefs" to make a sense distinct from that of "rulings" (the full phrase reads: "Islamic beliefs and rulings"), there is no way but to interpret it as "basic principles" of the religion. Furthermore, given the normative (legal) nature of the document, these principles also ought to be of a normative kind. That is, when it comes to establishing a legal/political system, and if we wish to direct this system in a particular direction, we need to translate metaphysical and abstract dogmas into normative principles and rules so that they may be observed by this system.[24]

Finally, it is necessary to make an arrangement so as to make sure that the "non-violation requirement" of Article 3 is observed by various offices of the rule making apparatus of the constitutional system. That is, as a part of the constitutionality test of the legislation, laws should be reviewed by an authority to this effect.[25] The

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22. Mohammad Hashim Kamali, Sharia Law, esp. as at p 300.

23. Hossein Mehrpour, MabāhisāAz Huqāqi Zan (Certain Issues on Women's Rights) (Itilāā Publishing 2000) 51, 92.

24. See, Mohammad Rasekh, "Are Islamism and Republicanism Compatible?" in Nadjma Yassari (ed), The Shari'a in the Constitution of Afghanistan, Iran and Egypt - Implications for Private Law (Mohr Siebeck 2005).

25. When we say "law" we mean the enactment of the parliament. Therefore, the constitutionality review of a draft

main question is about authority that holds such monitoring power. The presence of such authority, with a clear set of powers, would undoubtedly leave a profound impact on the way the officials and citizens understand and apply the Islamic limit on legislation.

4. The Monitoring Authority

It should be drawn into attention that provisions of a constitution are prone to be left either unimplemented or implemented while this implementation may not be in full conformity with the provisions. Therefore, constitutions usually devise certain arrangements and procedures with the aim of remedying such shortcomings. In this regard, various provisions are enshrined in the Afghan Constitution of 2004 with the purpose of making sure that both the implementation of the constitutional principles and rules and monitoring of this implementation (i.e. conformity of the implementation with the constitution) are met.[26]

On this footing, Article 157 provides that "[t]he Independent Commission for the supervision of implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People." Evidently, this arrangement is built into the constitutional system so that the very implementation of constitutional provisions is not disregarded. On the other hand, the Commission's authority is *prima facie* a general one, which encompasses the supervision over implementation of all constitutional provisions, including the legislative part. Moreover, according to Article 157, everything else regarding the Commission is left to the ordinary law.[27]

However, two important points should be noted here. First, the authority of the Commission is of a supervisory nature, hence, any other power, of executive or judicial nature, may not be derived from this Article 157. This is due to

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legislation, in the proper meaning of the terms, falls outside of this discussion, though it is certainly an obligation of the drafting institutions and persons to make sure that a draft legislation complies with all provisions of the Constitution, including Article 3 (see, for instance, Articles 16 and 30 of the Regulation on Procedure of Preparing and Processing Legislative Documents (2012). This would reduce the risk of violation of a constitutional provision of the whole legislative process.

26. Tom Ginsburg, "Comparative Constitutional Review" (2012) US Institute of Peace Report <http://www.usip.org/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf> accessed on 27 July 2018.

27. The Law on the Independent Commission for the Supervision of Implementation of the Constitution was enacted in 2008. We will refer to this Law again later in the text.

both the conceptual implication of the concept of "supervision" (which does not semantically include an executive or judicial power)[28] and the principle of presumption of non-authority (upon which the burden of proof is on the shoulders of officials that they have authority to do what they are doing).[29] Secondly, the "general" supervisory authority of the Commission may be qualified by a similar "particular" authority as set out in the Constitution. That is, if supervision over the implementation of a particular part of the Constitution is granted to a particular authority, it clearly means that the general authority derived from Article 157 is qualified and limited by this particular constitutional provision.

On this basis, it may be said that Article 121 of the Constitution is better understood if it is read in the light of two of the distinctions made in the above analysis. In that analysis two quite important distinctions were made: one between the two concepts of "implementation" and "conformity", and the other between the "general" and "particular" rules. Let us first state the precise text of Article 121: "[t]he Supreme Court has the authority to review the conformity of laws, legislative decrees, international treaties as well as international covenants with the Constitution and their interpretation, at the request of the Government or courts, in accordance with the law."

It is evident that, on one hand, the subject matter of Article 121 is about conformity of ordinary rules with the constitution, rather than the very implementation of a particular constitutional rule. In other words, it is assumed by this Article that a particular part of the Constitution has been already implanted, i.e. the legislative part, in consequence of which Article 121 requires an examination of the end result of such implementation (i.e. the enacted laws) against the constitutional requirements, as a conformity test.[30] Correspondingly, the subject matter of Article 121 does not fall within the purview of Article 157 which is about the very implementation of constitutional provisions. On the other hand, if it is argued that law making is an instance of implementation of the Constitution, hence, Article 157 is applicable to such an action, it may be said, in reply, that supervision over such implementation is "particularly" entrusted with the authority mentioned

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28. Mohammad Rasekh, Nizārat Wa Ta`ādul Dar Nizāmi Huqāqi Asāsā (Checks and Balances Under the Constitutional System) (5th ed, Derak Publication 2018) 15-17.

29. Mohammadreza Vijeh, "Ta'ammulā Bar Mafhāmi Salāhāyat" ("A Thought on the Concept of Discretion") in Mohammad Jalali (ed), Andāshihāyi Huqāqi Idārā (Administrative Law Thought) (Majd 2010) 312.

30. Moschtaghi, "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between Them", p 707.

in Article 121. This is a case of qualification of the general by particular. The particular authority of supervision enshrined in Article 121 does qualify and override the general authority laid out in Article 157.

Here, there remains another issue that has created strong controversy within the Afghan constitutional system. The issue relates to the authority of interpreting the Constitution which in turn may impact the interpretation and enforcement of the constitutional clause on the non-violation of the sacred religion.

Over the first decade of the life of the Constitution, a few constitutional cases arose, which in their turn brought the issue of interpretation of the Constitution to the fore.[31] Eventually, it amounted to the enactment, by the House of People, of the "Law on the Independent Commission for the Supervision of Implementation of the Constitution" in 2008. The President vetoed the law, arguing that parts of its provisions violated Article 121 of the Constitution. It was argued that the Independent Commission for the supervision of implementation of the Constitution, according to Article 157, is only to supervise the implementation of the Constitution. This is a duty totally different from interpreting the Constitution. They have to be kept separate.[32] In return, the House used its constitutional power (enshrined in Article 94) and overruled the presidential veto by passing the Law with a two third vote for a second time. Section 8 of this Law stipulates: "For the purpose of a better supervision of the application of the provisions of the Constitution, the Commission shall have the following duties and authorities: … (2) Supervision of the observance and application of the provisions of the Constitution by the President, the Government, the National Assembly, the Judiciary, and the state and non-state institutions."[33]

In 2009, however, the Supreme Court issued a Judicial Order by which parts of the Law were declared in violation of the Constitution and hence unenforceable.[34] In general, two kinds of arguments have been put forth for and against the authority

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31. The most famous of which has been the Spanta Case. See, Mohammad Hashim Kamali, Afghanistan Constitution Ten Years On: What Are the Issues? (AREU 2014) 10, 14.

32. Mohammad Qasim Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan" in Rainer Grote & Tilmann J. Röder (eds), Constitutionalism in Islamic Countries: between Upheaval and Continuity (OUP 2012) 677.

33. Law on the Independent Commission for Supervision of the Application of the Constitution 2008. See Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan", p 678.

34. For the text of both the Law of 2008 and the Order of the Supreme Court on this Law, see The Official Gazette, No. 986, Kabul: The Ministry of Justice, p 47 onwards.

of the Supreme Court to interpret the Constitution. The proponents argue on the basis of the intention of the writers of the Constitution who had drafted a chapter on a constitutional court which had been explicitly granted, among other things, the authority to interpret the constitution.[35] On the last days of constitutional deliberation, the chapter was deleted, by virtue of which Article 121 was hastily drafted and inserted into the Constitution. This Article does include a power of interpretation which, given the background and intention of the writers, should embrace the interpretation of the Constitution. The opponents, however, argue on a grammatical basis (in Dari language) that the phrase "and their interpretation" in Article 121 refers only to the four items mentioned before it (i.e. laws, legislative decrees, international treaties as well as international covenants) and, hence, the issue of the interpretation of the Constitution remains out of the domain of the Court's powers.[36]

It seems that the controversy over the mentioned interpretation power is still unresolved. Its resolution may partially depend on the kind of theory of constitutional interpretation (textualist or otherwise)[37] one chooses, but it also depends on dynamics of the power structure inside the country. All in all, one may claim that the Supreme Court, consisting of permanently employed high ranking judges, is more reliable, compared with the Commission whose very existence depends on the approval of the majority of (most probably non-lawyer) non-permanent members of parliament, to interpret the most important legal document of the land, especially when it comes to the other constitutional limit on law making (namely, the human rights and democracy boundary).[38]

The last point lays bare another significant element in understanding the Islamic limit on law making. Understanding and implementation of this limit would be extremely fluent if there were only one such limit in the Constitution. Things, however, are complicated when another equally important limit is set out therein.

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35. Scott Worden & Sylvana Q. Sinha, "Constitutional Interpretation and the Continuing Crisis in Afghanistan" [2011] 113 PEACEBRIEF 1- 4.

36. See Kamali, Afghanistan Constitution Ten Years On: What Are the Issues?, pp 12-14.

37. See, for instance, Robert Post, "Theories of Constitutional Interpretation" [1990] 30 Representations (Special Issue: Law and the Order of Culture), 13,41

38. Sarwar Danish favours a judicial system for review and interpretation: Sarwar Danish, Darāmadābar Vaz` wa Taswābi Qānuni Asāsi-i Jadāli Afghanistan (An Introduction to the Ordaining and Passing the New Constitution of Afghanistan) (Siraj 2003) 112-113; Hashimzai, "The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan", pp 675-78.

5. Relationship among Various Constitutional Limits

As just mentioned, the constitutional requirement not to violate the Islamic principles and rulings is not in fact the only limit imposed on the ordinary law making process. There is another set of rules that gives rise to another limit in this regard. This set consists of those provisions of the Constitution that relate to the establishment and observation of the rule of law, democracy, human rights, and international law standards. For the sake of brevity, we have called them the human rights and democracy limit.

The very existence of the Constitution, as the most fundamental binding rule-system, is the best witness for the necessity and the establishment of the state on the basis and within the limits of law (i.e. the rule of law). The rule of law principle has also explicitly and emphatically emerged at many points in the Constitution. Not only does Article 56 obligate all citizens of Afghanistan to observe provisions of the constitution, obey the laws, and their ignorance of the law is not considered as an excuse, Article 27 also embodies three vital requirements of the rule of law in the modern time. They all lie in the most sensitive realm of crime and punishment. According to this provision no commission or omission of an act shall be counted as a crime and, consequently punishable, unless it is in advance designated as a crime. Also, the kind and amount of punishment and procedures of prosecution and trial all have to be determined in advance. Due process of law is explicitly mentioned and emphasized with regard to the latter two. Correspondingly, the rule of law, as the backbone and the most important pillar of the constitutional system, is so fundamental that nothing can overrule it. Even any substance that is accepted as a standard of rule making cannot logically go so far as to undermine the pillar and play a self-defeating role in the system.

Democracy is another fundamental element of the Constitution which has emerged in various provisions of the Constitution. For instance, Article 4 declares that the national sovereignty belongs to the nation which shall be exercised either directly by them or indirectly through their representatives. The nation is also defined as all individuals who possess the citizenship of Afghanistan. Article 5 also emphasizes that it is a duty of the state to implement the provisions of the Constitution in order to, *inter alia*, protect the national sovereignty (which is already defined in Article 4), and Article 6 defines realisation of democracy as one of the obligations of the Afghan state. It obligates the state "to create a prosperous and progressive society based on social justice, preservation of

human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the country". Democracy here is depicted intertwined with other elements of a constitutional system.

Human rights occupy even a more significant and prominent place in the Constitution. From Article 6 (protection of human rights) to Article 7 (observance of the Universal Declaration of Human Rights) to an entire chapter on rights of the people (Chapter 2, including 28 Articles) to Article 74 (the President's oath so as, among other things, to protect rights of citizens) to Article 149 (amendment of fundamental rights of citizens provided only that they are improved) all reveal the high status of human rights in the Constitution. Finally, Article 7, by committing the state to observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights, marks still another important boundary for the legal system, in particular the law making apparatus. These provisions do mark a really significant milestone in the history of Afghan constitutionalism, despite the fact that in many Muslim countries there seems to exist a vague and insufficiently elaborated fear of the idea and institution of rights.[39]

It should be noted here that the above mentioned provisions of the Constitution in fact represent some of the main pillars of modern constitutionalism. The constituting power of the people and their active participation in determining their collective destination, the rule of law, fundamental human rights, separation of powers, the checks and balances system and the like are all amongst the requirements of a modern constitutional system which in turn is an embodiment of the modern justice.[40]

The question now is about the compatibility of the Islamic limit of the Constitution with its human rights and democracy boundary. No doubt, the Constitution requires the observation of both of the limits, which certainly implies that the writers of the document had presupposed their compatibility.

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39. On the Muslim response to human rights, see, for instance, Ann Elizabeth Mayer, "The Respective Roles of Human Rights and Islam: an Unresolved Conundrum for Middle Eastern Constitutions" in Saïd Amir Arjomand, Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan (Hart Publishing 2008) 7.

40. David T. Butleritchie, "The Confines of Modern Constitutionalism" [2004] 3 (1) Pierce Law Review 1, 32; and Mohammad Rasekh, "Sharia and Law in the Age of Constitutionalism" [2016] 2 (2) Journal of Global Justice and Public Policy 259, 276.

Over the short life of the Constitution, there have been serious cases of incompatibility of the two limits. Here, reference may be made to the actual conflict between the right to freedom of religion, on one side, and the ruling on *irtidād* (the punishable grave crime of apostasy, which includes converting from Islam to another religion), on the other. The *Abdul Rahman* (*Apostasy*) *Case* (2006) was an instance of this kind of conflict.[41] While apostasy (*irtidād*) is not criminalised under the criminal law, many traditionalist scholars insist on considering it as a crime and imposing a capital punishment for its commission. On the other hand, major human rights documents, to which Afghanistan is a party, e.g. International Covenant on Civil and Political Rights (1966), explicitly embrace a right to freedom of religion.[42] Therefore, it is not logically possible to resort to the idea of legal gap on apostasy and fill it with the traditional rules and rulings. Evidently, the legislature has not consciously passed a law on the issue and, hence, there is no legal gap in the first place. That is to say, recourse may not be made to Article 3 on issues such as apostasy.[43]

Accordingly, it is observed that there are dilemmas arising from the substance and structure of the Constitution which are in a dire need to theoretical and practical solution. We may put the matter in a slightly way by pointing to the conundrum which seemingly derives from the very text and language of the Constitution.

On one hand, it is required of all of the laws not to contravene principles and rulings of the sacred religion. To be more precise, every law has to stay within the boundaries of Islam. Language of Article 3, for instance, is clear and certain enough to this effect. On the other hand, all of the laws, including those laws that are not in violation of the said principles and rulings of the sacred religion, ought to remain inside the boundaries of human rights and democracy. Language of Article 7, for instance, is also clear and certain enough to this effect. Even at those points that rules are allowed to be brought in from *Hanafī* or *Shī`ī* jurisprudential Schools (based on Articles 130 and 131) these rules ought to be, respectively, within the limits of the Constitution and the law. As a result, a conundrum seems to appear on the horizon: laws are to be subject to rules of the sacred religion, on the one side; rules of the sacred religion are to be subject to laws, on the other.

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41. See, in this regard, Mandana Knust Rassekh Afshar, "The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution" [2006] Max Planck UNYB 10.

42. See Tarzi, "Islam and Constitutionalism in Afghanistan", p 712.

43. See, for instance, John Eddy, "Rule of Law in Afghanistan: The Intrusion of Reality" [2009] 17 (2) Journal of International Cooperation Studies 12-14.

In other words, in order for the legislature to enact a law (including enacting requirements of international documents and human rights) they have to observe the Islamic limit, while at the same time in order for them to integrate the Islamic substance into the legal system they should do so in accordance with the law and the constitutional provisions (including requirements of international documents and human rights).

The picture depicted above represents a circle, though not necessarily a vicious one. That is, observing any of the two main constitutional limits is dependent upon the other one. They are mutually dependent in an apparently circular way. This circle may indeed be a virtuous one. In order to avoid a vicious circle, at least a balance should be struck between the two sets of the mentioned limits. We will deal with this point in the next, i.e. the final and concluding, section.

6. How to Make a Balance?

As already mentioned, implementing the provisions of Articles 3 to 7 of the Constitution, as examples of various limitations that the Constitution imposes on law making, gives rise to an apparently circular conundrum. As a recap, we began this chapter by analysing the limit of non-violation of principles and rulings of the sacred religion of Islam on law making. An attempt was made to explicate the meaning and implications of this limit when it stands alone. Also, the authority in charge of monitoring the observance of the said limit was dealt with, as this has an important role to play over the implementation and interpretation of the limit. It should be added that the mentioned authority has of course the power to monitor the observance of all constitutional limits.

However, it has been shown that the limit arising from the non-violation provision of the Constitution is not the only one laid out by the Constitution with regard to law making. Another major constitutional limit, namely the set of human rights and democracy requirements, has been referred to as well. Given the second limit, the meaning and implications of the first one (that is, the Islamic limit) becomes complicated, since the two limits are supposed to sit together; otherwise the integrity of the Constitution would be compromised. In consequence, the law making authorities as well as the related monitoring authority are faced with the daunting task of keeping together the constitutional limits on law making, rather than falling for one of them. As argued above, none of the limits may be given priority to the other one. They need to stand side by side in a horizontal way. It is not possible to bring about a hierarchy between them.

This is what we referred to it as a conundrum, a seemingly circular situation, though it should be noted that the conundrum is not new to Muslims. It has been one of the major problems with which they have been grappling over the last one hundred and fifty years or so, as a part of the problem of constitutionalism following their encounter with modernity.[44]

The first point that should be emphasized is that we have to avoid taking any extreme stance on the problem.[45] Supporting just one side of the afore-said circle would make it a vicious one, in consequence of which the establishment of a genuine constitutional system shall be endangered. In other words, taking side with just one of the two elements of the circle, i.e. those of the Islamic and the democratic/human rights limits, would bring about an antagonist atmosphere in which one of the elements will be readily alienated from the legal system. That is, one of the set of limits has to be sacrificed for the sake of the other.[46]

Secondly, to consider each side of the conundrum (i.e. the sacred religion, and human rights and democracy) as a "source" may help us break out of the circle or turn it into a virtuous one. In this case, law functions as a vehicle for the values and principles embedded in the two mentioned sides/sources. By this, we mean neither of the set of the limits should be considered as a positive law which is ready to be implemented in a direct and immediate way. They are to be taken as various sources of the law, be it statutory or precedent-based. Accordingly, the sources have to be "understood" and, hence, from which laws and regulations of the country "inferred" via due (legislative and judicial) constitutional procedures.

Thirdly, we propose to establish an ongoing "interaction" between the two sources, as this seems the most justifiable and viable project to pursue by the

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44. In this regard, see, for instance, Mohammad Rasekh, "Mudirnīti Wa Huqūq-i Dīnī" ("Modernity and Religious Law") [2008] 64 (3) Nāmih Mufīd; Mohammad Rasekh & Fatemeh Bakhshizadeh, "Pīshzamīniyi Mafhūmi Qānūn dar Inqilūb-i Mashrūtiyi Iran: Az Mālikuriqābī tā Tanzīmāt" ("The Background of the Concept of Law in the Iranian Constitutional Revolution: From Absolutist to Regulatory Law") [2014] 83, The Law Journal of the Ministry of Justice; Mohammad Rasekh, & Fatemeh Bakhshizadeh, "Mafhūmi Qānūn dar `Asri Mashrūtih: Niwīsandigāni Mutaqaddim" ("The Concept of Law in the Age of Constitutionalism: Early Writers") [2015] 68 Legal Studies Quarterly; and Mohammad Rasekh , "Sharia and Law in the Age of Constitutionalism" [2016] 2 (2) Journal of Global Justice and Public Policy 259, 276.

45. See, for instance, Tarzi, "Islam and Constitutionalism in Afghanistan", p 710.

46. The author of the following paper has expressed concerns over such a situation in favour of the Islamic limit: Said Mahmoudi, "The Sharî'a in the New Afghan Constitution: Contradiction or Compliment" [2004] ZaoRV 64; Khaled M. Abou El Fadl, , Said Arjomand, Nathan Brownet al. (eds), Democracy and Islam in the New Constitution of Afghanistan, p 4.

process of law making at various levels. The degree of success of such interaction of course depends in turn on the public and political culture, on the one hand, and institutional capabilities of the country, on the other. This may be called the requirement of a "consistent" interpretation of the Constitution in the light of its major sources. Fortunately, this kind of approach to the sources and principles of constitution is one of the experienced effective approaches in other countries, e.g. Germany.[47]

Fourthly, the afore-mentioned "interaction" would allow the sources to learn from each other.[48] The interaction no doubt lays bare the weak and strong aspects of claims made under the two sets of constitutional limits. This is a continuous process which in its turn acts as a constitutional "evolution". Nevertheless, the context in which such learning and evolution take place finds a vital importance. The context (i.e. the social, political, cultural and economic situation) reveals the traditional wealth and needs, with which the two sources may interact and show their capabilities.

Fifthly, by this, the law makers find the opportunity to use the law as a vehicle for the formation of a synthesis out of the two sources. They would have rich material of the two heritages at their disposal and would undoubtedly come up with timely and effective solutions for urgent problems and needs.

Last but not least, the synthesis may be reached if only the law makers, within the legislative, judicial or administrative apparatus, manage to find a "balance point" of the two contributing sources of law. A continuously revised "reflective equilibrium" needs to be made between the "requirements" of the Islamic limit and the human rights and democracy limit so that a working and sustainable law may be passed and enforced. This is not certainly attainable by insisting on an exclusive view on either tradition (the Islamic limit) or modernity (the human rights and democracy limit). Law is bound to be inclusive of both.

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47. See, for instance, Tarzi, "Islam and Constitutionalism in Afghanistan", pp 710-713.

48. In this regard, see, for instance, Ann Elizabeth Mayer, "The Respective Roles of Human Rights and Islam: an Unresolved Conundrum for Middle Eastern Constitutions" in Said Amir Arjomand (ed), Constitutional Politics in the Middle East: With special reference to Turkey, Iraq, Iran and Afghanistan (Hart Publishing 2008) 77, 97.