

SHARIAH'S POSITION IN AFGHAN 2004 CONSTITUTION: A LEGAL ANALYSIS

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ABSTRACT

The legal position of Shariah in the 2004 Afghan constitution has been considerably debated due to the full involvement of the international community in the constitution-making process. Though Article 3 of the 2004 constitution of Afghanistan states that “no law shall contravene the beliefs and principles of Islam”, considering this provision and others, the position of Shariah in the constitution seems ambiguous. Some legal experts at national and international levels consider the 2004 constitution to be one of the most Islamic constitutions, recognising the supremacy of Shariah. Contrary to this, some scholars think that a set of constitutional provisions predicate a limited applicability of Shariah by referring to Hanafi Fiqh as a gap-filling law in Article 130. Keeping this problem in mind, this research paper examines the supremacy of Shariah in light of all provisions in the 2004 constitution. It aims to outline the actual role of Shariah within the 2004 constitution by elaborating on the different concepts of Shariah and law in the Afghan legal system. The study which follows qualitative research methodology is conducted

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through major library research and an empirical study, employing comparative and analytical approaches per doctrinal and non-doctrinal methods. It exposes the conceptual and applied aspects of the legal provisions relating to the applicability of the Shariah in the 2004 constitution. The research generally relied on primary sources such as the constitution of Afghanistan and the Quran and Sunnah for the Shariah. The researcher considered the connection between the various constitutional provisions on Shariah in conjunction with the hierarchy of legal norms and found that Shariah has a weak position under the 2004 constitutional setup up as a judicial review attests. The 2004 constitution provides a limited applicability of Shariah in the sense that no law shall contravene the Shariah while at the same time, the term law does not include the constitution- itself and the term Shariah generally refers to Hanafi Fiqh as a subsidiary source of law. The constitutional provisions on Shariah are not amendable, as the 2004 constitution declares them irrevocable. To strengthen the position of Shariah, it is proposed that the primary step is to define the term law comprehensively to include the constitution. However, the best alternative is that Afghans enact a new constitution that provides the supremacy of Shariah.

Keywords: Afghanistan, Shariah, Basic Law, Article 3, Ambiguity.

KEDUDUKAN UNDANG-UNDANG SYARIAH DALAM PERLEMBAGAAN AFGHANISTAN 2004: SUATU ANALISA UNDANG-UNDANG

ABSTRAK

Kedudukan perundangan Syariah dalam Perlembagaan Afghanistan 2004 telah banyak dibahaskan disebabkan oleh penglibatan sepenuhnya masyarakat antarabangsa dalam proses penggubalan perlembagaan. Walaupun Perkara 3 Perlembagaan Afghanistan 2004 menyatakan bahawa “tiada undang-undang boleh melanggar kepercayaan dan prinsip Islam”, mengambil kira peruntukan ini bersama-sama dengan yang lain membuatkan kedudukan Syariah dalam Perlembagaan nampak samar-samar. Seseengah pakar undang-undang di peringkat kebangsaan dan antarabangsa menganggap Perlembagaan 2004 menjadi salah satu perlembagaan paling Islamik yang mengiktiraf keluhuran Syariah. Namun, seseengah pakar pula berpendapat bahawa satu set peruntukan perlembagaan menunjukkan penggunaan Syariah terhad dengan merujuk kepada istilah yang disebutkan dalam teks di atas. Oleh yang demikian, kertas penyelidikan ini mengkaji keluhuran Syariah berdasarkan semua

peruntukan pada Perlembagaan 2004 dan konteks undang-undang Afghanistan. Kajian menggunakan kaedah doktrin analisis kandungan dan tafsiran undang-undang yang harmoni untuk mengetahui kedudukan sebenar Syariah dalam Perlembagaan 2004. Pengkaji mempertimbangkan kaitan antara pelbagai peruntukan perlembagaan mengenai Syariah dalam bersempena dengan hierarki norma undang-undang dan mendapati Syariah mempunyai kedudukan yang lemah di bawah Perlembagaan 2004. Perlembagaan 2004 memperuntukkan yang terhad kebolegunaan Syariah dimana tiada undang-undang boleh melanggar Syariah namun pada masa yang sama, istilah undang-undang tidak termasuk perlembagaan itu sendiri dan istilah Syariah umumnya merujuk kepada fiqah Hanafi sebagai sumber hukum tambahan. Peruntukan perlembagaan mengenai Syariah tidak boleh dipinda, kerana tambahan lagi, Perlembagaan 2004 mengisytiharkan bahawa peruntukan berkaitan Syariah tidak boleh ditarik balik. Oleh itu, bagi mengukuhkan kedudukan Syariah, dicadangkan supaya langkah utama ialah mentakrifkan undang-undang secara menyeluruh dengan memasukkan perlembagaan. Namun, alternatif yang terbaik ialah rakyat Afghanistan menggubal perlembagaan baharu yang memberikan keluhuran Syariah.

Kata Kunci: Afghanistan, Syariah, Undang-undang Asas, Perkara 3, Kekaburan.

INTRODUCTION

Geographically, Afghanistan is a landlocked country located in a strategic position at the crossroads of Central and South Asia. It borders six countries, namely, Iran, Turkmenistan, Uzbekistan, Tajikistan, China, and Pakistan.¹ After the 9/11 attacks on the United States of America (USA) in 2001, The USA and its allies in support of the North Alliance of Afghanistan rapidly invaded and toppled the Taliban regime by November 17, 2001. It resulted in a new political and legal framework for the country.² For this purpose, in December 2001, the German city of Bonn hosted a conference in which representatives of the international community and several Afghan factions - except

¹ Abdul Hai Habibi, *A Short History of Afghanistan* (Book Publishing Institution with Cooperation by the Historical Society of Afghanistan, 1961), 1.

² J. Alexander Their, "The Making of a Constitution in Afghanistan," *New York Law School* 51, no.3 (2006): 559.

Taliban - gathered under Lakhdar Brihimi's leadership in mapping out Afghanistan's future and reached an agreement that is commonly known as Boon agreement under which the 2004 constitution was approved by *Loya Jirga*³ (grand assembly).⁴ In addition to the declaration of Islamic republicanism,⁵ Islam as the official religion of the state,⁶ and Islamic values in the composition of national symbols,⁷ the Islamic principle of the 2004 constitution was placed to focus on the implementation of the rules of Shariah.⁸ This constitutional provision emphasises the legal status of Shariah that seems inconsistent with the other rules, referred to under different terms such as the tenets or provisions of Islam, Hanafi Fiqh, and others in the 2004 constitution.⁹ Most of all, commentators argue that the 2004 constitution is completely an Islamic constitution, that is Shariah shall prevail, the law must be based upon Shariah, and any legal provision, to the extent of disharmony, be void under Article 3. Importantly, the different meanings of the law and constitution and the meaning of Shariah as *fiqh* under the provisions of the 2004 constitution contrast with the above view weakens the supreme position of Shariah, applied as a gap-filling law whenever and wherever the constitution and other laws do not provide a solution to a problem.

In light of the above, this paper critically focuses on the constitutional provisions relating to the position of Shariah in the process of enacting legislation, interpretation of it, and the implementation of statutory rules to determine the legal position of

³ Loya Jirga is the highest manifestation of the people of Afghanistan. The 2004 Constitution of Afghanistan, 2004 (Art. no 110 of 2004).

⁴ Mark Fields and Romasha Ahmad, *A Review of the 2001 Bonn Conference and Application to the Road ahead in Afghanistan* (National Defense University Press, 2011), 5. And also see more the preamble, Articles 111 and 162 of the 2004 constitution of Afghanistan.

⁵ Article 1 of the 2004 constitution declares that "Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state".

⁶ Article 2 of the 2004 constitution states that "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals".

⁷ See Articles 19 and 20 of the 2004 constitution of Afghanistan.

⁸ See Articles 3, 130, 131 and 149 of the 2004 constitution of Afghanistan.

⁹ See Articles 3, 130 and 131 of the 2004 constitution.

Shariah which might play a vital role in eliminating the current cause for the lack of the constitution in Afghanistan.

LITERATURE REVIEW

The Bonn agreement is regarded as a milestone in embedding Islamic rules in the constitution of Afghanistan. Despite being an important subject among Afghans, literature on the position of Shariah in the 2004 constitution is scarce. Most of the literature is focused on the supremacy of Shariah in the constitution. Without consolidation of conflicting ideas, most of it only discusses the provision which shows that the 2004 constitution must accept the supremacy of Shariah if it is not interpreted in conjunction with other relevant legal provisions. It is difficult to find literature to establish a connection between the provisions which prescribe the implementation of Shariah rules in the 2004 constitution. Politicians in Afghanistan have deliberated on this subject in line with their interests and given recognition to the application of Shariah.

Although national legal experts are of different opinions, depending on their official positions, most of them and international legal experts have thought that the 2004 constitution of Afghanistan is the most valuable Islamic constitution in the world. However, this is debatable. Hence, in this study, the available literature related to the issue is reviewed to establish a link between the various provisions of Shariah in the 2004 constitution. Such a study is currently not available. In this relation, Martin Lue illustrated that Islamic provisions are written into the fabric of the 2004 constitution.¹⁰ Mohammad Ashraf Rasooli, one of the prominent members of the Constitutional Drafter Commission "CRC", argued that Islam is the main source of law in the 2004 constitution.¹¹ Likewise, Mohammad Hashim Kamali, believes

¹⁰ Martin Lue, "Islamic Law in the Legal System of Afghanistan," in the Bonn symposium on *the State Reconstruction and International Engagement in Afghanistan 2003* organised by London School of Economics and Political Science and University of Bonn. <file:///E:/isalamic> (accessed 22 October, 2024).

¹¹ Mohammad Ashraf Rasooli, *Tahlil wa Naqd Qanoni Asasi Afghanistan [The Analysis and Criticism of the Constitution of the Afghanistan]* (Sead Publisher, 2012), 38.

that no law can contravene the principles of Islam according to the 2004 constitution.¹² This literature introduces the supreme position of Shariah as a source of law without considering the meaning of the term law and Shariah in the Afghan legal context which provides qualifications and limits on the legal validity of Shariah, as prescribed by the 2004 constitution. The current research aims to analyse the restricted position of Shariah in the provisions of the 2004 Constitution that has not been discussed vigorously so far.

Unrestricted Applicability of Shariah

The Bonn agreement imposed a significant impact on the legal position of Shariah in the 2004 constitution. It introduced, among others, Islamic principles as the basis for the national justice system in 2001.¹³ Within this framework, *Loya Jirga* approved a new constitution in 2004.¹⁴ Regarding the application of Shariah, Article 3 of the 2004 constitution declares that “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”

The above text presents the supremacy of the tenets and provisions of Islam over laws in Afghanistan but the wording of the text led to the varied interpretation of this provision. In addition to the ambiguity and legal gap in the text, as will be demonstrated later in subsequent section, the objective of this Article has drawn substantive debate from constitutional framers, legal experts, lawyers, politicians, and the general public due to its conflicting idea with other constitutional provisions.¹⁵

Some stated that the objective of Article 3 is to present a repugnancy clause which focuses on the validation of laws contrary to

¹² Mohammad Hashim Kamali, “References to Islam and Women in the Afghan Constitution,” *Arab Law Quarterly* 22, no. 3 (2008): 286-288.

¹³ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (adopted 5 December 2001), Art 2.

¹⁴ See more the 2004 Constitution of Afghanistan.

¹⁵ Lutforahman Saeed, “Legal Pluralism in Afghanistan,” *Islam, Custom and Human Rights: A Legal and Empirical Study of Criminal Cases in Afghanistan After the 2004 Constitution* (2022): 23-64.

Shariah. Accordingly, it does not limit Islam as a source of law only.¹⁶ This means that legal provisions are invalid if they are contrary to Islamic principles. Otherwise, if the provisions of laws are consistent with the principles of Islam, they shall be applicable whether or not they are deduced from Islamic principles.¹⁷

Other scholars argued that the objective of this Article is to establish law on the basis of the Shariah, despite the fact that no mention of the term "source of law" in the provision is made, because it is obvious from the text that Islamic principles shall be the only standard by which the Afghan legislations shall be made.¹⁸ It appears that the same fact is described in different terms. The first view recommends the possibility of different sources of laws while not refusing the supremacy of the principles of Islam. Similarly, the second view marks the fact that the principles of Islam are the main source while not excluding other subsidiary ones.

Based on this, both of the aforementioned views constitutionally agree on the notion that laws shall be consistent with Islamic rules; as Article 3 of the 2004 constitution offers the supremacy of Islamic rules over laws in the country.¹⁹ Factually, it may imply the possibility of legislation to be made by Afghans when the subject matter of it is

¹⁶ Majid Masoudi, Seyyed Ebrahim Hoseini, and Zabihullah Moradi, "Evaluation of Mechanisms for Ensuring Women's Religious Identity from the Perspective of Jurisprudence and Legal System in Afghanistan," *Journal of the Socio-Political Thought of Islam* 3, no. 2 (2024): 47.

¹⁷ It can be seen that other sources of law such as custom is also adopted in Afghan legal contexts. The Civil Law of Afghanistan, 1977 (Art No. 2 of 1977).

¹⁸ Kristina Alekseyeva, et al., *An Introduction to the Laws of Afghanistan* (Afghanistan Legal Education Project, 2017), 50.

¹⁹ Mohammad Qasim Hashimzai, "The separation of Powers and the Problem of Constitutional Interpretation in Afghanistan," in *The Book by Design: Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Roder (Oxford University Press, 2012), 671.

*mubah*²⁰ or legally permissible in Shariah or there exists no Islamic legal text or legal opinion to explain a course of action.²¹

It must be taken into account that the 2004 constitution admitted diverse supreme concepts. Article 149 stipulates that “The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended. Amending fundamental rights of the people shall be permitted only to improve them. Amending other Articles of this Constitution, with due respect to new experiences and requirements of the time, as well as provisions of Articles Sixty-Seven and One Hundred Forty-Six of this Constitution, shall become effective with the proposal of the President and approval of the majority of National Assembly members.”

From the above text, it is explicitly seen that the 2004 constitution contains numerous types of provisions: two types of irrevocable provisions: namely, those referred to the principles of Islam and Islamic republicanism (Articles 1, 2, 3 and 130). The constitution also allows limited amendment to provisions concerning human rights. Further, it acknowledges ordinary amendments in the manner given by Article 149 of the 2004 constitution.

If the formal declaration of unamendable provisions can be regarded as a fitting attribute to the high position of Shariah, then such is true about the other two. Article 149 therefore might not be in a position which imparts a significant contribution to the unlimited applicability of Shariah especially if Article 3 is not interpreted unrestricted, in accordance with the conclusive supremacy of the Islamic rules, over other provisions in the 2004 constitution.²² This is analysed in the following discussion.

²⁰ *Mubah* is referred to something about which the choice to do or not to do is left up to a person under Islamic law. Meirison Meirison, et al. "An Application Study on Taklifi Law: Fiqh Schools (Madhab) Perspective," *Hunafa: Jurnal Studia Islamika* 18, no. 2 (2021): 211-212.

²¹ *Ibid*

²² Some constitutional provisions restrict the applicability of Shariah as *fiqh* which shall be illustrated in details under the title of the limited applicability of 'Shariah as *fiqh*. For example, in contrast to Article 3, the position of Shariah in terms of Hanafi Fiqh is placed as subsidiary source of law in Article 130. In addition to this, the constitution introduces itself as the main source of law and legislative decree in Article 162. The

The Legal Gap and Ambiguity of Article 3

Article 3 considers Islamic principles to be the main source of law, however, the legal gap and ambiguity which must be discussed in detail are commonly detected in its text due to the distinct meaning of the terms “law” and “tenets and beliefs of Islam” in Afghan legal context.

(a) The Legal Gap in Article 3

The legal gap is referred to as the lack of legal provisions which regulate certain relations or legal cases.²³ According to the hierarchy of the words inserted in Article 3, the legal gap shall be discussed before the ambiguity of its text.

Article 3 of the 2004 constitution mentions “the tenets and provisions of Islam” as a source of law not the 2004 constitution. Both the drafters of the constitution and legal experts are silent on this. Their works described the phrase “no law shall contravene Shariah” in the sense that Shariah is the supreme source of law by which all laws including constitutional provisions shall be established.²⁴ The reason could be that they have interpreted Article 3 without considering other constitutional provisions in this respect. They used the terms interchangeably although the 2004 constitution offers distinct meaning of law and constitution as follows.

Definition of law

Article 94 of the 2004 constitution states that “law shall be what both Houses of the National Assembly approve, and the President endorses, unless this Constitution states otherwise. In case the President rejects what the National Assembly has approved, the President shall send it back, within fifteen days from the date it was presented, to the House of People mentioning the reasons for rejection, and, with the expiration of the period or if the House of People re-approves it with two-thirds of all the votes, the draft shall be considered endorsed and

constitution is also used by judicial review as the standard for the compliance of laws in Article 121. See more Articles 121,130,131 and 162 of the 2004 constitution of Afghanistan.

²³ Sana Matin Nikpay, *Tahlil Takhasosi Qanone Asasi Afghanistan [The Professional Analysis of the Constitution of the Afghanistan]* (athenaicum, 2018), 32.

²⁴ See more Mohammad Ashraf Rasooli, 45.

enforceable.” In the above text, the definition and the procedures by which the legislative body shall enact laws are mentioned in different ways as follows:

Law is what the Parliament approves, and the president endorses unless this constitution states otherwise. It is the most common definition of law in Afghanistan.²⁵ The phrase “unless this constitution states otherwise” means that the 2004 constitution illustrates some provisions to highlight the procedures for the enhancement of law if there has not been agreement either between parliament and the president or between both Houses of Parliament.²⁶ In this case, the constitution gives further additions. It declares that “The draft shall be considered ratified either with the expiration of the period or with re-approval by People’s House with an absolute majority.”²⁷ It can occur in the below conditions.

- a) Law shall be what the House of People re-approves with two-thirds of all the votes if the president has rejected the enactment of both Houses of Parliament.²⁸ It presents that law can be re-approved by an absolute majority of the People’s House of Parliament if the president rejects the decision made by both Houses of Parliament.
- b) Law is the enactment of parliament which could be neither endorsed nor rejected by the president within fifteen days from the date it was presented.²⁹
- c) Law is sometimes what the House of People re-approves with two-thirds of all the votes and the president endorses if the difference has risen between the two Houses of Parliament.³⁰ In such a situation, the constitution provides a specific procedure through which a mixed committee composed of an equal number of members of each House of Parliament shall be formed to approve the draft after the president’s endorsement, the law shall

²⁵ Sarwar Danish, *Haqoqi Asasi Afghanistan [Constitutional law of Afghanistan]* (Publisher of Ibn Sina Institute, 2010), 42.

²⁶ See more Article 94 and 100 of the constitution of Afghanistan.

²⁷ See more Article 94 of the 2004 constitution of Afghanistan.

²⁸ See more Article 94 of the 2004 constitution of Afghanistan.

²⁹ See more Article 94 of the 2004 constitution of Afghanistan.

³⁰ See more Article 100 of the 2004 constitution of Afghanistan

be applicable, if the mixed committee does not resolve the dispute with respect to this. At this point, the draft shall be passed by the People's House with two-thirds votes and after the endorsement by the president, the law shall be enforced without reporting to the leaders' House.³¹

Otherwise, it should be noted that it is the Afghan tradition through which a constitution shall be approved by *Loya Jirga*, not parliament.³² A reference must be made to Article 162 of the 2004 constitution which stipulates that "This Constitution shall be enforced from the date of approval by the *Loya Jirga*, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid".³³ It represents that *Loya Jirga* approved the 2004 constitution by which ordinary legal provisions shall be established.

Despite the fact that the 2004 constitution institutionalised *Loya Jirga* it does not weaken the position of *Loya Jirga* regarding its legislative authority. Article 111 of the 2004 constitution declares that "the *Loya Jirga* shall convene in the following situations: 1. To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests; 2. Amend provisions of this Constitution; 3. Impeach the President in accordance with the provisions of Article Sixty-Nine of the Constitution."

The above text obviously shows that the amendment of the constitution is referred to *Loya Jirga*. Therefore, the aforementioned constitutional provisions demonstrate that the constitution contains provisions by which the law is enacted by the parliament.³⁴ The constitution itself is not endorsed by parliament, rather it is what *Loya Jirga* has formally approved.³⁵ *Loya Jirga* has the authority to make or amend the constitution but the enactment of the law is under the authority of parliament and president.³⁶ The constitution could not be

³¹ See more Article 100 of the 2004 constitution of Afghanistan.

³² See more chapter six of the 2004 constitution.

³³ It is also mentioned in preamble of the 2004 constitution that *Loya Jirga* approved the 2004 constitution.

³⁴ See more Article 162 of the 2004 constitution.

³⁵ See more preamble, Articles 94 and 162 of the 2004 constitution.

³⁶ See more Article 94 and 111 of the 2004 constitution.

rejected by the president once the *Loya Jirga* approved it, while the law could be rejected by president after its enactment by the parliament.³⁷ The constitution comes into force upon its approval by *Loya Jirga* with a majority of votes while the law shall be enforced either upon its approval by Parliament and endorsed by the president or upon its re-approval by the House of People in some cases.³⁸

According to the aforementioned distinction, it is obvious that the term law in the 2004 constitution does not contain the constitution itself.

As a result, it seems that the “tenets and provisions of holy religion of Islam” can be a basis for law, not the constitution in Afghanistan for the constitution states so, i.e., “no law shall be contrary to the tenets of Islam”. The absurdity one can observe is that based on this perception, the 2004 constitution could be inconsistent with the principles of Islam. If this was really the intention of the constitutional framers, then the authority of the 2004 constitution can be questioned. Consequently, it is requested to amend the definitions of law in such a way to contain constitutional provisions as well.

(b) The Ambiguity in Article 3

The text of Article 3 not only creates a legal gap but also the wording which is comparatively vague and can be subjected to varied interpretations. The provision used the phrase “tenets and beliefs of Islam” as the basis for law. This therefore has a broader scope to include not only the basic Islamic rules but also the belief system of Islam.³⁹ In the original text of the 2004 constitution, available in Pushto and Dari, the official languages in Afghanistan, the words *ahkam* (the plural form of *al-hukm*) and *mu'taqdat* (the plural form of *al-aqedah*) are used. The former can be translated as legal provisions and rules while the latter can be translated as beliefs.⁴⁰ Hence, the phrase “tenets and beliefs of Islam” has legal and religious implications. Islam is a religion comprising a belief system, law, ethics, and more. Shariah on

³⁷ See more Articles 94, 111 and 162 of the 2004 constitution.

³⁸ See more preamble, Articles 94, 100 and 162 of the 2004 constitution.

³⁹ Mohammad Hashim Kamali, “Afghanistan’s Constitution 2004: An Islamic Perspective on Interpretation,” USIP Paper (2008), 4-6.

⁴⁰ The constitution of Afghanistan, 2004 (Art. No 3 of 2004)

the other hand is a specific term which refers to the divine rules and regulations revealed to Prophet Muhammad (saws) read in the Quran and Sunnah.⁴¹

The word Shariah literally derives from the noun *Shar'* which means the source of water and therefore the term Shariah can be used interchangeably with Islam because Islam is the main source of life only as water is the basic source of life.⁴² In a technical sense, Shariah can be defined in different ways. In a narrow sense, the word Shariah is used in terms of the injunctions revealed by Allah, pertaining to the legal rules and regulations.⁴³ In a wider sense, Shariah is referred to as the sum total teaching and system of Islam.⁴⁴ However, the linguistic meaning of Shariah is to follow the way of Islam strictly.⁴⁵ Yet, the term Shariah is generally understood to be the justice system of Islam a branch of the holy religion of Islam.

As religious scholars have defined Shariah in different styles, the interpretation of the phrase "the tenets and beliefs of Islam" in Article 3 has become debatable. At the outset, it is essential to pay attention to the phrase "tenets and beliefs of Islam" carefully. The tenet of Islam implies Islamic rules and regulations that are referred to as Shariah as well as *fiqh* in a general sense but belief of Islam means the creed or the matters of faith, something additional, understood from the common teachings of Islam.⁴⁶

After the comprehensive analysis of the implication of the aforementioned term, some commentators argue that the phrase "tenets

⁴¹ Kamali, References to Islam and Women in the Afghan Constitution, 280-285.

⁴² Sad al-Din Musad Hilali, *Al-maharat al-usuliyyah Wa Atharuha Fi al-nudj Wa al-tajdid al-fiqhi* (Majlis al-nashr al-ilmi, 2004), 217.

⁴³ Mohammad Akram Laldin, *Islamic Law An Introduction* (IIUM Press, 2021), 3.

⁴⁴ Ibid

⁴⁵ Kuttiani Muhammed Muneer and Muhammad Mumtaz Ali, "The Shariah and Law: An Analysis," *International Journal of Law, Government and Communication* 2, no.5 (2017): 52.

⁴⁶ Ramin S. Moschtaghi, "Constitutionalism in an Islamic Republic the Principle of the Afghan Constitution and the Conflict between them," in *The Book by Design: in Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Roder (Oxford University Press, 2012), 685-692.

and beliefs of Islam” is used in terms of the general rules and principles of Islam as a comprehensive denotation of Shariah while others write that it is mainly used in terms of Shariah in the strict sense of the word.⁴⁷ Actually, the above views focus on the definition of Shariah by analysing “the tenets and beliefs of Islam” which need no further meaning. Their works do not mention the real meanings of Shariah which is rooted in the legal context of Afghanistan.

In the Afghan society, Shariah is generally understood to mean the principles of Islam, whether one calls it Shariah, Islamic law or *fiqh*. All of them are connoted by the term *fiqh* in Afghan legal context.⁴⁸ As Article 3 of the 2004 constitution provides the phrase “tenets and beliefs of Islam” the basis for legislation, the 2017 Penal Code, uses Hanafi jurisprudence in the sense of Shariah by declaring that “This law regulates the *Taziri* crimes and penalties. Perpetrators of *Hudud*, *Qisas* and *Diat* shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic Shariah.”⁴⁹ *Tazari*, are those crimes for which the punishment is generally determined based on the ruler’s discretion,⁵⁰ which in the Afghan context, they are referred to those

⁴⁷ Rasooli, Hashimzai and Mohammad Rasekh refer the phrase “tenets and beliefs of Islam” to the principle of Islam as wider meaning of Shariah. For example, Rasekh noted that “the only alternative meaning of tenets and beliefs of Islam in the constitution of Afghanistan would be basic principles of the religion”. Mohammad Rasekh, “Non-Violation of Islamic Law under the Afghan Constitution,” *Journal of Afghan Legal Studies* 2, no.2(2017): 198. By contrast, Kamali and Moschtaghi refer this phrase to Shariah in narrow sense. They noted that “it mainly referred to Shariah.” Kamali, “References to Islam and Women in the Afghan Constitution,” 286.

⁴⁸ Due to the majority of followers, the term Shariah as *fiqh* is mostly presented under the principles of Hanafi Fiqh in Afghan laws but the Jafari Fiqh was added to solve personal matters of Shia sect in the 2004 constitution for the first time. The Constitution of Afghanistan, 2004 (Art no 131 of the 2004).

⁴⁹ The Penal Code of Afghanistan, 2017 (Art no 2 of 2014). Historically. The similar provision was also embedded in Article 1 of the 1996 Criminal Law of Afghanistan which states that “This law regulates the *Taziri* crimes and penalties. Perpetrators of *Hudud*, *Qisas* and *Diat* shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic Shariah”.

⁵⁰ Khana-e-Wiristayi Afghanistan, *Sharhi Kode Jaza [Explanation of 2017 Penal Code]* (Asia Foundation, 2019), 18.

crimes that are primarily described by the 2017 Penal Code.⁵¹ Hudud refers to the crimes for which the punishment is specifically fixed by the Quran and Hadith.⁵² *Qisas* and *diat*, refer to those punishments which are classified for crimes of murder, manslaughter, and bodily hurt.⁵³ Similarly, Article 1 of the 1977 Civil Law⁵⁴ states "...if there is no provision in the law, the court shall make decision in accordance with the principle of Hanafi Fiqh."

The term *fiqh* is mainly deduced from the root word *Faqaha* which is referred to true understanding or understanding of the sacred religion of Islam. The Holy Quran has used the term *fiqh* with the aforesaid meaning in the verse below:

يَفْقَهُوا قَوْلِي.⁵⁵

The above verse contains the term *yafqahu* in the sense of understanding. The term *fiqh* can be used to mean *Kalam*. It is also noted to be used in terms of the knowledge of Shariah.⁵⁶ Imam Abu Hanifah, however, defined the word *fiqh* as the one's knowledge of rights and obligations "*Ma rifat al-nafsi ma laha wama alayha*".⁵⁷ It could also be referred to its basic sources. Therefore, *fiqh* is obviously the understanding of practical Shariah rulings derived from its detailed sources.⁵⁸ These rulings include the rights and obligations of humans in accordance with the Quran and the Hadith or the consensus of scholars (*ijma*) as well as analogical reasoning (*qiyas*).

⁵¹ Khana-e-Wiristayi Afghanistan, 18.

⁵² Salah al-Ansari, "Contextualising Islamic Criminal Law: An Analysis of Al-Azhar Scholars' Contributions," *Manchester Journal of Transnational Islamic Law & Practice* 19, no. 2 (2023): 20-22.

⁵³ Kaiwana Amini, "Investigating the Implementation of the Rules of Islamic Criminal Law in Afghanistan," *Integrated Journal for Research in Arts and Humanities* 4, no. 5 (2024): 71-76.

⁵⁴ Civil Law of the Republic of Afghanistan (Civil Code) - Official Gazette No. 353, published 1977/01/05 (1355/10/15 A.P.)

⁵⁵ Al-Taha: 28.

⁵⁶ Tallyn Gray, *Islam and International Criminal Law and Justice* (Torkal Opsahl Academic EPublisher, 2018), 104-108.

⁵⁷ Muhammad Ibn Sad, *Al-Tabaqat al-Kubra* (Beirut, 1957), 363.

⁵⁸ معرفة الأحكام الشرعية العملية المكتسبة من أدلتها التفصيلية.

However, *fiqh* has a restricted meaning than Shariah. Shariah includes either all ethical, theological and legal or at least theological and legal commandments of Allah to mankind while *fiqh* emphasises legal rules which are deduced from the different sources of Shariah pertaining to the actions of a competent person. The word *fiqh* is, therefore, a knowledge of legal rules, whether the regulations are derived directly from religious texts or through analogy, and ascertainment of human interest permitted under general principles of Shariah. This is against the simplistic view perceiving that *fiqh* will not be the law itself as it refers to the knowledge of law while the word shariah refers to the law itself.⁵⁹

According to the above clarification, it must be mentioned that the legal experts have interpreted the phrase “tenets and beliefs of Islam” in light of the common meaning of Shariah without considering its implication and of the fact that *fiqhi*⁶⁰ rules are relied on in the legal system of Afghanistan. Taking into consideration the substantive laws of Afghanistan, criminal and civil, being drafted in line with Shariah and Hanafi Fiqh, the controversy among legal experts over the specific concept of tenets and beliefs of Islam as Shariah, in the 2004 constitution, might be considered to be made an attempt to restrict the application of Shariah and *fiqhi* rulings in Afghan legal context, that seem contrary to the applied legal system.⁶¹

It appears that the framer of the 2004 constitution adhered to an unwritten theory of the Afghan legal environment. Such a theory seems to be conformed in Article 3 by providing that no laws shall be inconsistent with “the tenets and principles of Islam”, meaning the parliament should adhere to the “the tenets and principles of Islam”, in enacting the laws for the nation. Where the *Loya Jirga* fails to draft a comprehensive constitution then the legal gaps could be filled by

⁵⁹ Saim Kayadibi, *Principle of Islamic Law, The Methods of Interpretation of the Text, Usul al-Fiqh* (Islamic Book Trust, 2018), 13.

⁶⁰ Fiqhi rules are mainly the legal provisions derived from Islamic sources of law “the Quran, Hadith, Qayas, and Ijma”. Rasyid Al-Hafizh, Fachrul Rozy, and Zaim Rais, “Usul Al-Fiqh: Its Epistemology, Purpose, and Use,” *DIKTUM: Jurnal Syariah Dan Hukum* 19 (2021): 1-15.

⁶¹ Lutforahman Saeed, “Analysis of Article 130 of the Afghan Constitution,” *Islam, Custom and Human Rights: A Legal and Empirical Study of Criminal Cases in Afghanistan After the 2004 Constitution* (2022): 65-78.

judiciary. To fill the said gaps, the courts are required to refer to the Hanafi Fiqh which should be in accordance with the provisions of the constitution and that of the existing laws.⁶²

In such conditions, the courts cannot be allowed to invalidate the provisions of the constitution and the regulations embedded in any ordinary law. Despite the fact that the supreme position of Islamic law is conformed in Article 3 by considering that no law (made by parliament) shall be contrary to Islam, however, it is explicitly limited by the 2004 constitution.⁶³ Hence it is presupposed that Afghan laws shall be consistent with Islam in the first place, so if the judiciary is subjected to follow them such limit will not incapacitate the position of the principles of Islam as the supreme source of Afghan laws in any way.

The real impact of this theory can be that courts shall follow the statute laws (enacted laws) which are firmly made in line with Islamic law. And, when a court is referred to unwritten Islamic law (*fiqh*) it must be within the limits of the 2004 constitution.⁶⁴

Should one ignore the aforementioned unwritten theory, the 2004 constitution appears to be self-contradictory as demonstrated below.

The Limited Applicability of Shariah as Fiqh

In the discourse of the 2004 constitution's relation to Shariah, a basic question arises as to whether it introduces Shariah as supreme law. Most of the existing works do not effectively determine the real position of Shariah,⁶⁵ as they ignored the position of Articles 130⁶⁶ and

⁶² The Constitution of Afghanistan, 2004 (Art No. 130 of 2004).

⁶³ See more Articles 3, 130, and 131 of the Constitution of Afghanistan.

⁶⁴ The Constitution of Afghanistan, 2004 (Art No. 130 of 2004).

⁶⁵ Kaniye S. A. Ebeku, "The limited applicability of Shariah under the constitution of Nigeria," in *The Book by Design: Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Roder (Oxford University Press, 2012), 101.

⁶⁶ Article 130 states that "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall,

131⁶⁷ of the 2004 constitution with Article 3 in a harmonious manner⁶⁸ Article 3 as is obvious from its text implies the supremacy of Islamic beliefs and legal rules.⁶⁹

Nevertheless, if Article 3 is in conjunction with Articles 130 and 131, such principle of supremacy is not obvious. In these two subsequent Articles the principles of Islam are referred to in the sense of Hanafi and Shi'a schools of law (*fiqh*), the position of which seems weaker or subsidiary, compared to that of Islam under Article 3. Articles 130 and 131 impose two sets of limits on the position of Shariah (i.e., Hanafi and Jafari Fiqh) as follows.

Hanafi Fiqh as Subsidiary Source of Law

The first set of restrictions provided by the 2004 constitution on the application of Islamic law (Shariah or *fiqh*) in terms of Hanafi Fiqh is that it, seemingly, makes Islamic law a subsidiary source of law in Afghanistan. Such subsidiary position of Islamic law is clear from the text of Article 130 of the 2004 constitution which declares that “in the case under consideration, the court shall apply provisions of this constitution as well as other laws. If there is no provision in the constitution and other laws about a case, the court shall in pursuance of Hanafi jurisprudence, and, within the limits set by this constitution rule in a way that attains justice in the best manner”. The two limitations i.e., the absence of law and provisions of the constitution as well as the application of Hanafi Fiqh within the contains of the 2004 constitution, puts Hanafi Fiqh in a conflicting position to that of Islamic law, which is primary and as the first source of law in Article 3 of the 2004 constitution.

in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner”.

⁶⁷ Article 131 stipulates that “The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect”.

⁶⁸ Note, the translation of the term *mutaqadat* in Afghan constitution from Persian or Pashto to English may not be accurate or at least confusing.

⁶⁹ Article 3 of the 2004 constitution declares “no law shall contravene the tenets and provisions [beliefs] of the holy religion of Islam”.

The text of Article 3 has complex implications. It affects the power of the legislative assembly. In the 2004 constitution, Article 90,⁷⁰ subject to Article 3, gives the authority to Parliament to ratify, modify or nullify the laws and legislative decrees. This will mean such amendment shall be consistent with “the tenets and beliefs of Islam”, i.e., Shariah. If this interpretation is accurate then the beliefs and principles of Islam become the supreme source of law, limiting the power of the legislature in a limited sense. However, it does not limit its power to take laws from somewhere else provided it is not contradictory to Shariah.⁷¹ Article 130, however, operates on a different level, and seemingly limits the power of the judicial branch to utilise Islamic rules as the first source of law.

So, the courts are not permitted to establish Hanafi Fiqh as the first source of laws on the one hand, and the Parliament is not allowed to control, change or amend the decisions made by courts which independently criminalise some acts according to Islamic rules. On the other hand, it shows the limited applicability of Shariah in terms of the Hanafi Fiqh in the 2004 constitution.⁷² Article 130 of the 2004 constitution revisits a number of terms which give permission for the courts to fill legal gap by applying the provisions of Hanafi Fiqh within the limits of the 2004 constitution. At first glance, Article 130 consists of some important concepts which have already been explained except the term ‘case’ which is defined below.

The word ‘case’ which is mentioned in Article 130 of the 2004 constitution is defined in Article 4 of the 2013 Law on Organization

⁷⁰ Article 90 of the 2004 constitution states that “the National Assembly shall have the following duties: 1. Ratification, modification or abrogation of laws or legislative decrees; 2. Approval of social, cultural, economic as well as technological development programs; 3. Approval of the state budget as well as permission to obtain or grant loans; 4. Creation, modification and or abrogation of administrative units; 5. Ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them; 6. Other authorities enshrined in this Constitution”. The Constitution of Afghanistan, 2004 (Art No. 90 of 2004).

⁷¹ Mohammad Hashim Kamali, “References to Islam and Women in the Afghan Constitution”, 286-288.

⁷² Mohammad Ashraf Rasooli, *Mahakima-Ye Adilana [Fair Trail]* (Saed Publication, 2014), 143.

and Jurisdiction of the Judiciary of the Islamic Republic of Afghanistan as following:

A case is an event related to criminal, civil, public law, personal status and commercial matters that has been brought to a court by the parties for adjudication.

From the above text, it is explicitly clear that a case shall enter under the authority of the courts to be adjudicated whenever it has officially been submitted by one of the parties. This means they register the case in the registry book of the courts; it then comes under the authority of court to adjudicate. In other words, if a case is not officially entered by the parties into the registry book, the court is not allowed to solve it.⁷³

The second important subject in Article 130 of the 2004 constitution can be that it specifies the hierarchy of legal provisions in Afghanistan which damages the position of Shariah as Hanafi Fiqh by requiring adherence to the supreme position of the constitution and other ordinary laws.⁷⁴ In resolving a case, it is necessary for courts to explore the relevant provisions in the constitution and other laws at first. If courts were able to find the related provisions either in the constitution or in the other laws which might be applicable to the case under the consideration of courts, they must resolve the case by applying either constitutional provisions or those laws and must go within the bounds of the constitution and other laws. Otherwise, the decision of the courts for applying Hanafi Fiqh shall be unconstitutional.⁷⁵

Additionally, the courts are required to achieve justice in the best possible way and their decision shall be made within the limits set by the 2004 constitution. while they solve a case by applying Hanafi Fiqh.⁷⁶ It presents that the 2004 constitution records a variety of

⁷³ Max Planck Foundation for international Peace and the Rule of Law & Afghanistan Legal Research and Development Organization, *Constitutional Law and Human Rights International, Comparative and National Perspective* (Amiri Publisher, 2020), 109.

⁷⁴ Mohammad Nader Ahmadi, "Jaiga, Ahamiat wa Zarorat Afta [The Position, Importance and necessity of Announce a Religious Opinion]," *The supreme court publisher center* (2011): 90.

⁷⁵ Ibid

⁷⁶ Ghalam Hedar Allama, "Aieen Dad Rasi Kefari Afghanistan [code of criminal procedure in Afghanistan]," *The Judiciary Law Journal* 71. n, 60 (2007): 42.

restrictions on the application of the provisions of Hanafi jurisprudence to cases which comes under the consideration of courts. A reference can be made to Article 27 of the constitution which states that "No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense. No one shall be pursued, arrested, or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense."

The above text shows that the applicability of Hanafi Fiqh in criminal cases shall be defined under the principle of legality which is established by the phrase "No deed shall be considered a crime unless ruled by a law" in the 2004 constitution. In addition to this, the 2017 Penal Code, the ordinary law clearly mentions the principle of legality in Article 7 that declares "(1) No act shall be considered a crime, but in accordance to the law enacted before its commission. (2) No punishment shall be enforced, unless it is stated in this law. (3) No one shall be punished, except by the verdict of a competent court, in accordance with the provisions of the law enacted before the commission of the said act. (4) Punishment shall be applied on the perpetrator, in consideration of other conditions and circumstances stated in this law, proportionate to the committed crime."

The above text is mentioned under the title of Legality of Crime and Punishment and Fair Trial in the 2017 Penal Code which is originally rooted in the belief that all individuals deserve to have the knowledge of the legal and illegal acts.⁷⁷ It firmly concerns notice-specifically, that a person must be able to know whether his conduct is considered criminal.⁷⁸

Based on this, the scope of the applicability of Hanafi Fiqh in the 2004 constitution is the subject of controversy. There is no consensus among legal experts and judges on the scope of the application of the provisions of Hanafi Fiqh. Some legal experts attempted to restrict Hanafi Fiqh further. They believe that the Hanafi Fiqh shall not be

⁷⁷ Daniel E. Hall, *Criminal Law and Procedure* (Example Product Manufacturer, 6th ed, 2011), 36-38.

⁷⁸ Mohammad Ashraf Rasooli, *Mahakima-Ye Adilana [Fair Trial]*, 142-145.

applicable to all cases especially criminal cases according to Article 130.⁷⁹

They have interpreted Article 130 in conjunction with Article 27 of the 2004 constitution and argue that the applicability of the Hanafi Fiqh shall be restricted. It does not contain criminal cases; otherwise, the application of Article 130 shall be inconsistent with the principle of legality under Article 27 of the 2004 constitution according to which the Penal Code of 2017 was enacted to define deeds which are regarded as crime.⁸⁰

According to principle of legality, the judges are required to impose on the delinquent only those punishments which are established under the enacted law.⁸¹ Therefore, the Penal Code of 2017 defines Article 27 a crime as an “act or omission of an act that is considered a crime under the provisions of this law, its elements are specified and the law has prescribed punishment or preventative measures for it”, and focuses on the non-recognition of a crime beyond itself in Article 8 by declaring that “(1) Crime recognition and punishment determination based on analogy is not permissible. (2) Criminalisation and execution of punishment for an action, which is not considered crime and no punishment is prescribed for it in this law, is not permissible.”

The above text presents that no deed is regarded as crime in Afghanistan unless ruled by the Penal Code of 2017. According to this group of scholars, Article 8 of the 2017 Penal Code shall be also kept in mind concerning the recourse to Hanafi Fiqh.⁸² It must be noted that this is the Penal Code of 2017 to define a deed as crime and therefore it would not be lawful to apply the provisions of Hanafi jurisprudence

⁷⁹ Mohammad Ashraf Rasooli, Mr. Ruhullah Qarizada, DR Ahmad Raza Sadeqe. Presentation of Paper of Article 130 in the constitution of Afghanistan, (Kabul: 2020).

⁸⁰ Mohammad Sadr Tuohid Khaneh, “Atebar Asal Qanoni Bodan Dar Haqqi Kaifari Afghanistan: Moshkil Wa Rah Hal Karha [The validity of the principle of legality in the Afghan criminal law: Problems and the way for solutions],” *Journal of Criminal Law* 5. no, 17 (2017):157-195.

⁸¹ Taymour Kamel, *The Principle of Legality and Its Application in Islamic Criminal Justice System* (M. Cherif Bassiouni, 1982), 149-150.

⁸² Max Planck Foundation for International Peace and the Rule of Law & Afghanistan Legal Research and Development Organization, *Constitutional Law and Human Rights International, Comparative and National Perspective* (Amiri Publisher, 2020), 110.

on someone who has not committed crime based on the Penal Code of 2017. Hence, every deed beyond the Penal Code of 2017 is not considered crime, Hanafi jurisprudence shall not be applicable to all cases.⁸³

By contrast, most legal experts argue that Article 130 shall be applied to all cases including criminal cases.⁸⁴ They have made a claim that text explicitly permits courts to use the provisions of the Hanafi jurisprudence in all cases for which the constitution and other ordinary laws have not offered guidance. Hence, Article 130 provides that the 2004 constitution and other ordinary laws shall be applied in all cases, and the Hanafi jurisprudence should fill gap as and when a case arises.⁸⁵

This researcher is of the opinion that the above limiting perspective concerning the application of the provisions of Hanafi Fiqh does not keep in mind the accurate applicability of Hanafi jurisprudence in keeping with Article 130 and the principle of legality which is established in Article 27 of 2004 constitution of Afghanistan. The generality in the language in the text of Article 130 of the 2004 constitution leaves no room for exceptions. Basically, it does not contravene Article 27 of the 2004 constitution, for the pre-knowledge of law is possible both in cases of written and unwritten law. The making of exceptions as per the 2017 Penal Code of Afghanistan shall be inconsistent with the supremacy of the 2004 constitution, for it is the provisions of the 2017 Penal Code that shall comply with the 2004 constitution not otherwise.

Based on this, the principle of legality may need to be given a broad scope in the 2004 constitution to accommodate Article 130, in line with the established rules of interpretation of law. Accordingly, it will have to explain that the legality and illegality of all acts shall be determined by enacted law and Hanafi Fiqh. This view can also be seen

⁸³ Max Planck Foundation for International Peace and the Rule of Law & Afghanistan Legal Research and Development Organization, 110

⁸⁴ Abdul Salam Azimi, Baha-U-deen Baha and Abdul Karim Qanit, Presentation of Paper of Article 130 in the constitution of Afghanistan (Kabul: 2020).

⁸⁵ Abdul Salam Azimi, Baha-U-deen Baha and Abdul Karim Qanit

to have been applied to Article 2 of the 2017 Penal Code on the subject of the recourse to Hanafi Fiqh in Afghan legal system.⁸⁶

Article 2 of the 2017 Penal Code can also be considered to be made based on the provisions of Hanafi jurisprudence.⁸⁷ It firmly ascertains that the 2017 Penal Code is a codified version of Hanafi Fiqh. Therefore, crimes are divided into three groups under section 2 of the 2017 Penal Code. *Tazari*, *hudud*, *qisas* and *diat*.⁸⁸ It seems that the above division of crimes enshrined in section 2 of the 2017 Penal Code is made according to Hanafi jurisprudence, therefore, it is also based on the hierarchy, i.e., law and Hanafi Fiqh in the 2004 constitution.⁸⁹ To understand the provisions of the 2004 constitution and 2017 Penal Code on the application of Hanafi Fiqh in harmony, and the terms law and Hanafi Fiqh, in Afghan legal context, the 2017 Penal Code obviously provides the implementation of the law as to *tazari* crimes. Hence, Article 2 of the 2017 Penal Code specifies the scope of the application of Hanafi Fiqh and law separately, the implementation of the provisions of Hanafi Fiqh in *hudud*, *qisas* and *diat* does not contradict the legal principle of legality.⁹⁰

Recourse to Hanafi Fiqh in Criminal Tazari Cases by Afghan Courts

Despite the fact that sections 2 and 8 of the 2017 Penal Code require judges to not apply Hanafi Fiqh in *taziri* crimes, several court reports show that more than 1000 criminal cases were decided based on the

⁸⁶ The 2017 Penal Code has adopted the equivalent provisions of the 1976 Criminal Law in which Article 1 states that “This law regulates the Taziri crimes and penalties. Perpetrators of Hudud, Qisas and Diat shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic Shariah”.

⁸⁷ Article 2 of the 2017 Penal Code stipulates that “This law regulates the Taziri crimes and penalties. Perpetrators of Hudud, Qisas and Diat shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic Shariah”.

⁸⁸ Khana-e-Wiristayi Afghanistan, 17-19.

⁸⁹ The Constitution of Afghanistan, 2004 (Art no 130 of 2004).

⁹⁰ The Constitution of Afghanistan, 2004 (Art no 27 of 2004).

provisions of Hanafi Fiqh as per Article 130 of the 2004 constitution.⁹¹ These cases generally contain matters concerning runaway women and girls and the selling of haram animal meat which have been criminalised neither by the Criminal Law of 1977 nor the Penal Code of 2017 of Afghanistan.⁹²

(a) The Selling of Dog Meat Case

The selling of dog meat case became more important when three persons were arrested by police in 2014 due to selling dog meat to local residents under the name of sheep meat in Herat province located in the western part of Afghanistan.⁹³ The public and the butchers of Herat province together demanded harsh punishment for the offenders. They argued that convicts should be punished with the strongest punishment for such action which has obviously violated the principles of Islam and misused the name of the butchers.⁹⁴

⁹¹ Heather Barr and Joseph Saunders, " *I Had to Run Away*": *The Imprisonment of Women and Girls for moral Crimes*," in Afghanistan. Human rights watch (HRW), 2012, 86.

⁹² The Criminal Law of 1976 was practically implemented in line with the Article 162 of 2004 constitution. It states that "This Constitution shall be enforced from the date of approval by the *Loya Jirga*, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws and legislative decrees contrary to its provisions shall be invalid". In the 2017, the 1976 Criminal Law was replaced by the 2017 Penal Code. Article 916 of the 2017 Penal Code declare that "..... (2) By enforcement of this law, provisions contained in the following legislative documents shall be abolished: 1- Penal Code published in official gazette # (347), 1355 (1976);". Both laws did not provide provisions on the running away and selling Haram meat cases. Ghazi Hashimi, "Defending the Principle of Legality in Afghanistan: Toward a Unified Interpretation of Article 130 to the Afghan Constitution, p 4 <SSRN-id2817307.pdf > (accessed 25 October, 2024).

⁹³ *Khaama Press*, "Individuals arrested for selling dog meat in Herat province", (2014) <<https://www.khaama.com/individuals-arrested-for-selling-dog-meat-in-herat-province-8816>> (accessed 24 October, 2024).

⁹⁴ Afghanistan media network, selling dog meat perpetrators should be punished, (2015) <http://www.afghanpaper.com/nbody.php?id=84737> (accessed 6 November, 2024).

At that particular point of time, the 1976 Criminal Law of Afghanistan was applicable according to the Article 162 of the 2004 constitution which stipulates that “This Constitution shall be enforced from the date of approval by the *Loya Jirga*, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws and legislative decrees contrary to the provisions of Islam shall be invalid”. As there was no evidence to prove that the 1976 Criminal Law would be in contrary to the 2004 constitution, the courts implemented it until its replacement by the 2017 Penal Code.⁹⁵

However, there was no certain provision in 1996 Criminal Law and also it has not been added in the 2017 Penal Code to forbid selling of dog meat. Hence, Harat city’s lower court sentenced the two perpetrators to 13 years imprisonment by justifying ruling as per Article 130 of the 2004 constitution which authorises the Afghan courts to apply the provisions of Hanafi Fiqh in the case of the lack of provisions in the constitution and other laws.⁹⁶ A third perpetrator was also sentenced to three years imprisonment after he was found guilty of cooperation with the other two convicted men.⁹⁷ This decision was finally affirmed by the appellate court of Harat province and supreme court.⁹⁸

(b) Runaway Cases

As already mentioned, Neither the 1976 Criminal Law nor 2017 Penal Code of Afghanistan characterise running away as crime, therefore, the majority of criminal cases in which the courts have applied the provisions of Hanafi Fiqh as a gap filling law are the runaway cases

⁹⁵ The Penal Code of Afghanistan, 2017(Art no 916 of 2017)

⁹⁶ *Khaama Press*, “Sellers of dog meat jailed for 13 years in Herat province (2015) <<https://www.khaama.com/sellers-of-dog-meat-jailed-for-13-years-in-herat-province-8950> > (accessed 25 October, 2024). And see more Primary Court of Herat City, Selling Dog Meat case, PP 40–48. ‘And also indictment of the prosecutor, PP 1-2.

⁹⁷ Afghanistan media network, selling dog meat perpetrators should be punished, (2015) <<http://www.afghanpaper.com/nbody.php?id=84737> > accessed 25 October, 2024).

⁹⁸ See more Selling Dog Meat case, Herat City Primary Court, 2015.

pertaining to the cases of young women and girls.⁹⁹ According to the report, 70 percent of the approximately 700 women prisoners in Afghan jails were imprisoned for moral crimes, where girls and young women had run away from their homes.¹⁰⁰

The subject of the runaway women and girls from their homes was regarded as serious for it paved a way for crimes like adultery and prostitution. Therefore, the supreme court of Afghanistan issued a directive under which the judges were instructed that running away could cause crimes such as prostitution and adultery which are prohibited by Shariah, and therefore, the courts have classified the behavior as a *taziri* offense under Hanafi jurisprudence and to treat the girls and women who flee from their homes as offenders under Hanafi Fiqh.¹⁰¹

In relation to this, the law enforcement authorities in Afghanistan normally had to arrest, imprison, and prosecute girls and young women for running away, often framing the charge as an attempt to commit adultery. There are many examples of how these cases were decided by the Afghan courts.

In Logar Province of Afghanistan I, a 16 years old girl was married to the elder man by her father in 2010. Later, she was gone with her lover to Nangarhar province. Due to such behaviour, she was detained in Logar province's Juvenile Correction Center where she was allegedly raped. After being arrested, she was sentenced to seven years jail by primary court.

As a result, United Nations Assistance Mission in Afghanistan "UNAMA" and civil society criticise the prosecution of runaway cases by urging the Afghan President to stop the prosecution of these cases.

⁹⁹ Article 425 of the 1976 Criminal Law stated that "A person who carries off a girl, who is 18 years or over, at her own will from her parents' residence for the purpose of lawfully marrying her, shall not be deemed as having committed an act of kidnapping." This is in line with Article 80 of the 1977 Civil Code which states, "Marriage contract of major and discerning girl without the agreement of her guardian shall be effective and binding."

¹⁰⁰ Human Rights Watch. Free Women Jailed for "Running Away", (2012) <<http://www.refworld.org/docid/505c1c852.html> > (accessed 4 November, 2024).

¹⁰¹ The High Council of supreme court, instruction, approval no 527 dated 1 August 2010.

According to this, the Attorney General's Office issued guidance which declared that "A circulation must be prepared and shared with all relevant prosecution offices in the center and provinces and the prosecutors should be instructed not to prepare unjustifiable case files regarding running away cases that have not been criminalised under Afghanistan laws and cannot be heard by courts and refrain from conducting baseless investigations. Other circumstances where people run away to commit any other crime are not covered by this instruction. The issue is being communicated to you so that you can take action in accordance with the instruction of the High Council of Attorney General Office of the Islamic Republic of Afghanistan".¹⁰²

From the text, it seems that girls and young women in running away cases must not be prosecuted, but still, it leaves the gap by stating that "other circumstances where people run away to commit any other crime" because the above bodies asked the supreme court to specify whether girls and women run away from home because of domestic violence would constitute a crime.

In consequence, the Afghan supreme court issues an official decree to prevent the criminal courts including the prosecution office from prosecuting running away cases.¹⁰³ In addition to these decrees issued by the Attorney General's Office and the supreme court of Afghanistan, the girl who fled with her lover was prosecuted for such behaviour.

¹⁰² Attorney Generals' Office, Guidance dated 27 November 2012.

¹⁰³ The supreme court's decree was issued on 13/12/2012 which declared that "here is a difference between run away from home with committing a crime. The action of those who leave home because of family violation and go to judiciary, law enforcement organizations, legal aid organizations, or their relatives' home does not constitute crime. A large number of girls because of family violation living in shelters; therefore, running away in this situation must not be prosecuted. However, running away for the purposes of moral crimes or other purposes consider crime and shall be prosecuted. In this case the law enforcement agencies must not use the term "runaway" rather they must find description for the committed act from statutory laws. Courts and attorney general office shall use the specific term for committed crime and avoid the term runaway". The original decree is in Dari and is on file with the author. This is translation provided by Ghazi Hashimi. Ghazi Hashimi, 42.

In 2015, four girls attempted to run away from home, they spent a night at their friend's home. After being arrested, they were prosecuted and accused of both adultery and running away. After doing a virginity test one of the girls was accused of adultery.¹⁰⁴ The prosecutor recommended to the lower court to provide them with punishment under Article 130 of the 2004 constitution.¹⁰⁵ Though the lower court did not charge them because of the lack of evidence, but decided the case under Article 130 of the constitution that the time they spent in the detention center was sufficient.¹⁰⁶

Shia School of Law as Main Source of Law for Personal Matters

The constitution offers the second set of limits on the application of Shariah by declaring that "*Courts shall apply Shia school of law in the cases dealing with personal matters involving the followers of shia sect in accordance with the provisions of law.*"

In accordance with above text, Shia Personal Status law was approved in 2009.¹⁰⁷ This law generally regulated the matters related to family relationships but its enforcement was challenged for several reasons.¹⁰⁸ Among them, the most important are the inconsistency between the 2009 Shia Personal Status law and international human rights instruments, the dominance of Sunni ideology, Afghan complicated social, and religious dynamics, and the lack of a Shia-

¹⁰⁴ AFGHANISTAN 2015 HUMAN RIGHTS REPORT, <<https://2009-2017.state.gov/documents/organization/253169.pdf>> (accessed 23 November 2024)

¹⁰⁵ As already mentioned, the running away cases have not been constituted by the 1976 Criminal Law and the 2017 Penal Code. Article 130 of the constitution provides Hanafi Fiqh as gap filling law by declaring that "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner".

¹⁰⁶ Ghazi Hashimi, 40.

¹⁰⁷ See more the 2009 Shia Status Law of Afghanistan.

¹⁰⁸ Maryam Laly, "The Women's Rights Movement in Afghanistan: The Absence of Scholarship and the Challenges of Practice," *The Pi Sigma Alpha Undergraduate Journal of Politics* (2015): 51.

formal judicial framework.¹⁰⁹ Hence, Shia community leaders and religious authorities provide unofficial advice and mediation in family matters related to the Shia minority.¹¹⁰ It must be noted that Shia school has a short life in the legal system of Afghanistan. In contrast with the position of the previous Afghan constitutions and the current practical legal system, the only constitution was the 2004 constitution that adopted the law of Shai school.¹¹¹

CONCLUSION

The constitution is drafted in a way that is not clear and not comprehensive. Unless the suggestions mentioned above are accepted, the constitution can be understood differently therefore minimising the certainty of its provisions on the position of Shariah.

Generally, in the Afghan legal context, some provisions under the Islamic principle of the 2004 constitution focus on the implementation of Shariah which is used in terms of *fiqh* in the Afghan legal context. It is highly important to mention that the 2004 constitution upholds Islamic principles as a source of law but not itself.

¹⁰⁹ Lauryn Oates, "A Closer Look: The policy and law-making process behind the Shiite Personal Status Law," (2009): 1-31.

¹¹⁰ Due to the war and unstable situation for many years, the Afghan governments and institutions have not been able to conduct a nationwide census to determine the accurate population range though the Shia population is estimated to be about 11 percent of the total population in Afghanistan. Mahmood Popal, and Seid Mahdi Seidzadeh, "Impressive Factors of the Victimization of Shiite Muslim Minorities in Afghanistan: A Case Study District 13 of Kabul during the Pre-Taliban Period," *International Journal of Offender Therapy and Comparative Criminology* (2024): 0306624X241281970.

¹¹¹ Apart from Hanafi Fiqh the Jafari Fiqh was introduced by the 2004 constitution for the first time in the history of the Afghan legal system. Not only, all previous Afghan constitutions of Afghanistan established Hanafi Fiqh applicable for courts but also the current government of Taliban which is known as Emart-E-Islami Afghanistan, insists that courts must apply Hanafi Fiqh. Barnett R. Rubin, "Constitutional Issues in the Afghan Peace Negotiations: Process and Substance," *United States Institute of Peace*, Special Report, no. 488 (2020): 6-13.

The legal position of Shariah in the 2004 constitution is introduced in such a way that the legislators must use Shariah as the main source of law which does not include the constitution under the authority of *Loya Jirga* but the court shall use Shariah in terms of *fiqh* either as a subsidiary source of law or as the source of personal statutes law of Shia sect.

Otherwise, the 2004 constitution declares Shariah as the main source of law in Article 3 but it weakens the position of Shariah by restricting Shariah as *fiqh* and by defining law as ordinary law. It has led the constitution to achieve a status of supremacy over Shariah by declaring either Hanafi Fiqh as a subsidiary source of the Afghan legal system or the Shai school of law as the source of personal matters of Shia sect in Articles 130 and 131 respectively. Article 130 of the 2004 constitution provides the hierarchy of norms through which the courts shall apply Hanafi Fiqh if there is no provision in the constitution and other laws.

It shows the restricted applicability of Shariah as *fiqh* which shall be applied by courts as gap-filling law. Although the principle of legality is inserted in Article 27 of the 2004 constitution, it limits the application of the Hanafi Fiqh in criminal cases. The 1976 Criminal Law and 2017 Penal Code refer *hudud*, *qisas* and *diat* crimes to the Hanafi Fiqh. In addition to this, the Afghan courts have also applied the Hanafi Fiqh as gap filling law to regulate *taziri* crimes where they did not find provisions in the constitution and other laws. Finally, the 2004 constitution defines the constitutional provisions related to the sacred religion of Islam as irrevocable provisions which shall not be amendable to amendment. Hence. It is essential to strengthen the position of Shariah either by amending the definition of constitution and law or by enacting a new constitution.

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