

RESEARCH ARTICLE

The Taliban, Afghan constitutionalism and modern Islamic law states: renegotiating the balance of religious and secular law

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Abstract

Reflecting on the Islamic law–secular law balance in past Afghan constitutional regimes and contemporary Taliban rule, this paper contextualizes Afghan constitutionalism in a broad spectrum of constitutional traditions present in other Islamic law states (ILS). Though the Taliban are reticent about their plans for a constitutionally-anchored society, similar to processes elsewhere, the organization’s previous drafters relied upon the country’s previous constitutional regimes and on other countries’ constitutions. Though necessarily aspirational, we argue that taking lessons from the Taliban’s history, Afghanistan’s own rich constitutional tradition, and contemporary ILS’ approaches—combined with international cooperation—there may be a way forward for a Taliban-led Afghanistan: one grounded in a stable constitutional order that protects the dignity of Afghan people. But since the Taliban regained control of the country, its people have endured extreme social and economic hardship. The ongoing crisis cannot be ignored. This paper does not seek to disregard or minimize Taliban-induced atrocities; rather, by exploring the history of Afghan constitutionalism through a different lens, it looks to provide a building block for a future, more stable solution. While the existing scholarship focuses mainly on the current Taliban practices, we examine past Afghan constitutions and propose the potential for specific legal solutions in the context of the country’s robust constitutional tradition. We rely on qualitative and quantitative data in analyzing the nexus between secular law and Islam-based constitutional language, highlighting certain trends and patterns. In an important way, therefore, our research places the Taliban efforts at constructing a legal system as part of an evolving—however jolted by the Taliban—constitutional process.

Keywords: comparative constitutionalism; Islamic constitutions; Afghanistan

Introduction

This paper outlines the historical evolution of Afghanistan’s constitutionalism, with a particular focus on the social, political and legal dynamics surrounding regimes established by constitutions that preceded the 2021 Taliban takeover. On the heels of a

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two-decades-long conflict, the Taliban returned to power, generating widespread concern for the future of Afghanistan and its people, specifically in the context of human rights. Following the Taliban's most recent attempt at governance, that concern proved well placed; democratic norms and human rights protections were rapidly rolled back.¹ International condemnation and economic sanction followed, further plunging an already fragile country into greater turmoil.²

Reflecting on the Islamic law–secular law balance and contemporary Taliban rule, this paper proceeds in three parts; Part I provides a brief explanation of Taliban rule in Afghanistan, from the movement's rise to power, through U.S. involvement, eventual withdrawal and, ultimately, to the Taliban's recent resurgence. Throughout the country's broader history, Afghanistan has been governed by thirteen constitutions, including interim documents and the Taliban's own 1998 draft constitution.³ This history shows expressive commitment to Islamic law, democratic ideals, equality and human rights.⁴ The Taliban's 1998 draft constitution includes *some* of these commitments as well, reflecting similar provisions seen in the earlier regulations.⁵ Part II consists of a chronological analysis of five significant Afghan constitutional regimes: 1923, 1931, 1964, 2004 and 1998 (Taliban draft constitution).⁶ Each constitution offers unique insight into the ever-changing social, political and legal dynamics that propelled these constitutive governing frameworks. This section then discusses the realities of a Taliban-designed legal system. Taking into consideration contemporary scholarship and recommendations from international and regional frameworks that guide post-conflict constitution building, this section concludes with an analysis of public participation in constitution-making and its feasibility in today's Taliban-led Afghanistan. Part III reflects on Afghan constitutionalism across a broad spectrum of constitutional traditions present in twenty-nine modern Islamic law states (ILS).⁷ This section considers the Islamic law–secular law nexus as expressed in ILS where Islam-based legal language dominates the legal landscape or constitutes merely a small part of it.

The Taliban

Power, collapse and resurgence

A full accounting of the Taliban's rise in Afghanistan would require an in-depth analysis of the country's internal ethnic, sectarian and historical dynamics; an examination of

¹See 'Afghanistan: Taliban's Catastrophic Year of Rule, Denial of Women's Rights, Media Crackdown, and Retaliatory Killings Amid Mass Hunger' *Human Rights Watch*, August 11, 2022, 12:00 AM, <<https://www.hrw.org/news/2022/08/11/afghanistan-talibans-catastrophic-year-rule>>.

²Nabih Bulos, 'Afghanistan's Money Is Crumbling to Pieces, Just Like Its Economy' *L.A. Times*, September 27, 2022, 2:00 AM, <<https://www.latimes.com/world-nation/story/2022-09-27/afghanistan-money-bills-falling-apart-economic-crisis>>.

³See *Asia: Timeline of Constitutions: Data from the Comparative Constitutions Project*, Constitute Project, available at <<https://constituteproject.org/countries/Asia?lang=en>>.

⁴See generally *infra* Part II.

⁵See *infra* Parts II.D. and II.F (outlining the 1964 'liberal revolution', its associated constitutional commitments, and the Taliban's previously-signaled reliance on the 1964 constitutional text).

⁶We focus on five constitutional regimes while providing an overview of continually-shifting Afghan constitutional history. Each of the five constitutional regimes is uniquely suited for our analysis. We recognize that our analysis is grounded in English translations of Afghan constitutions. While this reality may generate differences in word counts and religious references in these texts (vis-à-vis Dari or Pashto versions), the effect of these differences on the broader analysis is likely nominal.

⁷An ILS is defined as 'a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law, and where Muslims constitute at least 50 percent of the population'. EJ Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (2020), 42, Oxford University Press.

geopolitical forces that have exerted – and continue to exert – considerable influence in the region; and a comprehensive study exploring how these forces interact.⁸ While such an analysis is beyond the scope of this paper, this subsection provides an overview of the Taliban's ideology, and its rise, fall and resurgence; the inquiry is restricted to post-Soviet-occupation developments, beginning in 1990.⁹

The Soviet Union completed its withdrawal from Afghanistan in 1989; however, conflict in the country persisted, albeit in a different form. Given enduring military and financial support from the Soviets, it took another two years – and the collapse of the Soviet Union – for the *mujahideen* to topple the existing Afghan government.¹⁰ But despite their success, groups that previously coalesced around the anti-establishment resistance movement failed to cooperate. As a result, civil war characterized by an “intra-*mujahideen* struggle” ensued.¹¹ As the conflict progressed, competing ethnoreligious factions subjected the country to chaos, corruption and confusion. The result was a population eager for stability and peace, ready to accept the Taliban's ‘simple and appealing [message]: peace, order, and Islamic law’.¹² Of course, the cost of this relative stability was the swift imposition of fundamentalist rules, particularly those subjecting women to severe education and employment restrictions.¹³ According to one Afghan official: “My daughters sit in the house and cry to me: We want education. This is heartbreaking, but peace is the first priority for people here. The Taliban must be given credit for accomplishing this.”¹⁴

The Taliban took control of Kabul in 1996. By 2000, Afghanistan “was more unified than it had been at any point in the preceding two decades.”¹⁵ The country was by no means one cohesive political entity nor were stable institutions in place; however, by

⁸H Abbas, *The Taliban Revival: Violence and Extremism on the Pakistan-Afghanistan Frontier* (2014), 59, Yale University Press; see LP Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (2001), 24. ([O]wing to its geographical location, Afghanistan has been subjected to countless invasions and incursions whose indelible imprint on the landscape has been matched by the social and demographic transformations they have wrought.)

⁹The former Soviet Union occupied Afghanistan throughout the 1980s, eventually withdrawing in 1989. See H Abbas (n 8) 57–58. The impact of this occupation cannot be overstated. See generally P Dimitrakis, *The Secret War in Afghanistan: The Soviet Union, China and Anglo-American Intelligence* (2013).

¹⁰See LP Goodson (n 8) 70–73; see also *Opening Statement for the United States, United States v. Al Fawwaz* (2022), WL 2068147 (S.D.N.Y. 22 January 2015). (describing the ‘mujahideen’ as ‘[p]eople in Afghanistan who [were] freedom fighters, people who stood[] to hold off and caused to hold off and retreat the powerful Soviet Union’); see H Abbas (n 8) 54. (relating the word ‘mujahideen’ to the word ‘jihad,’ which, ‘[i]n Islamic tradition ... refers primarily to a spiritual struggle within oneself, against sin; but its secondary meaning revolves around the idea of religious armed struggle’).

¹¹N Ghufuran, ‘The Taliban and the Civil War Entanglement in Afghanistan’ (2001) 41 *Asian Survey*, 462–66.

¹²*Ibid.*, 469.; see LP Goodson (n 8) 77.

¹³See BR Rubin, ‘Afghanistan Under the Taliban’ *Current History*, February 1999, 79–80.

¹⁴See N Ghufuran (n 11) 469. (quoting B Bearak, ‘State of Misery: A Special Report. Afghans Ruled by Taliban: Poor, Isolated, but Secure’ *New York Times*, October 10, 1998), <<https://www.nytimes.com/1998/10/10/world/state-misery-special-report-afghans-ruled-taliban-poor-isolated-but-secure.html>>. This simple and appealing ‘relative stability’ returned in the years following the Taliban's resurgence. See H Rahimi and AH Watkins, *Taliban Rule at 2.5 Years* (17 Combating Terrorism Center (CTC) at Westpoint Sentinel 1, 2024), 1. (‘In the absence of widespread armed conflict, there is now greater freedom of movement and ability to travel the country than most living Afghans can recall. Yet, the Taliban's adoption of sweeping gender-based restrictions ... means that the state formally denies much of this freedom to over half its population.’) (citations omitted).

¹⁵See LP Goodson (n 8) 86. Though not fully addressed here, note that Pakistani (and Saudi) financial and military aid played a significant role in the Taliban's ability to achieve widespread control. *Ibid.*, 110–15. For an analysis indicating that this aid was essential, see H Abbas (n 8) 68.

comparison to the preceding decades a relative, though brief, peace ensued. To solidify their control, the Taliban pushed for an evolution of their organizational structure from a predominantly militant movement to one capable of effective governance.¹⁶ Headed by an Amir, Mullah Muhammad Umar, the country was renamed the Islamic Emirate of Afghanistan in 1997 and its new leadership began the process of institutionalizing their fledgling government. Informal networks ‘connecting the leading figures to the new state structure’ were formed, and various religiously inspired governmental ministries – equivalent to those present in other ILS – were established.¹⁷ With time, the efficacy of this structure, with informal, dispersed leadership and centralized authority in Kabul, proved strategically and socially problematic.¹⁸ Economic stagnation and increasingly restrictive public policies followed as the Taliban imposed their ‘obscurantist version of sharia law that was a mixture of tribalism, male chauvinism and illiteracy’.¹⁹

Despite the desire of many in the organization for formal recognition, as Taliban rule progressed into the late 1990s and early 2000s, key decisions made assimilation into the international community a practical impossibility. Chief among them were the massacre of the Hazaras – a predominantly Shia ethnic minority – and the willingness to safely house Osama Bin Laden and al-Qaeda.²⁰ Idiosyncratic interpretations of Islam, and continued violations of the Islamic laws of war, led other ILS to reject formal recognition of the Taliban.²¹ With the terrorist attacks of September 11, 2001, and the subsequent U.S. invasion, whatever limited avenue may have existed for a diplomatic way forward was closed.²²

U.S. forces swiftly toppled the relatively unpopular, disjointed Taliban regime in November of 2001. But less than two years later, remnants of the organization were again capable of launching attacks against those who officially governed the country. By 2021, the Taliban controlled more territory than they had at any point in the war.²³ Though a full-scale analysis of the diplomatic and tactical missteps by both the U.S. and its Afghan partners is outside the scope of this paper, we wish to highlight that ‘the laws that emerged from the post-Taliban state building effort were drafted by foreign advisors The wide-ranging legal concepts reflected in those laws sometimes conflicted with local

¹⁶To be clear, at no point was a ‘total’ peace achieved. See H Abbas (n 8) 81.

¹⁷*Ibid.* (comparing the ‘new security service’ to its ‘homologue in Saudi Arabia’).

¹⁸In the years following the Taliban resurgence, the efficacy of this structure and the centralization of power has continued to prove problematic. See Rahimi and Watkins (n 14) 4.

¹⁹*Ibid.*, 69. (further suggesting that ‘[i]n reality, the Taliban were more of a vigilante militia than a political group capable of governing a state’). See also LP Goodson (n 8) 117–21. (discussing centralized ministries ‘characterized by little activity,’ the lack of a clear policy framework, and contorted Islamic policy relating to women, required religious practices, and minority rights).

²⁰See LP Goodson (n 8) 123; see H Abbas (n 8) 71. (indicating that the ‘wholesale massacre of Hazaras . . . damaged Taliban credentials beyond repair,’ with both ILS and Western states); ‘Afghanistan: ISIS Group Targets Religious Minorities’ *Human Rights Watch*, September 6, 2022, 12:01 AM, <<https://www.hrw.org/news/2022/09/06/afghanistan-isis-group-targets-religious-minorities>>; G Porter, (reviewing R Gutman, ‘How We Missed the Story: Osama Bin Laden, the Taliban, and the Hijacking of Afghanistan’ (2009) 16 *Middle East Policy* 60 (2008)).

²¹See H Abbas (n 8) 71.

²²See Rahimi and Watkins (n 14) 9. (discussing the Taliban’s approach to foreign relations and noting that ‘owing to the precedents of their draconian rule in the 1990s and the international opprobrium that followed,’ the Taliban ‘bring particular baggage to the arena of international relations’).

²³Special Inspector General for Afghanistan Reconstruction, ‘What We Need to Learn: Lessons from Twenty Years of Afghanistan Reconstruction’ *SIGAR*, August 2021 [hereinafter *IG Report*].

Afghan traditions ... [and] the tenets of [shari'a].²⁴ U.S. and coalition struggles aside, the Taliban's resilience, and their ability to effectively conduct a protracted military campaign while garnering popular support, should not go unnoticed.²⁵ The movement forced the U.S. to the negotiating table on a number of occasions, and U.S. leverage to extract concessions progressively decreased with each successive iteration.²⁶ The U.S. withdrew in August of 2021 and the Taliban emerged more powerful and capable of exerting widespread influence.²⁷

Afghanistan today

Today, the Taliban again remains in the midst of a slow, largely ineffective transition from a domestic guerilla fighting force to a functional government capable of national administration.²⁸ Thus far, leadership has opted for a structural organization reminiscent of previous Taliban rule, and past Afghan constitutional arrangements: centralized leadership guides policy through provincial leadership and down to the local level.²⁹ Unlike previous regimes, however, the group's supreme leader, Haibatullah Akhundzada, 'retains his tight grip on all decisionmaking'.³⁰ While serving to stabilize some of the disorder that followed the August 2021 return to power, that tight grip has also yielded increasingly restrictive social policies and quelled internal dissent, stripping women and girls of many rights they enjoyed before, most notably access to higher education. 'Haibatullah has repeatedly dismissed input from other Taliban factions, especially more pragmatic, internationally oriented Taliban leaders'.³¹

²⁴*Ibid.*, 74. Examples of diplomatic and tactical missteps include imposing formal, Western-styled institutions on informal Afghan environments and an overarching failure to understand the diversity of local contexts, among others. *Ibid.*, 74–76. See also Rahimi and Watkins (n 14) 4. (discussing the ongoing difficulties the Taliban face as a Pashtun movement and suggesting that their 'history of interactions with other ethnic groups ... set the stage for particularly fraught subnational and inter-ethnic dynamics throughout society').

²⁵See G Dorronsoro, 'The Taliban's Winning Strategy in Afghanistan' *Carnegie Endowment for International Peace*, 2009; see also *IG Report* (n 23) 73.

²⁶See *IG Report* (n 23) 17.

²⁷A Ullah, R Sultana and RU Kokab, 'US-Taliban Talks, Agreement and Insurgency' (2020) 14 *FWU Journal of Social Sciences*, 142, 151.

²⁸*European Union Agency for Asylum, Afghanistan* (Security Situation, Country of Origin Information Report 26), (2022), 36. [hereinafter Afghanistan—Security Situation]. See A Siddique, 'Unprecedented Differences': Rifts Within the Taliban Come Out In the Open' *Radio Free Europe Radio Liberty*, June 2, 2022 <<https://www.rferl.org/a/taliban-rifts-exposed-afghanistan/31880018.htm>>.

²⁹See (n 150) and accompanying text (suggesting that the Taliban explicitly modeled their administrative structure on previous Afghan constitutions); Afghanistan—Security Situation, see (n 28) 25.

³⁰V Felbab-Brown, 'Afghanistan in 2023: Taliban Internal Power Struggles and Militancy' *Brookings*, February 3, 2023, <<https://www.brookings.edu/blog/order-from-chaos/2023/02/03/afghanistan-in-2023-taliban-internal-power-struggles-and-militancy/>>.

³¹*Ibid.* See Afghanistan—Security Situation (n 28) 32. (citing a drop in the crime rate in the immediate aftermath of the Taliban takeover); C Goldbaum, 'Loss Piles on Loss for Afghan Women' *N.Y. Times*, March 8, 2023, available at <<https://www.nytimes.com/interactive/2023/03/08/world/asia/afghanistan-taliban-women.html/>>. ('When the Taliban returned to power ... women were among the most profoundly affected. While the end of the fighting offered a welcome respite, particularly for women in rural areas, others' lives have been severely constricted. Many watched 20 years of gains ... unravel as the new government issued edict after edict scrubbing women from public life.');

Rahimi and Watkins, (n 14) 2.

In September 2021, a month after regaining control of the country, the Taliban suspended the Afghan constitution of 2004. Without a stable constitutional order in place, ‘they declared to provisionally implement elements of Afghanistan’s Constitution of 1964 ... that are not in conflict with shari’a and the ‘principles of the Islamic Emirate’ ...’³² As a former Afghan cabinet minister noted, ‘the Taliban government [i]s “not based on any particular constitution.”’³³ With that constitutional void, and nothing more than amorphous guidance that constitutional provisions – and sub-constitutional edicts – be shari’a compliant, the Taliban are free from any legally binding limits on how they choose to govern.

Given their autocratic style of governance, reticence to reduce their beliefs to writing, and oft-conflicting messaging, it is difficult to reduce the Taliban’s religious and political ideology to a fixed point. Granted, the Taliban is clear that the Islamic legal tradition as expounded by the Hanafi jurisprudence – however interpreted – should govern Afghanistan.³⁴ Yet, it is God who is the lawgiver and lawmaker. Humans are obliged to discover God’s will for humanity. However, the corpus of the Hanafi jurisprudence is notably diverse. In fact, views of some Hanafi jurists on specific issues may even be contradictory. Thus, ambiguity in application of these rulings to contemporary governance poses considerable challenges. In addition, regardless of the Taliban’s open commitment to the classical Hanafi doctrine, some of their policy decisions depart from these teachings. By way of illustration, though Taliban-enacted laws severely restrict women’s rights, including rights to education and employment, Abu Hanifa – the founder of the Hanafi school – viewed women as active participants in Muslim societies. For instance, according to him, a woman can adjudicate in court cases where she fulfills requirements needed for a witness.³⁵

In theory, the group is bound by the guiding tenets of shari’a, but ‘the actual construction of the law is a *human* activity, and its results represent the law of God as *humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law – the human *fiqh* – that must be normative for society’.³⁶ This freedom from legally binding language is likely deliberate. Once a governmental structure is announced, and legally protected individual rights are instantiated via text, a new iteration of the Taliban regime would simultaneously restrict its decision-making power while likely angering internal and external actors.

Though thus far the Taliban has been governing Afghanistan without a formal constitution, the 2022 book by the most influential religious authority in the organization and current Chief Justice of the Taliban’s Supreme Court, Abdul Hakim Haqqani, *The Islamic Emirate and its System*, constitutes the most significant compilation of philosophy

³²Afghanistan—Security Situation (n 28) 25. (quoting Ayaz Gul, ‘Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now’ VOA News, September 28, 2021, available at <<https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>>).

³³*Ibid.* (quoting Akmal Dawi, ‘Taliban Seeking 110,000-Strong Army After 6 Months in Power’ VOA News, February 15, 2022, available at <<https://www.voanews.com/a/taliban-seeking-110-000-strong-army-after-6-months-in-power-/6442084.html>>).

³⁴Abdul Hakim Haqqani’s 2022 book, *The Islamic Emirate and its System*, elaborates on the dominant position of the Hanafi madhab in governance (see the chapter entitled ‘The Madhhab,’). See Abdul Hakim Haqqani. *The Islamic Emirate and its System (Al Emirate Al-Islami’a wa Nezmaha)* (Maktabah Dar ul-Ulum Sharaih, Lahore, 2022) 37–38.

³⁵Powell (n 7) 109.

³⁶Powell (n 7) 101. (quoting B Weiss, *The Spirit of Islamic Law* (2006) 116).

and legal philosophy undergirding Taliban policies.³⁷ Endorsed by the Taliban leader Haibatullah Akhundzada – who contributed a brief preface to the book – *The Islamic Emirate and its System* provides a palpable and credible normative exposition of the revived Taliban state. Although some of the writing is on a theoretical jurisprudential level, the book outlines features of a shari'a-based state and Taliban views of legitimate Islamic governance: duties and responsibilities of the Islamic state's leader, the role of scholars, armed forces, sources of Islamic legislation, status of custom (*urf*), education and women's role and place in Islamic society. In discussing the various aspects of a proper Islamic state, Haqqani relies on Islam's foundational sources: the Qur'an and sunna, and insights from the Hanafi school of jurisprudence. Shari'a constitutes a complete and final statement on governance and takes precedence over any constitutional efforts. In fact, a constitution is superfluous.³⁸

Arguably, as in the context of any ILS, in their efforts to govern Afghanistan, the Taliban need to strike the proper balance between religious and secular law.³⁹ This is an endeavor that has been attempted time and time again in Afghanistan. From 1923 forward, each Afghan constitution has sought to express the balance in a different way, shifting from a more secular domestic legal system to a more religious one and back again. The Taliban, by avoiding ratification of a binding document, are unrestricted in their attempt to govern on an ad hoc basis. They are therefore able to send mixed – and often contradictory – messages to differing audiences.⁴⁰ In addressing the international community, the Taliban can signal an intent to pursue progressive policies that might allow Afghanistan to eventually be accepted into the broader global order. Yet, at the same time, the Taliban pursue fundamentalist policy domestically, appeasing the more conservative factions of the Afghan population and their own conservative base.⁴¹ No matter the

³⁷Haqqani (n 34). See FM Zaland, 'The Conflicting Synthesis of the Taliban's Religious and Cultural Identity' (2023) 21(3) *Review of Faith & International Affairs*, 38–45.

³⁸*Ibid.*, 41 (quoting Haqqani, (n 34) 23).

³⁹See generally Parts II and III. We recognize that a sharp juxtaposition of Islamic law as a religious law against secular law is an oversimplification. Indeed, from a practical standpoint, multiple precepts of the Islamic legal traditions are secular, that is, they do not rely on religious texts or religiously-grounded jurisprudence, but rather provide simple, practical solutions. See generally, AH Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (2012) The University of Chicago Press; M Mashal, 'What Do the Taliban Want in Afghanistan? A Lost Constitution Offers Clues' *N.Y. Times*, June 28, 2019, available at <<https://www.nytimes.com/2019/06/28/world/asia/taliban-peace-talks-constitution.html?searchResultPosition=3>>. (discussing the Taliban's insistence 'on Shariah as the only source of law').

⁴⁰See Rahimi and Watkins (n 14) 1. (discussing a recent statement from the Taliban's acting Minister of Interior of Afghanistan and noting that the pronounced 'position of non-interference ... encapsulates the tensions and contradictions at play in the Taliban's two and a half years of rule').

⁴¹Noted Afghan politician and women's rights activist, Fawzia Koofi, suggests that the international community has been swayed (in part) by competing Taliban messaging. 'Before completing their reconquest of Afghanistan in August 2021, the Taliban had promised to safeguard women's rights, along with other pledges designed to ease world fears ... But since then, they have issued dozens of edicts to deprive women of basic human rights, including last month barring them from attending universities.' F Koofi, Opinion, 'The World Has Fallen for the Taliban's Liles Once Again' *N.Y. Times*, January, 19, 2023, available at <<https://www.nytimes.com/2023/01/19/opinion/afghanistan-taliban-women-security.html?searchResultPosition=16>>. See also Siddique (n 28). (discussing an internal Taliban rift regarding the regime's repressive policies); Radio Azadi, 'OIC Islamic Grouping 'Emergency Meeting' Eyes Afghan Rights Situation, New Taliban Bans On Women' *Radio Free Europe Radio*, January, 11, 2023, available at <<https://www.rferl.org/a/afghanistan-oic-women-rights/32218592.html>>. (discussing the Organization of Islamic Cooperation's (OIC) emergency meeting 'to discuss recent developments in Afghanistan and the humanitarian situation' and indicating that

message, there are no constitutional limits against which any audience can measure the regime's adherence to the rule of law. Moreover, there are no constitutionally grounded rules holding the governing regime accountable.

Vagueness in legal drafting is nothing new; indeed, a degree of vagueness is a necessary corollary of legal drafting.⁴² After all, in the United States and elsewhere, 'it is emphatically the province and duty of the judicial department to say what the law is'.⁴³ Whether interpretation or specification of legal provisions rests with the judiciary, or other governmental entities, it must rest somewhere. Lack of legal precision can serve as a useful tool in lawmaking at the executive or legislative level, providing room for political compromise, ongoing flexibility, interbranch cooperation and more effective governance.⁴⁴ Arguably, in the context of Afghanistan, legal vagueness was a springboard for the country's longest lasting constitutional scheme in 1931.⁴⁵ Alternatively, in some societies and to some extent, vagueness in legal language can be seen as an anti-democratic tool employed to subvert constitutionally mandated separation of powers.⁴⁶ In any case, though the drafting process necessarily yields vague language, the general apprehension for written legal commitments is at its apogee with the Taliban.

Rather than govern subject to the strictures of any constitutional language, vague or not, thus far the Taliban have chosen to govern exclusively via unconstrained, sub-constitutional actions.⁴⁷ Though in part vague and theoretical, Abdul Hakim Haqqani's 2022 book seems to be the nonbinding but definitively guiding compendium for governing Afghanistan. Yet, it is narrow in scope and thus does not fully capture the Taliban's multifaceted ideology comprising Deobandi beliefs, localized Pashtunwali values, and tribal customs.⁴⁸ Deobandism itself, while adhering to the Hanafi school of law, was developed through a network of seminaries in India and takes many forms.⁴⁹ For

the 'OIC and another influential Islamic organization, the International Islamic Fiqh Academy (IIFA), have described the [gender-based] bans as contrary to the purposes of Islamic law and the consensus of the ummah').

⁴²H Asgeirsson, *The Nature and Value of Vagueness in the Law* 1 (2020). (suggesting that 'the law is to some extent vague'). As Elkins, Ginsburg, and Melton note, specific phrases incorporated in constitutions are subject to interpretation and adjustment by political players within a country. The effects of these adjustments can have a wide range of effects on the meaning of constitutional provisions, including in some cases, their transfiguration. See Z Elkins, T Ginsburg and J Melton, *The Endurance of National Constitutions* (2009).

⁴³*Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁴⁴See Asgeirsson (n 42) ('Legal indeterminacy ... is sometimes a good thing. First, lawmakers sometimes do better to enact law with vague content, and to let interpreters handle borderline cases if and when they arise, than to try to work out a more determinate alternative. Second, lawmakers sometimes do better to make it vague what the content of a law is than to not legislate at all.'). R Dixon and T Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2012) 9 *International Journal of Constitutional Law*, 636, 638. (arguing that constitutional deferrals can serve to mitigate informational asymmetries and potential 'error costs' in the drafting process).

⁴⁵See Part II.C. (picking up Pasarlay's argument and suggesting that the success of the 1931 constitution can be attributed, in part, to constitutionally vague deferrals).

⁴⁶See J Blackman, 'Gridlock' (2016) 130 *Harvard Law Review* 241, 242–43.

⁴⁷See generally 'The Rule of Taliban: A Year of Violence, Impunity and False Promises' (2022) *Amnesty International* 25–40. (discussing the Taliban's use of extrajudicial killings, enforced disappearance, arbitrary arrests, and the persecution of religious minorities).

⁴⁸See Zaland, (n 37) 39–41.

⁴⁹See Cole Bunzel, 'The Taliban's Political Theory: 'Abd al-Hakim al-Haqqani's Vision for the Islamic Emirate' *Hudson* July 29, 2024); Zaland (n 37). (discussing the importance of engaging the *transnational* network of Deobandi madrassas) (emphasis added).

example, Islamic scholars from one wing of the movement believe in political involvement with varying degrees of secularism; others renounce political involvement of any kind.⁵⁰ Though the internal machinations of the current regime remain opaque and the ideology is inherently difficult to define with precision, there is one point of clarity: if the current style of governance is any indication, the Taliban's most conservative faction is in control, with little desire to reduce a formal legal structure to writing.⁵¹

Afghan constitutionalism: a storied past

This section examines five Afghan constitutions that had significant impacts on Afghanistan's legal tradition: 1923, 1931, 1964, 2004 and the Taliban's draft constitution of 1998. As legal, social and political dynamics have changed over the past century, so too have the country's governing documents. In tandem with continuous societal shifts, Afghanistan has undergone several constitutional changes, with each iteration striking a new balance between Islam-based and secular language in law.

To visualize patterns of the changing nexus between Islam-based and secular legal language, we explore each constitutional text with quantifiable metrics designed to capture the two categories of legal regulations.⁵² The 'total religious references' indicator measures the number of references to religion, with a focus on references to 'Islam' and 'shari'a'.⁵³ The 'religious provisions' indicator captures the number of constitutional provisions included in a given constitution, controlling for repeated references to 'God', 'Islam' and related language used repeatedly in a single provision.⁵⁴ Notably, not all 'religious provisions' are created equal; some are more robust than others. For example, though both are designed to achieve a similar end, Article 4 of the 1923 constitution and Article 65 of the 1931 constitution are substantively different. The former ensures that the King governs in accordance with the shari'a, while the latter directs that the National Council 'should not' pass measures that contravene the canons of Islam.⁵⁵

Acknowledging important substantive differences between each constitutional text, this paper focuses on a raw, descriptive count of religious references and provisions while recognizing the importance of other factors. To more accurately understand their relative impact, we juxtaposed the number of Islam-based constitutional provisions against the

⁵⁰John Butt, 'A Taleban Theory of State: A Review of the Chief Justice's Book of Jurisprudence' *Afghanistan Analysts Network*, August 2023, 5–9 (addressing Haqqani's educational background).

⁵¹See Goldbaum (n 31). (noting lower-level policy restricting women's rights and suggesting that they have caused tension within the government); Koofi (n 41). (indicating that despite internal tension within the Taliban, they have continued to pursue increasingly fundamentalist policies, including commandeering the Afghan school system).

⁵²These metrics are borrowed from Powell's previous work quantifying ILS constitutions. See generally Powell (n 7).

⁵³For example, while references to 'Islam' and 'shari'a' are of course included, every mention of the 'Islamic Shura' (eighteen total) in the Taliban's 1998 draft constitution is included in this metric.

⁵⁴For example, Article 6 of the 1931 constitution – the King's Holy Oath requirement – contains references to 'Almighty God,' the 'Quran,' the 'Shari'a of Mohammed,' 'Islam' and 'God' (twice). This provision would register eight 'total religious references,' but only one 'religious provision.'

⁵⁵*The Constitution of Afghanistan*, April 9, 1923, art. 4; *The Constitution of Afghanistan*, October 31, 1931), art. 65. Setting aside substantive issues of interpretation and application, each clause contains one "religious reference" for our purposes (shari'a and Islam, respectively). While we acknowledge the individual provisions are materially different, the goal of this paper is to assess the constitutions as a whole, with an eye toward the more general religious versus secular law balance and any insights that balance provides.

total word count of each constitution (relative count). For example, while the Basic Code of 1923 contains merely one more religious provision than its 2004 counterpart, at just 3,092 words compared with 11,357, the Basic Code of 1923 includes significantly more Islam-based legal language on a relative basis.

Undoubtedly, there are limitations to insights that the descriptive, text-based data are able to yield. Legal exposition, jurisprudence and constitutional interpretation regarding equivalent or similar constitutional provisions may vary greatly across time and space. Thus, these processes residing outside the constitutional text itself may impact the way that constitutions operate. Yet, setting these considerations aside, constitutional texts themselves can provide insights of fundamental importance. In particular, we are able to gauge the pervasiveness of religious language in constitutional provisions, juxtaposing it against secular provisions across several constitutions in Afghanistan. Figure 1 presents the data in both bar and line graph form. The five bars – the total word counts for each constitution – are overlaid with line graphs representing the number of total religious references and total religious provisions respectively. Figures 2 and 3 further dissect this information.

While our goal is not to overemphasize the religious–secular balance, leaving any historical and qualitative analyses aside, a couple of initial observations are readily apparent based on the descriptive data. Unsurprisingly, the Taliban’s draft constitution is by far the most religious. Indeed, out of 110 provisions, fifty-six contain religiously-infused language. This proportion is markedly different from the 1931 constitution, the country’s most stable and longest lasting, which contained twenty religious provisions, or eighteen percent of the total document. Though often noted as a shift to the right following the Basic Code of 1923, the 1931 constitution moved the relative percentage of religious provisions slightly downward from nineteen to eighteen percent. The constitutions of

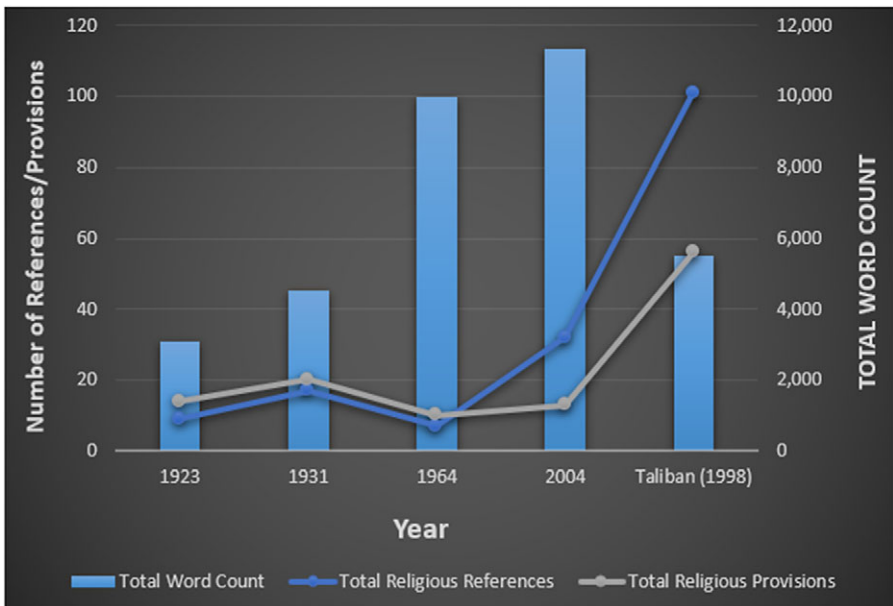


Figure 1. Afghanistan's constitutions: religious language.

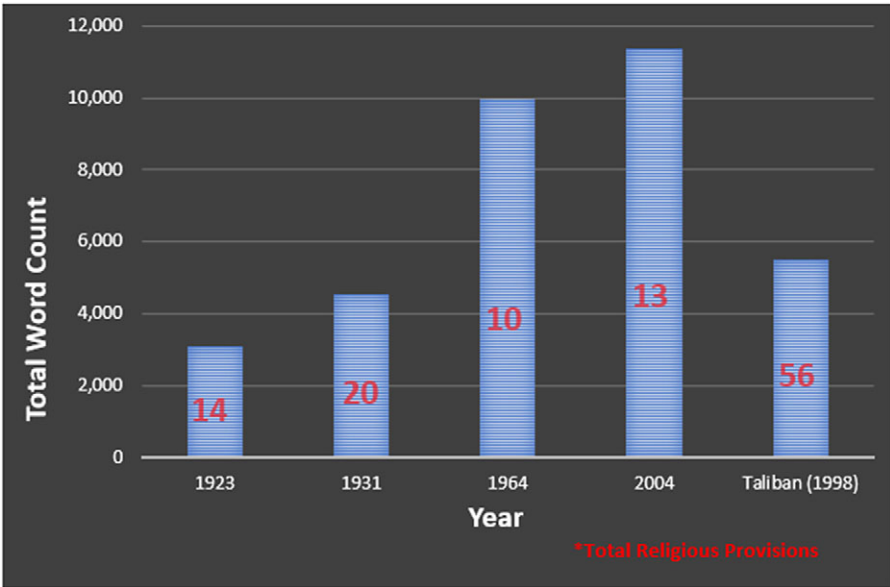


Figure 2. Religious provisions: total word count.

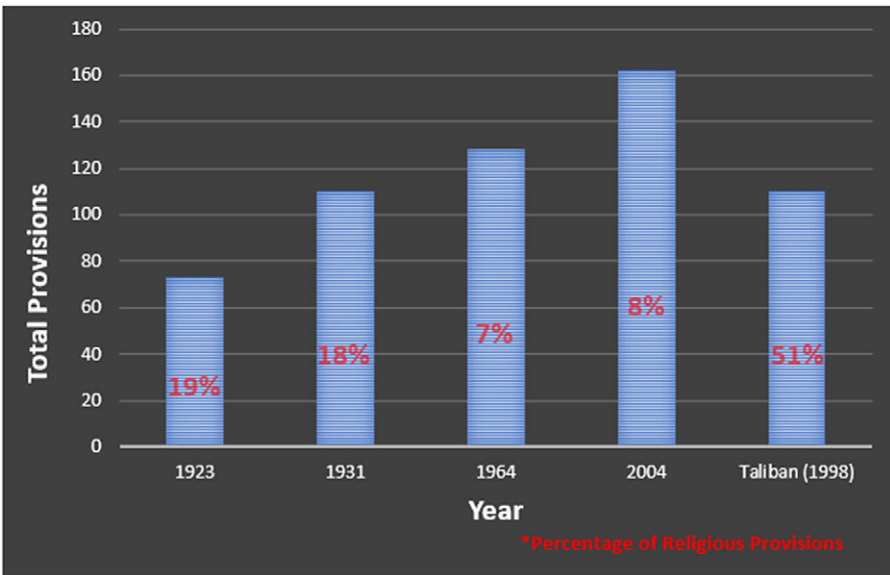


Figure 3. Religious provisions: percentages.

1964 and 2004 were decidedly the most secular, and both were ultimately followed by periods of extreme instability. Granted, constitutions are not drafted, nor do they operate, in a vacuum. Quite the opposite: the political, socioeconomic and cultural reality on the

ground may extend or shorten the lifespan of any constitutional regime. Setting aside all other factors that have contributed to periods of violence or stability in the country, the descriptive, raw data suggest that a twenty versus eighty percent religious-secular split has produced the most constitutionally stable Afghanistan. In contrast, though the endurance of any Afghan constitution has been directly tied to the lifespan of the regime that authored it, extreme shifts to the left or right have produced country's most volatile – and violent – historical periods.

The role of custom

When considering the evolution of the legal landscape in Afghanistan, it is crucial to highlight the reality that majority of Afghan people – especially those residing in the country's rural areas – perceive unwritten customary norms as providing a *de facto*, overarching normative system.⁵⁶ Indeed, 'Islamic law stipulates that everything which does not cross the limits established by God is permitted, and customary norms of behavior often fill in legal lacunae'.⁵⁷ Therefore, as long as local custom does not violate shari'a, it is often used in place of or as a supplement to written law.⁵⁸ It is against this complex and multilayered backdrop that Afghan constitutional tradition must be contextualized.⁵⁹ Indeed, though in any ILS striking the appropriate balance between secular and religious law is a challenge, in Afghanistan the difficulty is exacerbated by a diversity of stakeholders operating amid competing customs and local normativities shaped by racial, cultural, ethnic, regional, tribal and linguistic considerations and sensitivities.⁶⁰ Notably, the importance of *urf* is also addressed in Haqqani's 2022 book. According to Haqqani, persistent in time, widely accepted customs and practices of people in an Islamic state, if not conflicting with shari'a, should be honored. Haqqani contrasts such genuine Afghan customs with those hailing from the West, which 'lack validity, and must be abolished'.⁶¹ Any attempt to draft a lasting constitution must effectively account for these – and many other – differences.⁶²

⁵⁶The Customary Laws of Afghanistan' (2004) *International Legal Foundation*, 4. [hereinafter *Customary Laws*] (emphasis removed) ('The reconstruction of a legal system in any post-conflict country requires a certain understanding of the local customary laws. In Afghanistan, the need for such an understanding is particularly acute ...'). This reality was not fully understood throughout the U.S. state-building effort; a misunderstanding the Taliban effectively exploited. *IG Report* (n 23) 17.

⁵⁷Powell (n 7) 116.

⁵⁸*Ibid.*, 117.

⁵⁹For a more comprehensive account, providing an abbreviated compilation of the customary laws of Afghanistan, see generally *Customary Laws* (n 56).

⁶⁰See generally *ibid.* See also S Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* (2016), 44–45. (Ph.D. dissertation, University of Washington) (on file with authors) (discussing Afghanistan's wide-ranging diversity and the difficulty it created for early rulers).

⁶¹Haqqani (n 34) 39. For more discussion, see M. Abdul Ahrar Ramizpoor, *Restriction of Civic Space in Afghanistan Under the Taliban – From Religious Ideas to Actions* (Raoul Wallenberg Institute for Human Rights and Humanitarian Law, 2024) (on file with authors).

⁶²For an argument that, because of Afghanistan's extremely divided society, the most successful constitutions defer controversial foundational questions and empower formal institutions to resolve them in the future, see Pasarlay (n 60).

1923: The birth of Afghan constitutionalism

Afghanistan shook free from its status as a British Protectorate in 1919. Led by King Aman-Allah, with their newfound independence the country rapidly moved to establish a constitutional monarchy and a ‘government by law’.⁶³ But just as quickly as it had formed, Afghanistan’s first constitutional monarchy collapsed under the pressure of rebellion.⁶⁴ Many attribute this quick rise and fall to King Aman-Allah’s overly progressive Basic Code of 1923, a constitutional structure that struggled to gain acceptance in the country’s prominent ‘tribal society’.⁶⁵ But as with most Afghan historical accounts, this narrative oversimplifies the complex internal and external forces that generated the first failed attempt at stable, constitutionally-anchored governance. Internal tribal disputes certainly added stressors to the already difficult task of instantiating a new, independent government, but illiteracy, external British influence, and a host of other complicating factors all played a role in King Aman-Allah’s eventual demise.⁶⁶ More importantly in the constitutional analysis, this oversimplified narrative fails to account for ‘the monarch’s resolve that Afghanistan’s constitutional reforms spring from *within* the Islamic legal and ethical traditions, or the shari’a’.⁶⁷

As with the constitutional structure of any ILS, the Basic Code of 1923 sought to strike a balance between religious and secular laws. To be sure, the constitution contained a number of progressive provisions, such as the right to an education for men *and* women, as well as an unqualified freedom of the press.⁶⁸ However, the Basic Code also included fourteen religious provisions, and nine explicit references to Islam and shari’a, despite its relatively short (by modern standards) length of 3092 words. Notably, it provided that ‘[t]he religion of Afghanistan is the sacred religion of Islam’, and required the king to govern in accordance with Islam and the shari’a.⁶⁹ Many of these early constitutional features had considerable staying power and have endured through each successive constitutional regime.⁷⁰ Interesting examples of such provisions include Articles 2, 4 and 21 of the 1923 Basic Code, all of which deal with the role of Islam and shari’a in Afghanistan’s governance.⁷¹

⁶³F Ahmed, ‘In the Name of a Law: Islamic Legal Modernism and the Making of Afghanistan’s 1923 Constitution’ (2016) 48 *International Journal of Middle East Studies* 655, 655–56. (quoting LW Adamec, *Afghanistan, 1900–1923* (1967), 111.

⁶⁴MN Shahrani, ‘King Aman-Allah of Afghanistan’s Failed Nation-Building Project and its Aftermath’ (2005) 38 *Iranian Studies*, 661. (book review).

⁶⁵LB Poullada, *Reform and Rebellion in Afghanistan, 1919–1929, King Amanullah’s Failure to Modernize a Tribal Society* (1973); see Ahmed (n 63) 656.

⁶⁶GJ Arez, ‘Reform and Rebellion in Afghanistan, 1919–1929’ (1975) 34 *The Journal of Asian Studies*, 563, 563 (book review).

⁶⁷Ahmed (n 63) 656.

⁶⁸*The Constitution of Afghanistan*, April 9, 1923, arts. 11 and 14. The constitution also entitled followers of other religions to ‘the full protection of the state,’ consistent with the revelatory texts. *Ibid.* art. 2; see the Qur’an 109, 1–6 (Sahih International translation) (‘Say, “O disbelievers, I do not worship what you worship. Nor are you worshippers of what I worship. Nor will I be a worshipper of what you worship. Nor will you be worshippers of what I worship. For you is your religion, and for me is my religion.”’).

⁶⁹*The Constitution of Afghanistan*, April 9, 1923, arts. 2 and 4.

⁷⁰See CB Lombardi and AF March, ‘Afghan Taliban Views on Legitimate Islamic Governance: Certainties, Ambiguities, and Areas for Compromise’ *Peaceworks*, February 2022, 20. (‘Since 1923, almost every successive Afghan government has drafted a new constitution to mark its coming to power and to establish the grounds on which it will assert its legitimacy as a distinctly Afghan Islamic government.’).

⁷¹See, e.g., *The Constitution of Afghanistan*, April 9, 1923, art. 2; *ibid.* art. 4 (‘... rule in accordance with the principles enunciated in the shari’a’); *ibid.* art. 21 (‘... cases will be decided in accordance with the principles of shari’a’). (‘The religion of Islam is the sacred religion of Islam.’).

While specific Islamic provisions have survived the last century of Afghan constitutional history, the Basic Code's most lasting impact came by way of its structural model. '[D]escribed as one of the first 'Islamic state' projects of the 20th century',⁷² King Aman-Allah's Afghanistan consisted of a layered bureaucracy, with appointed and elected officials managing decentralized government affairs from the capital, through provinces and down to the local level.⁷³ Though the Basic Code incorporated religious language, its structure was reminiscent of Western governments, particularly Great Britain.⁷⁴ Most notably, in 'its perceptive attempt to circumvent the widening gulf between "Islamic" and "secular,"' the jurists of King Aman-Allah's Afghanistan 'pursued their goals by engaging the challenges of modern state building from *within* the Islamic-Hanafi legal tradition, and not outside it'.⁷⁵ In doing so, these jurists worked to find a space in which an ILS could fit in the post-colonial, international landscape while trying to ensure the shari'a occupied a central role in the government and everyday Afghan life.

Despite these early efforts to strike an adequate balance between religiously-infused and secular legal language, the Basic Code proved too progressive, and modernist reforms came too quickly for the country's religious elite.⁷⁶ In a nod to religious conservatives, amendments were adopted in 1925, but these still could not stabilize increasingly tenuous state institutions.⁷⁷ Rebellion soon followed, and King Aman-Allah's vision for Afghanistan never fully materialized.⁷⁸ The predominant narratives suppose that the fall of the Basic Code came as a result of a revolt against modernity, but as with most Afghan history, that too is likely overly simplistic. Whether it was progressive ideals or progressive ideals pushed too quickly, King Aman-Allah's first constitution survived merely six years before being replaced in 1931.⁷⁹

⁷² Ahmed (n 63) 670–71.

⁷³ See, e.g., *The Constitution of Afghanistan*, April 9, 1923, art. 25. ('The responsibility for the administration of the government is vested in the council of ministers and independent departments.');

ibid. art. 39 ('There is hereby established a state council in the capital of the kingdom and local councils in the provinces and district centers ...').

⁷⁴ Early in his reign, King Aman-Allah relied 'heavily on the advice of his well traveled, liberal-minded father-in-law.' This reliance likely influenced the Western-styled institutions that made up the early Afghan government and frequently invoked a 'rule of law' refrain. See Shahrani (n 64) 668.

⁷⁵ Ahmed (n 63) 671–72. Jurists, in the Islamic legal tradition (and as used here), are distinct from judges. 'The ideal vision of the jurist is one who works in isolation of the state, and has no interest in sully[ing] a hard earned reputation in study and effort to understand God's law with the temptations of life of this world, whether they be wealth or power.' HA Hamoudi, *Islamic Law in a Nutshell* 15, (2020).

⁷⁶ See PL Kakar and J Schiwal, *Lessons from the 1931 Constitution of Nadir Khan: Religious Inclusion and Reform* (Afghan Peace Process Issue Paper: U.S. Institute Of Peace, March 2021), 5.; see generally SK Nawid, *Religious Response to Social Change in Afghanistan, 1919–29: King Aman-Allah and the Afghan Ulama* (1999). (explaining the reform movement and its eventual demise).

⁷⁷ See, e.g., *The Constitution of Afghanistan*, April 9, 1923, art. 2. (as amended) (adding 'the sublime hanafite rite' as the official religious rite); *ibid.* art. 9 (as amended) (adding a requirement that 'afghan subjects are bound by the religious rite ...'); *ibid.* art. 24 (as amended) (excepting 'punishments which are in accordance with the rules of the sharia' from the original prohibition on torture).

⁷⁸ See Kakar and Schiwal (n 76) 3.

⁷⁹ *Ibid.*, 4. (describing Nadir Khan, King Aman-Allah's eventual replacement, as not opposed to reform generally and an advocate of more gradual change); DI Ahmed and T Ginsburg, 'Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions' (2014) 54 *Virginia Journal of International Law*, 615, 660. (discussing the revolt of 1929 that deposed King Aman-Allah).

1931: A conservative compromise

While the Basic Code of 1923 brought ‘remarkable and significant social and political changes to Afghanistan’, the country was not yet ready for ambitious legal reforms.⁸⁰ During the transition to the 1923 to the 1931 constitution – the Fundamental Principles of the Government of Afghanistan – outward-looking modernization gave way to inward-looking conservatism.⁸¹ The constitutionally-expressed balance between religious and secular provisions was remarkable in its durability, and came by way of a compromise between ‘modernists, traditional religious leaders (ulema), tribes and the monarchy [It] achieve[d] an equilibrium wherein each group gained more from abiding by the constitutional order than from challenging it’.⁸² Ultimately, it ushered in three decades of peaceful dispute resolution, as political disagreements were handled through political institutions.⁸³

Though it has been described by critics as a ‘do nothing constitution’ and a ‘step backwards’ in Afghan constitutional history, the 1931 constitution was uniquely successful in its longevity.⁸⁴ As such, it merits particular attention. To be sure, the constitution was a step toward conservatism. In merely 4,530 words, the constitution contained twenty religious provisions, and seventeen specific references to Islam or shari’a.⁸⁵ It also departed from the Basic Code of 1923 in several notable respects. The Hanafi interpretations of Islam were firmly entrenched throughout the newly established government, two supremacy clauses were included, and a repugnancy clause was added to the constitutional text.⁸⁶ And while most individual rights were retained, ‘shari’a qualifiers’ now modified equal protection and freedom of the press.⁸⁷ According to the new constitutional order, Afghanistan was – first and foremost – an *Islamic* law state. This reality was welcomed by conservative religious leaders who played a significant role in the 1929 revolt.

At its most basic level, the 1931 constitution retained the basic structure of the layered bureaucracy, with a King at the top, set up by the Basic Code. Appointed and elected

⁸⁰*Ibid.*, 663 (describing the 1923 reforms as ‘too ambitious for Afghan society’).

⁸¹P Fishstein, ‘Afghanistan’s Arc of Modernization: 1800 to 1978’ *The Globalist*, September 1, 2010, available at <<https://www.theglobalist.com/afghanistans-arc-of-modernization-1880-to-1978/>>. (‘As the late Afghanistan scholar Louis Dupree observed, throughout Afghanistan’s modern history there has been a tension between the outward-looking modernizing elements and the inward-looking conservative ones.’).

⁸²Kakar and Schiwal (n 76) 2.

⁸³*Ibid.*, 8; see S Pasaaray, ‘Rethinking Afghanistan’s Longest-Lived Constitution: The 1931 Constitution Through the Lens of Constitutional Endurance and Performance Literature’ (2018) 10 *Elon Law Review*, 284, 292.

⁸⁴Pasaaray (n 83) 285. (first quoting T Barfield, *Afghanistan: A Cultural and Political History*, (2010). and then quoting F Biloslavo, ‘The Afghan Constitution Between Hope and Fear’ (2004) 1 *Cemiss Quarterly*, 61, 62; see *ibid.* (indicating that by surviving for thirty-three years, the 1931 constitution surpassed ‘the average lifespan of written constitutions by more than a decade’).

⁸⁵But see SA Arjomand, ‘Constitutional Developments in Afghanistan: A Comparative and Historical Perspective’ (2005) 53 *Drake Law Review*, 943, 948. (‘Nadir Khan’s Constitution of 1931 was in some respects significantly more liberal than that of 1923 ... ’).

⁸⁶*The Constitution of Afghanistan*, October 31, 1931, arts. 1, 2, and 88. (Hanafi school of jurisprudence established for the general population, the King, and the shari’a courts); *ibid.*, art. 65. (‘Measures passed by the National Council should not contravene the canons of the religion of Islam or the policy of the country.’).

⁸⁷See, e.g., *ibid.*, art. 10. (‘All Afghan subjects have equal rights and duties under the shari’a law and the law of the State.’); *ibid.*, art. 23. (Publications and newspapers of Afghanistan, *such as are not against religion*, are under no restrictions save as provided by the special law relating to them.) (emphasis added).

officials managed decentralized government affairs from the capital, through provinces, and down to the local level.⁸⁸ As with the Basic Code, the more democratic structural provisions proved aspirational early on, and while they were intended to be elected, ‘deputies to the lower house [of parliament] were hand picked by the king just as much as the members of the upper house’.⁸⁹ Despite the continued failure of the 1931 constitution to put its democratic ideals into practice, it made a critical, structural change: no organ of government would be above the shari’a. The parliament, the courts, and the King were all subject to the supremacy of Islam and the dictates of the shari’a.⁹⁰ In this way, ‘constitutional rights could be acceptable and secure legitimacy, as long as these rights did not impinge upon Islam’.⁹¹

The introduction of additional, stronger supremacy, repugnancy, and holy oath clauses is notable in the 1931 constitutional regime. Arguably, ‘had [King Aman-Allah] incorporated strong form Islamic supremacy clauses in his [1923] constitution to provide “insurance” against novel and perceivably “un-Islamic” rights, he may have succeeded in placating the opposition to his constitutional reforms’.⁹² More likely, as with all of Afghan history, a fortunate confluence of internal and external factors contributed to the endurance of this constitutional regime. Islamic constitutional symbolism surely matters, and probably served as an important stabilizing force in 20th century Afghanistan, just as it does across contemporary ILS today.⁹³ But the implementation, or lack thereof, of constitutional directives played a role as well. Despite the constitutional directive for electoral government, ‘the parliament became a means for keeping the tribal leaders ... in Kabul during the months ... when they were likely to foment trouble in their regional strongholds’. Though problematic, this kind of sub-constitutional action could, at least in the short term, act to stabilize the central government.

On a more optimistic note, several critical constitutional deferrals may have ‘played a key role in ensuring that the 1931 Constitution promoted ongoing debates of controversial constitutional issues ...’.⁹⁴ Though in many cases leaving constitutional questions unanswered in a founding document would more naturally act as a destabilizing force, deferring key questions can, and in this case arguably did, encourage disputes to be resolved through non-violent channels.⁹⁵ For example, the 1931 constitution qualified

⁸⁸See Arjomand (n 85) 949.

⁸⁹*Ibid.*, 949.

⁹⁰See *The Constitution of Afghanistan*, October 31, 1931, arts. 1. (‘The King of Afghanistan should be a follower of [the Hanafi religion].’), 5 (The King with carry on the administration of government ‘in accordance with the dictates of the expounders of the sacred Shariat of the Holy Prophet (peace be upon him!) and the Hanafi religion.’), 6 (The King swears ‘to rule according to the Shariat of Mahomet.’), 65 (‘Measures passed by the National Council should not contravene the canons of the religion of Islam.’), 88 (‘Suits filed in the Shariat courts are dealt with in accordance with the principles of the Hanafi religion.’), and 91 (‘Every person may plead in court any provision of Shariat law to protect his rights.’).

⁹¹Ahmed and Ginsburg (n 79) 668.

⁹²*Ibid.*, 667–68.

⁹³See *ibid.*, 668; see generally Part III.

⁹⁴Pasarlay (n 83) 285. Borrowing, as Pasarlay does, Rosalind Dixon’s and Tom Ginsburg’s description of a deferral, it ‘is a conscious decision by constitutional writers not to decide a controversial issue by constitutional design, but rather, to leave it to the legislature or the judiciary to decide after the constitution is ratified.’ *Ibid.*, 296. (citing R Dixon and T Ginsburg, ‘Deciding Not to Decide: Deferral in Constitutional Design’ (2012) 9 *International Journal of Constitutional Law* 636, 646–47).

⁹⁵*Ibid.*, 295–96. (discussing Dixon’s and Ginsburg’s work on constitutional deferrals and suggesting that ‘certain types of constitutional deferrals can occasionally be useful in promoting productive ongoing negotiations of contentious constitutional principles, and thus, can help constitutions survive longer’).

several fundamental rights. Fundamental rights were guaranteed, but only insofar as they were in accordance with the shari'a or other applicable law.⁹⁶ In both cases, the shari'a or other applicable law would be determined by a separate body post-ratification. And '[u]ntil the 1950s, the government did not attempt to resolve the deferrals on these questions of rights, arguably because concretizing a particular practice would have created violence'.⁹⁷

In the subsequent years, at the sub-constitutional level, competing factions were then able to debate critical issues non-violently, and the constitutional scheme survived.⁹⁸ Whether it was the numerical addition of religious provisions that shifted the religious-secular constitutional balance (symbolically or otherwise), the addition of key provisions that appeased more violent constituencies, or constitutional deferrals that promoted continued debate, the 1931 constitution endured for decades. Arguably, each of these factors contributed to the document's overall success. Throughout the 1950s and 1960s the economy slowly grew, education expanded, and the state accumulated sufficient military power to subdue rebellion – all these socioeconomic factors helped maintain the constitutional order. But no matter the primary cause, thirty-three years later this success continued when – in 1964 – the 1931 constitution became 'the only constitution in the history of Afghanistan [to be] replaced peacefully'.⁹⁹

1964: a liberal revolution

With three decades of relative peace and a stable constitutional order, Afghanistan modernized and government institutions expanded.¹⁰⁰ Domestic conflict remained, but with a growing modern, urban and educated population, disputes were resolved without violence. Afghanistan's first political parties were born, and the growing urban elite continued to push reform through the Liberal Democrat and Nationalist parties throughout the 1950s, though both parties, as compared with Afghan society more broadly, had a decidedly liberal, reformist agenda.¹⁰¹ Taking control of the Parliament, these parties used the 'forum to express "democratic ideas, defend the rights of their constituencies, and supervise the affairs of the state"'.¹⁰² Reform bred further reform, and a diverse array of competing ideologies continued to emerge.¹⁰³ Soon, this progress outstripped the strictures of the 1931 constitution and another constitution-drafting process was initiated.¹⁰⁴

⁹⁶See, e.g., *International Journal of Constitutional Law*, October 31, 1931, arts. 11. ('No one is imprisoned or punished without an order in accordance with the Shariat or the appropriate laws.'). 13 ('All Afghan subjects have equal rights and duties under the Shariat law and the law of the State.'). and 16 ('No official or other person may enter a private residence without an order under Shariat law or the law of the land.').

⁹⁷Pasarlay (n 83) 297.

⁹⁸See *ibid.*, 298–300.

⁹⁹*Ibid.*, 305.

¹⁰⁰See Pasarlay (n 60) 82.

¹⁰¹*Ibid.*, 83–87.

¹⁰²*Ibid.*, 85. (quoting H Emadi, *Dynamics of Political Development in Afghanistan: The British, Russian, and American Invasions* (2010)), 51–52.

¹⁰³See *ibid.*, (suggesting that expanded freedom of the press 'helped the growth of newspapers that, in turn, enabled new movements and ideologies to express themselves').

¹⁰⁴The 1931 constitution, as a 'social device[] that structure[d] the creation of rules' and provided a 'focal point' for Afghan society, functioned well. Powell (n 7) 60. But insofar as it erected barriers to parliamentary oversight of executive branch officials, it proved unsustainable for a decidedly liberal Afghan Parliament. See Pasarlay (n 60) 86.

At King Zahir Shah's direction, the drafting committee was instructed to produce a constitution that would be 'acceptable to the *ulamā*', the tribal notables, the emerging intellectuals, and to the liberals'.¹⁰⁵ In a country with a multiplicity of competing constituencies, creating a founding document was no easy task. Ultimately, the process yielded Afghanistan's 1964 constitution, 'known as "the finest in the Muslim world"'.¹⁰⁶ But despite the progressive societal trends, the document retained the Islamic provisions of its predecessors and went further in some areas. Article 64's repugnancy clause provided that '[t]here shall be no law repugnant to the basic principles of Islam'.¹⁰⁷ In theory, this provision was a win for the more conservative segments of the Afghan population. But because much of the constitutional language was vague and did not clarify that the 'basic principles of Islam' were those of the Hanafi school of jurisprudence, there was significant tension among the different members of the *ulamā*' and other conservative leaders.¹⁰⁸ Similarly, Article 2 declared Islam as the state religion and partially recognized the Hanafi school. Yet, the courts were to apply the Hanafi *fiqh* only in cases where no constitutional provision or state law applied.¹⁰⁹

The 1964 constitution referenced Islam or shari'a merely seven times and contained half as many religious provisions when compared with its 1931 counterpart, despite the fact that the new constitutional text was twice as long.¹¹⁰ Though King Zahir Shah pushed for inclusive legal solutions based on a compromise, the drafting process and final document 'arguably coordinated the "insiders" to the constitutional negotiations. The government tried to sideline the traditional power groups ... and connect directly with the new groups of intellectuals, whose inclinations were more democratic, liberal, and forward-looking'.¹¹¹ As a result, Afghanistan witnessed a shift in the religious-secular law balance; this time a significant swing toward the secular. While the 1964 constitution provided for greater individual rights protections, 'the document failed to channel political conflict through the political process'.¹¹²

In what became its fatal flaw, the constitution 'prohibited members of the royal family from occupying political offices...'. This 'effectively denied Daoud Khan, the King's cousin and former prime minister (1951–1963), the option to take his disagreements to formal political institutions established by the Constitution'.¹¹³ After just ten years, the

¹⁰⁵Pasarlay (n 60) 89. (Quoting A Mubarez, TW Sīyāsī-Ye, Afghanistan 1919–1997 (1998) *Analysis of Political Events of Afghanistan* 1377).

¹⁰⁶S Pasarlay and M Qadamshah, 'The Durability of Constitutional Solutions to Religious Conflicts in Divided Societies: Lessons from the Constitutional History of Afghanistan' (2018) *Chicago-Kent Journal of International and Comparative Law* 18, 1, 21. (quoting L Dupree, *Afghanistan*, (1973), 565.); see KM Abou El Fadl et al., *Democracy and Islam in the New Constitution of Afghanistan* (2003) 1 (*RAND Center for Asia Pacific Policy*, 2003). (describing the 1964 constitution as 'widely regarded as a well-drafted and progressive document').

¹⁰⁷Afg. Const. of 1964, art. 64.

¹⁰⁸See Pasarlay (n 60) 93.; H Travis, 'Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq' (2005) 3 *Northwestern Journal of International Human Rights* 3, 4, 6.

¹⁰⁹Afg. Const. of 1964, art. 2.; see Pasarlay (n 60) 93.; Travis (n 108) 6. ('[T]he 1964 constitution no longer gave Sharia equal status with Afghanistan's "general civil and criminal laws," but made it authoritative only where no statute existed in the area.') (quoting AFG Const. of 1964, art. 21).

¹¹⁰The 1964 constitution included ten religious provisions, while the 1931 document contained twenty. The former was 9,970 words long, while the latter was just 4,530 words.

¹¹¹Pasarlay (n 60) 91–92.

¹¹²Pasarlay (n 83) 290.

¹¹³*Ibid.*

1964 constitution fell victim to Khan's coup, and decades of turmoil followed.¹¹⁴ Competing ideological factions continued to struggle for power, with each unsuccessfully attempting to nationalize its own constitutional vision.¹¹⁵ With heavily armed factions spreading throughout the country, conflict persisted and eventually culminated with the rise of the Taliban in the 1990s.¹¹⁶ But just as quickly as they rose to power, key decisions led to foreign intervention and Taliban's fall.¹¹⁷

2004: foreign interference

In 1996, the Taliban took control of Kabul, and they maintained relative control of Afghanistan through 2001.¹¹⁸ But the terrorist attacks of September 11, 2001, and the subsequent U.S. invasion, eventually lead to another constitutional overhaul. Following decades of violent conflict, this time the drafting process took place with no functioning government in place. Much like the situation 1964, in a post-2001 Afghanistan, the relevant stakeholders faced significant challenges. But now, they were working to coordinate competing factions after thirty years of violent transitions, from 'a constitutional monarchy, to a republic, to a communist dictatorship under Soviet occupation, to a failed and fractured state engaged in devastating civil war, to the home of a fundamentalist and reactionary theocracy'.¹¹⁹ Ultimately, the constitutional stakeholders were tasked with establishing an order capable of bringing together a divided and armed society.¹²⁰ Unlike 1964, however, there were additional contributors at the table: the United States and the broader international community.¹²¹

Given the lack of a functioning government, the drafting of the 2004 constitution was an extended, layered process. First, key factions came together with the international community in Bonn, Germany, to form a temporary government under which the drafting process could take place.¹²² Critically, the Taliban were excluded from these negotiations.¹²³ Ultimately, despite significant disagreements, the Bonn Agreement was signed and a transitional administration was put in place.¹²⁴ But as with other periods in Afghan constitutional history, '[i]nstead of a detailed statement of major political issues,

¹¹⁴Khan would displace the Afghan monarchy in an effort to replace it with a 'republican system, consistent with the true spirit of Islam.' Hasan Kakar, 'The Fall of the Afghan Monarchy in 1973' (1978) 9 *International Journal of Middle East Studies* 195, 214. (quoting a Khan radio announcement).

¹¹⁵Pasarlay (n 60) 98. ('From 1975 until 2001, Afghan politics appeared to be a zero sum game. A series of regimes succeeded each other—each trying to rule under a constitution that enshrined its vision of the state.').

¹¹⁶See Part I.

¹¹⁷See Pasarlay (n 60) 48. (indicating that the Taliban's housing of terrorists gave the international community incentive to intervene, and suggesting that the September 11, 2001 attacks made that intervention inevitable).

¹¹⁸For a fuller account of the Taliban's rise to power see Part I. Note too that commanders of regional factions continued to resist Taliban rule. Most notably, the northern part of Afghanistan never fell under Taliban control. *Ibid.*, 147.

¹¹⁹*Ibid.*, 152–53.

¹²⁰*Ibid.*, 148.

¹²¹While the U.S. and the international community certainly played a role in the drafting of the 2004 constitution, Pasarlay suggests that the level involvement is often overstated. *Ibid.*, 220.

¹²²See *ibid.*, 153.

¹²³*Ibid.*, 300.

¹²⁴See *ibid.*, 164.

the Bonn Agreement simply laid out the process for reform; most issues were left to be resolved by the new constitution'.¹²⁵

With the interim government in place, the development of the new constitution continued in a phased approach, including a drafting commission, three separate reviews, and a final publication committee.¹²⁶ After three years, the 2004 constitution was adopted on January 4, 2004, and quickly received praise as 'one of the most enlightened constitutions in the Islamic world'.¹²⁷ The document was modeled after the 1964 constitution, and the two documents bear striking similarities in their approach to the nexus between religious and secular law.¹²⁸ The 2004 constitution designated Afghanistan as an Islamic republic and Islam was declared a state religion.¹²⁹ The constitution also retained a repugnancy clause and continued to favor the Hanafi school of jurisprudence.¹³⁰ The drafters included merely thirty-two religious references across thirteen religious provisions, in the longest constitution in Afghanistan's history.¹³¹ Thus, only eight percent of all constitutional provisions can be classified as religious, which constitutes a one percent increase from the 1964 constitution.¹³²

Ultimately, the predominantly secular nature of the 2004 constitution left the more conservative stakeholders unsatisfied.¹³³ Articles 3 and 130 prioritize Islam in relatively general terms but deliberately leave critical post-ratification questions unanswered.¹³⁴ Article 3 guaranteed that no law would 'contravene the tenets and provisions of the holy religion of Islam', but left open the question of *who* would decide when the provision had been violated, or which version of Islam would govern the final determination.¹³⁵ Article 121 seemed to indicate that the Supreme Court would fill that role, but the provision's deliberately vague language left that question open, and led to continued instability post-

¹²⁵*Ibid.*

¹²⁶*Ibid.*, 73. (summarizing the five stages of the constitution-making process and indicating that each stage 'gave birth to a new and revised draft of the constitution').

¹²⁷Travis (n 108) 82. Quoting Agence France-Presse, 'Us, Un Envoys Welcome Afghan Constitution' *Outlook India*, January 5, 2004. But see J. Alexander Thier, 'The Making of a Constitution in Afghanistan' (2006–07) 51 *The New York Law School Law Review*, 557, 558. (arguing that a 'combination of secrecy, haste, insecurity, and intimidation made the [drafting] process inaccessible to the public and limited open, honest debate').

¹²⁸Thier (n 127) 558.

¹²⁹See Afg. Const. of 2004, art. 1. ('Afghanistan shall be an Islamic Republic...'); *AFG Construction of 2004*, art. 2. ('The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan...'); see K Kakar, 'Lessons From the 2004 Constitutional Process for the Intra-Afghan Peace Negotiations' *United States Institute of Peace*, December 2020, 1, 5. (suggesting that the Taliban rejected the legitimacy of the constitution and Afghan government officials).

¹³⁰See Afg. Const. of 2004, art. 3. ('No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.');

¹³¹*ibid.*, art. 130. ('If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of *Hanafi* jurisprudence ... rule in a way that attains justice in the best manner.')

(emphasis added).

¹³²The 2004 constitution totals 11,357 words.

¹³³But see Thier (n 127) 577. (characterizing the 2004 constitution as 'thoroughly Islamic').

¹³⁴In line with external influence and this secular tilt, the 2004 constitution uniquely prioritized women's rights. See, e.g., *AFG Construction of 2004*, arts. 22. ('The citizens of Afghanistan, man and woman, have equal rights and duties before the law.')(emphasis added), 44. ('The state shall devise and implement effective programs to create and foster balanced education for women ... '), and 84. (requiring the President to appoint women to the House of Elders).

¹³⁵See Pasarlay (n 60) 264–65.

¹³⁶*Ibid.*, 265–69.

ratification.¹³⁶ With that issue unresolved, '[o]n certain occasions, the legislature and the executive threatened to amend the laws that define the powers of the Supreme Court and the [Independent Commission for the Supervision of the Implementation of the Constitution]'.¹³⁷ Article 130 required courts to rule 'in pursuance of Hanafi jurisprudence', but only when 'there is no provision in the Constitution or other laws about a case ... and, within limits set by this Constitution'.¹³⁸ But without an answer to *who* decides final questions of constitutional review, critical questions remained open post-ratification.

Other, more fundamental structural matters also proved problematic. The 2004 constitution ultimately produced a 'highly unitary state with strong presidential powers', but this issue was hotly debated during the drafting process.¹³⁹ While some deferred constitutional questions gave way to the practical need to reestablish a functioning government and economy, 'deferrals over the structure of the government and the electoral system [] provoked significant disagreement and strife'.¹⁴⁰ In practice, President Hamid Karzai, through the executive branch, claimed to answer many of the deferred questions himself, generating further disagreement and instability.¹⁴¹ By 2016, many policymakers, stakeholders and much of the general public recognized the shortcomings of the 2004 constitutional regime.¹⁴² Unfortunately, that recognition never yielded a peaceful constitutional transition via political institutions. To the Taliban, who had no say in the drafting process, the constitution – largely imposed by outside actors – was illegitimate and thus in need of replacement. To bring about change, the Taliban continued to pursue their objectives through violence, and the group ultimately regained control of the country in August of 2021.¹⁴³

1998: The Taliban enter the constitutional conversation

From their return to power through to the present day, the Taliban have governed Afghanistan without a constitution. As mentioned above, Abdul Hakim Haqqani's 2022 book seems to provide a credible framework for the contemporary Taliban-led

¹³⁶See AFG Construction of 2004, art. 121. ('At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.'). Thier (n 127) 578. ('Article 121 of the 2004 Constitution appears to give [the power of Islamic review] squarely to the Supreme Court'); S Pasarlay, 'The Limits of Constitutional Deferral: Lessons From the History of the 2004 Constitution of Afghanistan' (2018) 27 *Washington International Law Journal* 683, 698. (arguing that 'the Supreme Court is *not* clearly authorized to interpret the Constitution' and that "[t]his type of constitutional deferral is extremely dangerous").

¹³⁷Pasarlay (n 136) 685.; see Afg. Const. of 2004, art. 157. ('The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law.').

¹³⁸AFG Construction of 2004, art. 130.

¹³⁹J Blanc, 'Afghanistan's Election Disputes Reflect Its Constitution's Flaws' *Carnegie Endowment for International Peace*, March 12, 2020, available at <<https://carnegieendowment.org/2020/03/12/afghanistan-s-election-disputes-reflect-its-constitution-s-flaws-pub-81274>>; see Pasarlay (n 60) 245. ('The structure of the government, the presidential system, continued to be one of the most contested issues.').

¹⁴⁰See Pasarlay (n 60) 261–62.

¹⁴¹*Ibid.*, 262–63.

¹⁴²See *ibid.*, 263.

¹⁴³With the benefit of hindsight, excluding the Taliban from the drafting process dealt the fatal blow to the 2004 constitution. That fact provides powerful evidence that, at minimum, the group must be included as a relevant stakeholder in any future constitutional developments, in whatever form they take.

Afghanistan and constitutes the most significant compilation of religious and legal philosophy undergirding Taliban policies.¹⁴⁴ The book addresses various aspects of governance, and because of Haibatullah Akhundzada's endorsement, it provides reliable insights into the future of the Taliban's legal, social and political grand design. But going back to their first interval of power, though consistently secretive about the details of a future constitutional regime, the Taliban have shown a willingness to engage in constitutional dialogue.¹⁴⁵ To an extent, it appears that the Taliban are open to consulting other ILS' constitutions, with a caveat – now confirmed by the substantive content of Haqqani's 2022 book and current Taliban policies – that Afghanistan's domestic legal system will not be limited or constricted by these foreign legal regimes.¹⁴⁶ Despite the fact that the Taliban leaders have previously vocalized commitments to the United Nations and acknowledged that the protection of human rights is of concern, many of these commitments have proven to constitute merely cheap talk.¹⁴⁷ Unsurprisingly, the Taliban have also claimed that Afghanistan does not need a constitution because the Qur'an '[is] all the constitution they need[]', and *The Islamic State and Its System* confirms these sentiments directly. According to Haqqani's volume, absolute sovereignty belongs to God, and the foundational texts of Islam render human-made laws (including a constitution) unwarranted.¹⁴⁸

As the past several years demonstrate, the group is responsible for wide-ranging human rights abuses, particularly in the area of women's rights.¹⁴⁹ These realities necessitate caution regarding the desirability and plausibility of any constitutional process in contemporary Afghanistan. Keeping in mind the 2022 blueprint on governance, Haqqani's book, and the fact that the group's ideology has evolved since its first attempt at governance, the Taliban's 1998 draft constitution provides contextualization for what could transpire. The document contains fifty-six religious provisions, constituting fifty-one percent of its 110 provisions. By comparison, in the 1923 and 1931 constitutions, religious provisions constituted merely nineteen and eighteen percent of total provisions respectively. Interestingly, the 1964 constitution, which seems to be of inspiration to the Taliban, was finalized with merely seven percent of its 128 provisions classified as religious. The 1998 draft's increase in expressive Islam-based legal language signals a clear intent to shift the religious–secular law balance decidedly toward the religious; however, the document accomplishes this goal by repeatedly qualifying constitutional provisions.¹⁵⁰ As an illustrative example, '[a]ll the people of Afghanistan ... have equal

¹⁴⁴Haqqani, (n 34).

¹⁴⁵See M Bashir Mobasher, MQ Shah and S Pasarlay, 'The Constitution and Laws of the Taliban 1994–2001' (2022) *International Institute. For Democracy & Electoral Assistance*, 11. (suggesting that "[a]t the start of their first spell in power, in the mid-1990s, the Taliban leaders were less inclined to draft a constitution or enact laws that would guide their government and facilitate the functioning of an effective bureaucracy").

¹⁴⁶See MJ Nelson, 'Taliban Law: Theory and Practice' (2021) *Melbourne Asia Review*, November 2021; Lombardi and March, (n 70) 30.

¹⁴⁷See *The Taliban Reader* (AS Van Linschoten & F Kuehn, eds. 2018) (text publicly posted on a Taliban-affiliated website in the 1990s highlights that 'the Taliban Islamic movement of Afghanistan has lent serious and genuine support to the peace-making efforts of the United Nations ... [and that the] Islamic State of Afghanistan considers itself to be a faithful member of the United Nations'); *ibid.*, (text posted on a Taliban-affiliated website in the 1990s also highlights that '[t]he Islamic State of Afghanistan is determined to provide educational and employment opportunities for the women of Afghanistan').

¹⁴⁸See Ramizpoor (n 61).

¹⁴⁹Pasarlay (n 60) 144; see (n 1 & 20) and accompanying text.

¹⁵⁰See, e.g., Taliban Draft Const. of 1998 (published 2005) art. 18 ('All the people of Afghanistan ... have equal rights and duties before the law, taking into consideration the Islamic provisions'); art. 21 ('No act is

rights and duties before the law', but only after 'taking into consideration the Islamic provisions'.¹⁵¹ This qualification mechanism enables the Taliban to simultaneously signal a willingness to govern within the bounds of a constitutional structure while leaving open broad left and right limits within which to do so.

Granted, the actual text constitutes merely a portion of the *de facto* Afghan legal system. Indeed, personal status and criminal law legislation, decrees and other subconstitutional laws impact the day-to-day lives of the Afghan people. And the Taliban have been governing via a variety of ad hoc measures such as directives, decrees, letters, edicts and orders to gradually piecemeal the Afghan domestic legal system in the spirit of Haqqani's 2022 book. Many of the Taliban's morality laws – staunchly opposed by the international community – have been issued by the Ministry for the Promotion of Virtue and the Prevention of Vice.¹⁵² What is more, uncertainty about the law is compounded by the reality that local Taliban leaders are frequently charged with dispensing justice, a process which may entail rather arbitrary interpretation.¹⁵³ In this context, it is paramount to highlight yet again the importance of customary law in Afghanistan. It is the many local variations of custom that reside within the bounds of legally binding obligations observed and executed, especially in Afghanistan's many rural areas. All these factors taken together will determine the functioning of the Taliban's legal regime in the near future.

At present, meaningful public participation – an important element in the constitution-making process, especially in societies recuperating from conflict or transitioning from an authoritarian rule – does not seem to be feasible in Afghanistan. As a result, an Afghan constitution is likely not a desirable result in the near term. Women's exclusion from any aspect of public life, including state governance, further compounds this reality. In addition, there are many ethnic, social and political groups whose preferences are not taken into account by the Taliban government.¹⁵⁴ Though scholars and policymakers hold divergent views on what constitutes a good constitutional process, most agree that there are many benefits to involving the public in the process of constitutional drafting.

Some scholars assert that '[p]articipatory constitution making is today a fact of constitutional life as well as a good in itself'.¹⁵⁵ Indeed, though for years the idea of public consultation in the process of constitutional drafting was somewhat of an exception, the end of the twentieth century witnessed a dramatic shift: an overwhelming

considered a crime unless determined by the provisions of the Islamic shari'a ... '); art. 34 ('Freedom of expression and statement, within the Islamic shari'a limits, is inviolable.') (translated and reprinted in *The Taliban Reader* (AS Van Linschoten and F Kuehn, eds. 2018) [hereinafter *Taliban Draft Const.*]).

¹⁵¹Taliban Draft Const. of 1998 (published 2005) art. 21.

¹⁵²See ACAPS Analysis Hub Afghanistan, *Second Update on Taliban Decrees and Directives Relevant to the Humanitarian Response*, July 25, 2024, available at <https://www.acaps.org/fileadmin/Data_Product/Main_media/20240725_ACAPS_Second_update_on_Taliban_Decrees_01.pdf>; ACAPS Analysis Hub Afghanistan, *Taliban Directives and Decrees Affecting Human Rights and Humanitarian Actors*, April 23, 2023, available at <https://www.acaps.org/fileadmin/Data_Product/Main_media/20230424_acaps_thematic_report_afghani_taliban_directives_and_decree_0.pdf>; Annie Kelly and Zahra Joya, 'Frightening' Taliban Law Bans Women From Speaking in Public' *The Guardian*, August 26, 2024, available at <<https://www.theguardian.com/global-development/article/2024/aug/26/taliban-bar-on-afghan-women-speaking-in-public-un-afghani-stan>>.

¹⁵³See Nelson (n 146).

¹⁵⁴See Haroun Rahimi and Mahir Hazim, International Law and the Taliban's Legal Status: Emerging Recognition Criteria? (2023) 32(3) *Washington International Law Journal*, 228–59.

¹⁵⁵Vivien Hart, 'Democratic Constitution Making' (2003) *U.S. Institute of Peace Special Report* 1, 107, 12.

majority of recently enacted constitutions either relied on or called for some form of direct consultation from the citizens.¹⁵⁶ The pervasiveness of the practice has led some to assert that public participation in constitution making is not only a trend and a highly desirable element in the constitutional processes but also an emerging right, or even a requirement under international law.¹⁵⁷ In practice, constitutions and complex bargaining processes that surround their drafting are frequently conceptualized as extensions of domestic peace processes.¹⁵⁸ International organizations such as the United Nations and its various organs (including the Secretary General and the UN Human Rights Committee), as well as regional organizations, see the citizenry's input in constitutional drafting as significant.¹⁵⁹ Several international conventions – such as the International Covenant on Civil and Political Rights (ICCPR, Article 25), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, Article 5) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, Article 7) – discuss the right to participation in public affairs.¹⁶⁰ Several regional institutions and legal frameworks also promote principles of human rights, democratic culture and good governance, all of which are crucial in post-conflict constitution building.¹⁶¹ In general, arguments in defense of a broad public participation in constitutional drafting highlight the legitimating effects with regard to substantive constitutional provisions and the drafting process itself.¹⁶²

¹⁵⁶Shamshad Pasarlay, 'Public Participation in the Constitution-Making Process: The Afghan Experiment' (2023) 49(1) *Brooklyn Journal of International Law*, 50–96.

¹⁵⁷Hart (n 155). See also Vivien Hart, 'Constitution Making and the Right to Take Part in Public Affairs' in *Framing the State in Times of Transition: Case Studies in Constitution Making* 22–25 (2010). But see Thomas Franck and Arun Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010).

¹⁵⁸For more information, see Sujit Choudhry, 'Civil War, Ceasefire, Constitutions: Some Preliminary Notes' (2012) *Cardozo Law Review* 33, 1907; Jennifer Widner, 'Constitution Writing in Post-Conflict Setting: An Overview Constitution Drafting in Post-Conflict States Symposium' (2008) *William & Mary Law Review* 49 1513–42.

¹⁵⁹See the United Nations Secretary General's Guidance Note on United Nations Constitutional Assistance, which frames the process of constitutional drafting as key element of peacemaking and positive dialogue-based governance. For the UN Human Rights Committee's views, see U.N. Human Rights Comm., General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), U.N. Doc. CCPR/C/21/Rev.1/Add. 7 (December 7, 1996). More generally, see, Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (2009).

¹⁶⁰For the U.N. Human Rights Committee's views, see U.N. Human Rights Comm., General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), U.N. Doc. CCPR/C/21/Add. 7 (December 7, 1996). See also *Practical Considerations for Public Participation in Constitution-Building: What, When, How, and Why?* Int'l IDEA Policy Paper No. 24, (International Institute for Democracy and Electoral Assistance (2021)).

¹⁶¹Some of these regional institutions include the Inter-American Democratic Charter, African Union and its Constitutive Act, African Charter on Democracy, Elections, and Governance, and the Association of Southeast Nations' Human Rights Declaration. The Constitutive Act of the African Union places emphasis on democratic principles, good governance, human rights, and popular participation. See African Charter on Democracy, Elections and Governance, African Union, available at <<https://au.int/en/treaties/african-charter-democracy-elections-and-governance>>; ASEAN Human Rights Declaration (2012), Association of Southeast Asian Nations, available at <<https://asean.org/asean-human-rights-declaration/>>; Inter-American Democratic Charter (2001), Organization of American States, available at <<https://www.oas.org/en/democratic-charter/>>.

¹⁶²For more information, see Jason Gluck and Michele Brandt, 'Participatory and Inclusive Constitution Making. Giving Voice to the Demands of Citizens in the Wake of the Arab Spring' (2015) *Peaceworks* No. 105.

These views are disputed by others who argue that extensive public involvement in constitutional drafting is not always beneficial or even possible, especially in the aftermath of militarized domestic conflicts. As Horowitz writes, there are instances when ‘even a deliberative process may fail to find a consensus or appropriate compromise, and even a process that succeeds in doing so may leave some participants unsatisfied’.¹⁶³ In general, arguments skeptical about extensive public consultation throughout constitution-making assert that such practices can exacerbate preexisting societal polarization, thereby increasing instability.¹⁶⁴ Of course, there is also a much broader issue dealing with the applicability of international legal frameworks to Taliban-ruled Afghanistan. The official website of the Taliban Ministry of Justice states that ‘Afghanistan made a legal commitment to abide by the international human rights treaties ...’ and the Human Rights Support Unit – as an internal government mechanism – is to oversee the implementation of human rights.¹⁶⁵ These statements stand in sharp contrast with reality on the ground. In January 2025, the Chief Prosecutor of the International Criminal Court has requested arrest warrants for the Taliban leader Haibatullah Akhundzada and Abdul Hakim Haqqani.¹⁶⁶

Unless designated interim, constitutions are intended to be permanent as the key component of a state’s domestic legal system. Thus, it is important that procedural choices and design features emerge as a genuine social contract between relevant stakeholders in a society. Granted, each case is unique and the details of the constitution-making process, as well as decisions about which groups and actors should join the bargaining table, differ across time and space. But generally, practice shows that some form of ‘consideration should be given, inter alia, to elite groups and other power holders; ethnic and minority groups; sectarian groups; civil-society organizations, especially those that are organized and active; and women’.¹⁶⁷ Consequently, to be accepted as legitimate across Afghanistan’s complex social landscape, the legal system as a whole – including the constitution – must emerge as a result of compromise between the various Afghan stakeholders: political parties, tribal and ethnic groups and religious scholars who represent both conservative and progressive agendas.¹⁶⁸

An approach that embodies the logic of inclusive government will engender positive engagement from civil society and the international community. So far, under the Taliban rule, many Afghan people have lost ‘their sense of participation because they do not see

¹⁶³Donald Horowitz, *Constitutional Processes and Democratic Commitment* (2021) 245.

¹⁶⁴More generally, see Richard Albert, Yaniv Roznai, eds., 2020, *Constitutionalism Under Extreme Conditions*. See also Pasarlay (n 156).

¹⁶⁵See Ministry of Justice, Huquq and Human Rights, available at <<https://moj.gov.af/en/huquq-and-human-rights>>.

¹⁶⁶Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in Afghanistan, International Criminal Court (2025), available at <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-afghanistan>>.

¹⁶⁷Laurel E. Miller, *Designing Constitution-Making Processes. Lessons from the Past, Questions for the Future*, 601–65, in *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010), at 618.

¹⁶⁸However, as Ginsburg notes, “[m]any of the most successful constitutions in East Asia—those of Japan, Korea, Taiwan, Indonesia, for example—were produced with a minimum of popular involvement.” Tom Ginsburg, *Constitution Making and Constitutional Change*, in David S. Law, Holning Lau, and Alex Schwartz (eds.), *The Oxford Handbook of Constitutional Law in Asia* (online edn, Oxford Academic, October 23, 2023), accessed 15 Nov. 2024.

themselves represented in the ruling structure'.¹⁶⁹ Thus, instead of meaningful participation in the governance of the country, many citizens struggle to find a way forward in an environment filled with coercion and distress.

Constitutionalism in modern Islamic law states

While considering the nexus between secular and religious law, it is informative to contextualize Afghan constitutionalism in a spectrum of constitutional regimes in the ILS category. There is no one correct manner of embedding Islam in the law and state institutions. Granted, whether or not a particular rule or the legal system as a whole reflects the spirit of shari'a is not of concern here. Moreover, the very relation between state governance and Islam as religion or as a legal tradition is debated.¹⁷⁰ Placing these considerations aside, each state belonging to the ILS category conceptualizes the Islamic-law-versus-secular-law nexus in a unique manner, and organizes its governance in the context of specific local, geographic, geopolitical and jurisprudential realities.¹⁷¹ In fact, the inherent heterogeneity of Islamic law is embraced by Islamic jurisprudence, as it ensures Islam's appropriateness for a variety of social realities in different historical periods.¹⁷²

As a result, some ILS, including Iran or Saudi Arabia, adopt Islamic law – however interpreted – as the supreme law governing the country, imbuing Islam-based legal concepts and legal language throughout the constitution and the subconstitutional legal system. Iran's 1989 constitution is thoroughly imbued with religious terms, and includes more than two hundred references to shari'a and Islam.¹⁷³ The notion of religious guardianship, *velāyat-e faqīh*, endows Shia religious leaders with considerable political power. In fact, the Guardian Council has played a fundamental role in shaping the interpretation and application of the Islamic legal tradition in Iran. In Saudi Arabia, Wahabi scholars have historically influenced political, social, and religious life. In contrast with Iran's constitution, the 1992 Saudi Basic Law of Governance is quite short, and its name purposely avoids the term "constitution" to indicate that only the Qur'an should be thought about in these terms.¹⁷⁴ Other ILS, such as Morocco and Tunisia, restrict Islamic law's compulsory application to a fraction of their domestic laws, most notably personal status law: family law and inheritance law.¹⁷⁵ Finally, in several ILS, including Indonesia, the state's territorial administrative units are endowed with finding solutions to the Islam-secular law balance dilemma. It is informative, therefore, to conceptualize the ILS category as composed of a range of different domestic legal solutions that express the Islamic law vis-à-vis secular law balance.¹⁷⁶ This spectrum captures the cross-sectional variations over time in specific countries at certain time periods.

¹⁶⁹Nilofar Sakhi, 'The Taliban Takeover in Afghanistan and Security Paradox' (2022) 9(3) *Journal of Asian Security & International Affairs*, 383–401.

¹⁷⁰For more discussion of this topic, see HA Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (2012); T Asad, *Formations of the Secular: Christianity, Islam, Modernity* (2003); WB Hallaq, *The Impossible State* (2013).

¹⁷¹See S Ahmed, *What is Islam? The Importance of Being Islamic* (2016); C Mallat, *Introduction to Middle Eastern Law* (2007). It is crucial to highlight the reality that Sunni, Shia and Ibadi schools of jurisprudence diverge on multiple legal issues, whether substantial or procedural.

¹⁷²KA el Fadl, 'The Shari'ah' in *The Oxford Handbook of Islam and Politics* (2013) 7–26.

¹⁷³Powell (n 7) 53.

¹⁷⁴Powell (n 7) 52–53.

¹⁷⁵Hamoudi (n 75).

¹⁷⁶EJ Powell, SC McDowell, R O'Brien and J Oksasoglu, 'Islam-based Legal Language and State Governance: Democracy, Strength of the Judiciary and Human Rights' (2021) 32 *Constitutional Political Economy*, 376.

Setting aside concerns about their style of governance, any potential, future constitutional drafting efforts by the Taliban will either fall somewhere within the ILS spectrum or redefine the category's right-most limit. And while many other ILS also oppose Western influence in state governance, unlike today's Taliban-led Afghanistan, these states have been able to integrate into the broader international community. While a fraction of ILS continue to push against some of the established international norms, the overwhelming majority of these states have successfully socialized themselves into prevailing conceptions of what is considered proper participation in the global community. At present there are many, deep-seated obstacles that hamper meaningful integration between Taliban-led Afghanistan and the global order. Though many ILS and non-ILS alike condemn the Taliban's most radical laws – in particular those that deal with women's rights – leaders of numerous countries are also motivated to engage with modern-day Afghanistan. 'As Taliban officials have made clear that they will not bow to outside pressure, more European leaders and international organizations have appeared to accept the limits of their influence and engage on issues where they can find common ground'.¹⁷⁷

Interestingly, whereas many ILS constitutions include repeated references to relatively general phrases such as Islam, shari'a, Islamic law, or God, the Taliban legal leanings – and Afghanistan's constitutional history more generally – are somewhat unique in their constitutionally explicit and simultaneously exclusive devotion to a particular jurisprudential school. In most other ILS, references to *fiqh*-specific interpretations may appear in the subconstitutional legal system, including criminal codes or personal status laws. At times, a specific *fiqh* is indeed constitutionally acknowledged, but such mentions appear less absolute and explicitly prohibitive of other legal interpretations.¹⁷⁸

During their previous reign, the Taliban operated on the basis of a variety of administrative, procedural and customary laws loosely thrown together to generate the supreme law of the land. That law was to guide the Afghan people on their path to God. Haqqani's 2022 book, and the 1998 Taliban draft constitution, bear some similarity to constitutional solutions found across the ILS category. It is safe to say that for the Taliban, *sine qua non* legal requirements are that 'the sharia of Islam [be] the *only* source of legislation in the country'; that the Amir rule on the basis of the Hanafi school of jurisprudence, and that he be a Hanafi, Muslim male.¹⁷⁹ These constitutional directives, and many others that share similar commitment to Islam-based legal language (e.g., repugnancy clauses, holy oaths and broader religious affiliation) fit well within existing ILS domestic legal systems.¹⁸⁰ But in practice, after more than forty years of war, it is clear that much depends on the ways in which these directives are brought to life through interpretation and governmental policies. Additionally, it seems that the Taliban leaders are not acceptant of any Islamic norms that curtail the competences of the state. In tandem, any hostility or even mere lack of enthusiasm toward the current status quo is met with severe consequences. Whether deliberate vagueness in law-based governance – including a written constitution – is merely a temporary strategy or a long-term scheme is yet to be seen. Haqqani's text suggests that

¹⁷⁷Christina Goldbaum, 'World Opens to the Taliban Despite Their Shredding of Women's Rights' *New York Times*, October 24, 2024, <https://www.nytimes.com/2024/10/24/world/asia/afghanistan-taliban-diplomacy.html?smid=nytcare-android-share>.

¹⁷⁸Powell (n 7). See also Nelson (n 146).

¹⁷⁹Lombardi and March (n 70) 17, 19. (quoting Dastor-I Emarat-I Islami Afghanistan [Order of the Islamic Emirate of Afghanistan], published in Pashto online; unpublished English translation by Shamshad Pasarlai, in possession of Lombardi & March) (emphasis added).

¹⁸⁰See generally Powell (n 7) 106–12.

since shari'a is an absolute, binding supreme law of the land, any state-enacted constitution might be unnecessary.¹⁸¹ Yet, there is some evidence that under Haqqani's guidance, 'work on the "constitution" is currently in progress'.¹⁸² Yet, in this context it is important to keep in mind that during their previous rule, the Taliban governed without a constitution as the 1998 document has remained in draft form.

Conclusion

It has been more than three years since the U.S. withdrew from Afghanistan and the Taliban regained control. In the intervening time, the country, and its people, have endured extreme social and economic hardship. The ongoing crisis cannot be ignored. This paper does not seek to disregard or minimize Taliban-induced atrocities; rather, by exploring the history of Afghan constitutionalism through a different lens, it looks to provide a building block for a future, more stable solution. While the Taliban espouse, and practice, a fundamentalist version of Islam that is often inconsistent with both classical and modern Islamic law, there is a potential for meaningful parallels to be drawn. They can be found within Afghanistan's own rich constitutional history, and in modern ILS. And while strict constitutional, rule-of-law based objectives are likely aspirational, these points of convergence offer a place to start. Over time, the hope is that once dialogue begins and institutions form, continued movement may lead to more peaceful outcomes.

In this context, it is useful to highlight the reality that other ILS, despite their commitment to Islam-based legal language, do not denounce participation in the global order. Nor does ILS' commitment to Islam disappear in their international dealings. Quite the opposite: in the context of some international commitments, argumentations firmly planted in religious norms is at times a centerpiece of these states' global engagements.¹⁸³ Thus, the presence of Islam-based legal language as included in many parts of Afghanistan's domestic legal tradition has the potential to offer many essential points of convergence with which to ground future discussions with other ILS and non-ILS alike. In a similar manner, these provisions have the capacity to provide common ground for negotiation on some of the Taliban's deeply troubling social policies.¹⁸⁴

Disclaimer. The views expressed in this article are those of the author and do not necessarily represent the views of the Department of Defense or its components.

¹⁸¹William Maley, 'Taliban Rule and Anti-Constitutionalism' *Australian Institute of International Affairs*, August 23, 2023, <https://www.internationalaffairs.org.au/australianoutlook/taliban-rule-and-anti-constitutionalism/>.

¹⁸²Milad Sayer, 'Taliban Reportedly Working on 'Constitution' *AMU*, September 18, 2023, <https://amu.tv/65398/>.

¹⁸³EJ Powell, 'Complexity and Dissonance: Islamic Law States and the International Order' (2022) 24 *International Studies Review* 1.

¹⁸⁴Lombardi and March (n 70) 20. (suggesting that some of the Taliban's views 'should be regarded as subject to negotiation').