

The *Shari'a* in the New Afghan Constitution: Contradiction or Compliment?

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I. Introduction

In English legal terminology the term *Shari'a* may be used to refer to Islamic rules of law in general. In Islamic countries, the term may have a more specific meaning as the grand source of law. The *Shari'a* is distinct from the *fiqh*, which refers to legal rules emanating from this primary source through interpretations by the learned – *faqih* (plural *fuqahâ*).¹

To answer the title question “contradiction or compliment?”, the distinction needs elaborating. In the present context, the status of the *Shari'a stricto sensu* in the hierarchy of sources of law and its relation to other legal sources in Islamic countries have to be touched upon.

Shari'a means literally “path to be followed” and implies divine guidance. It is generally defined as Divine Law consisting of two parts: God’s own words, i.e. the corpus of revealed law as contained in the Koran, and the *Sunna*, i.e. the traditions of the Prophet Muhammad, consisting of his statements and deeds. In this sense the *Shari'a*, referring to primary sources of law, is eternal and immutable.

Fiqh, which literally means “understanding” and implies Islamic jurisprudence, refers to interpretations derived from and application of the *Shari'a* in order to regulate people’s daily activities. The interpretations are human products and can therefore be modified depending on factors such as time, circumstances and the understanding of the learned interpreter, *faqih*, or of the legislator.²

As regards the *fiqh*, there are several legal schools or *madhab*. Five are considered to be more dominant. Four are referred to as *Sunni* Islam. They are *Mâleki*, predominant in North Africa, West Africa and Kuwait, *Shâfi'i* in Malaysia, Indonesia, Southern Egypt, Southern Arabia and East Africa, *Hanafi* in Eastern Europe, India, Pakistan, Turkey, Syria, Lebanon and Jordan, and *Hanbali* in Saudi

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¹ Some authors show the distinction through reference to sources and methods of Islamic Law. They maintain that *Shari'a* refers principally to the sources of Islamic law, whereas *fiqh* refers principally to its methods. See, e.g., M. A. Baderin, *International Human Rights and Islamic Law*, 2003, 33.

² *Ibid.*, 34. See also J. Hjärpe, “Normativa strukturer inom Islam”, 29 *Föreningen lärare i religionskunskap, årsbok 1997, 1998*, 135-142, at 139.

Arabia and Qatar. The fifth school, *Ja'fari*, which is dominant in Iran, constitutes the most important legal school for *Shi'a* Islam.³

There is general understanding of the *Shari'a* in the particular sense of the term and also agreement about its status as the supreme law in the constitutions of some Islamic countries. But the relation between the *fiqh* and the positive laws of a State can vary considerably in different Islamic countries. Based on the actual practice of such States, some models can be named here.⁴

An extreme case is when a State adopts one legal school of the *fiqh* and makes it the prevailing legal order of that State. This is the case in Saudi Arabia, where *Hanbalî* legal rules constitute the laws of the State. It means that in principle no laws are enacted in Saudi Arabia. Those royal decrees that are issued and stipulate rules in various areas are considered to be explications of what *Hanbalî* jurisprudence implies in those areas. It also means that judges are not bound to find explicit rules: they can and shall give judgements on the basis of the Koran and the *Sunna* even when there are no explicit laws. A similar case is the Taliban regime in Afghanistan, which enforced *Hanafi* jurisprudence as the prevailing law of the country.

A variant of the Saudi Arabian model is Iran, where the *Ja'fari* legal rules dominate. Basically all penal and private laws are based on *Ja'fari* jurisprudence. Even if the laws are enacted by a parliament – The Islamic Consultative Assembly – they enter into force only after approval by the “Council of Guardians”. This powerful Council examines laws with respect to their compatibility with both the *Shari'a* and the Constitution. It has a veto right.⁵ Here legislation in essence is considered to be an explication of what *Ja'fari* legal rules imply.

Another alternative is the Turkish model, i.e., a system of wholly secular legislation. In Turkey the legislator has no legal obligation to consider Islamic legal sources. While the enacted laws are usually in harmony with the religious norms, their force is derived from the decisions of an elected assembly, not from their compatibility with Islamic requirements.

Between these two extremes, a number of Islamic countries adopt laws with varying degrees of regard to the *Shari'a*. In the majority, the legislative assembly enacts laws independently, but is at the same time expected to base its legislation on the Koran and the Prophet's *Sunna*. The compatibility of enacted laws and the *Shari'a* is assumed. In some cases, such compatibility is constitutionally required, and the possibility of a judicial review of compatibility by the Supreme Court or

³ For an account of the origins and development of these schools, see Baderin, *supra* note 1, 37-38.

⁴ Hjærpe has elaborated these models in some detail. Hjærpe, *supra* note 2, 140-141.

⁵ If the Council disapproves legislation passed by the Islamic Consultative Assembly and the Assembly still insists on its enactment, the legal act shall be sent to a higher organ, the “National Exigency Council”, which will rule on the fate of the legislation. Article 112 of the Constitution of the Islamic Republic of Iran.

an equivalent institution is foreseen. The Constitution of Egypt falls into this category.⁶

Note that attribution of an Islamic legal school to a State and categorization of Islamic countries into models do not necessarily give a comprehensive picture of the role and function of Islamic sources of law in the constitutions of Muslim countries. In fact, in most of these countries we are facing at least two opposite movements, one consisting of staunch advocacy of a traditional and fundamental approach to Islamic sources and another propagating legislative reform on the basis of new interpretations of eternal norms in the Koran and the *Sunna* in order to enact laws more consistent with modern requirements. This means that the assessment of the actual role of the *Shari'a* and other sources of Islamic law in a constitution may depend largely on the way the constitution is actually implemented.

After these introductory observations, a review of the new Afghan Constitution with respect to the place therein of the *Shari'a* and the impact of Islamic legal sources on its content is in order.

II. The Afghan Constitution

The new Afghan Constitution⁷ consists of a relatively short preamble and 162 articles divided into 12 chapters. The first point in the Preamble emphasises the Afghan people's faith in God and their belief in the sacred religion of Islam.⁸ A number of provisions in the Constitution clearly demonstrate the dominant position of Islam in all aspects of life. The first article of the Constitution establishes that Afghanistan is an Islamic Republic.

Article 2 briefly states that Islam is the religion of Afghanistan, but followers of other religions are free to exercise their faith and perform their religious observances within the limits of the provisions of law. It is noteworthy that no distinc-

⁶ For an analysis of the practice of Egypt's Supreme Constitutional Court in this respect, see B. Johansen, *The Relationship Between the Constitution, the Shari'a and the Fiqh in the Adjudication of Egypt's Supreme Constitutional Court*, paper presented at the international conference in Heidelberg, referred to above.

⁷ Afghanistan has had written constitutions since 1923. The first two, from 1923 and 1931, affirmed the absolute power of the king. A new constitution in 1964 provided for a constitutional monarchy based on separation of powers. The constitution was abolished after a military coup in 1973 that led to the establishment of a republic. The political turmoil in the country between 1973 and 2001 resulted in the adoption of three constitutions in 1976, 1987 and 1990. After the collapse of the Taliban regime in 2001, the interim government reintroduced the 1964 Constitution with the exception of those provisions that relate to monarchy. This constitution was to apply until the adoption and entry into force of a new constitution. The new Afghan Constitution was adopted by the *Loya Jirga* (Grand National Assembly) in December 2003 and entered into force on 26 January 2004. For further details and the texts of previous constitutions, see <<http://jurist.law.pitt.edu/world/afghanistan.htm>> (last visited 29 Nov. 2004).

⁸ All references to provisions of the new Constitution are to the unofficial translation provided by the Constitutional Commission of Afghanistan at <<http://www.constitution-afg.com>> (last visited 29 Nov. 2004). The Dari version of the text has also been consulted.

tion is made here between different Islamic fractions in Afghanistan and their legal schools. This may be because no fraction was supposed to receive a preferential treatment in the Constitution. It is also probable that the wording is intentional to make this provision consistent with the relevant universal human rights. Such a distinction can be seen in the Iranian Constitution, for example where Islamic fractions other than *Ja' fari* Islam and other religions are specifically addressed in three separate provisions.⁹

In Article 7, which deals with the obligation of the State to promote education at all levels, the development of religious education and improvement of the conditions of mosques, religious schools and centres are specially emphasised. This duty is further emphasised in Article 45 where the State is required to implement a unified educational curriculum based on the provisions of Islam and to develop the curriculum of religious subjects on the basis of the various Islamic schools of thought existing in Afghanistan.¹⁰ In line with these measures, the State is obliged, according to Article 54, to eliminate traditions contrary to Islamic principles.

Article 35 guarantees Afghan citizens the right to form political parties in accordance with the provisions of the law, on condition that the "programme and charter of the party are not contrary to the principles of sacred religion of Islam ...".¹¹

Under Article 19, the national insignia of Afghanistan consists of a *Mehrab*, i.e., a praying place, on which the phrase "There is no God but Allah and Muhammad is his prophet, and Allah is Great" is inscribed. The Constitution's Article 20 prescribes that in the national anthem, which will be in Pashtu, mention shall be made of "Allah is Great".

Chapter 10 of the Constitution, where the possibility of amendment is regulated, stipulates in Article 149 that "The provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended". All these provisions clearly demonstrate the concern of the authors of the Constitution to establish plainly the Islamic character of the State and to make sure that Islamic law permeates the whole text.

As regards the relation between the *Shari'a* and the Constitution, Article 3 is probably the most significant provision. It reads, "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam". "Beliefs and provisions" in this article is a legally vague concept and prone to broad interpreta-

⁹ Articles 21-23 of the Constitution of the Islamic Republic of Iran, <<http://fnem.8m.com/Iran.cons.htm>> (last visited 29 Nov. 2004).

¹⁰ These requirements should be compared with, e.g., Article 19 of the Constitution of Egypt, which says "Religious education shall be a principal subject in courses of general education", or Article 30 of the Iranian Constitution, which reads "The government must provide all citizens with free education up to secondary school, and must expand free higher education to the extent required by the country for attaining self-sufficiency". Explicit reference in the Afghan Constitution to the inclusion of Islamic teachings in the educational programmes has no equivalent in the constitutions of other Islamic countries.

¹¹ This obviously excludes the formation of a communist party in the country. Even other political parties that may propagate women's rights, for instance, the equal right of women to the custody of the children after divorce, may be banned on the basis of this article.

tions. It can arguably be a reference not only to the *Shari'a stricto sensu*, but also to the *fiqh* and perhaps even to the doctrine of Islamic law. The impression that the reference may also be to the *fiqh* is reinforced in Article 130, which stipulates, "When there is no provision in the Constitution or other laws regarding ruling on an issue, the court's decisions shall be within the limits of this Constitution in accord with *Hanafi* jurisprudence ...". Given the fact that *Sunni* Muslims make up some 84% of the Afghan population, such reference to *Hanafi* jurisprudence is understandable.

The Constitution does not neglect the *Shi'a* population, which constitutes about 15% of the Afghan people. Article 131 provides that:

Courts shall apply *shia* law in cases dealing with personal matters involving the followers of *shia* Islam ... In other cases if no clarification by this Constitution and other laws exists and both sides of the case are followers of *shia* Islam, courts will settle the case according to *shia* jurisprudence.¹²

Provisions in Articles 130 and 131 are to fill the gap. Both treat the *Shari'a* as complementary to the Constitution. This special treatment of two large religious groups of the country prompts questions about the status of other religious groups and their laws¹³ in a constitution that obviously seeks to be one of the most progressive Muslim legal documents as regards respect for universal human rights.

The expression "beliefs and provisions" in Article 3 should be compared with a more specific reference to the *Shari'a* in Article 65 of Sudan's Constitution, which provides that "The Islamic *Shari'a* and national consent through voting ... are the sources of law and no law shall be enacted contrary to these sources". Article 2 in the Egyptian Constitution is also more precise, stating that "Islamic Jurisprudence is the principal source of legislation". However, Iran whose Constitution, more than any other Islamic country's, is inspired by the *Shari'a*, has chosen almost as vague a wording as Afghanistan's. The Iranian Constitution's Article 4 sets out that "All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria". Here, the term "criteria" has in practice covered the *Shari'a*, the *fiqh*, *fatwa*¹⁴ and doctrine of the *Ja'fari* fraction of Islam.

A full assessment of the implications of Article 3 in the Afghan Constitution depends in the first place on the types of mechanisms foreseen in the Constitution for the supervision of its implementation. Article 63 seems relevant in this respect. It says that the President-elect, prior to taking office, shall take an oath and swear before the National Assembly "to obey and safeguard the provisions of the sacred re-

¹² There is a difference between the original Dari and the English versions of the Constitution. The Dari version of the second part of this article can be translated as follows: "As regards other cases where this constitution or other laws do not provide any answer, the courts shall settle the case in accordance with the provisions of the *Shi'a* Islam."

¹³ Afghanistan has a population of about 23 million people, with some 34 different ethnic groups representing a broad range of religions and religious fractions.

¹⁴ A legal opinion given by a high-ranking jurist, who is called *mufti* by *Sunni* Muslims and *ayatollah* by *Shi'a* Muslims.

ligion of Islam, to observe the Constitution and other laws of Afghanistan and supervise their implementation ...". Given the strong powers of the President,¹⁵ it may be understood that he is expected to act as the guardian of the Constitution. However, making the safe-keeping of Islam the President's utmost obligation before anything else, even before compliance with the Constitution, shows the place of religion in the country and in the Constitution.¹⁶ It also indicates that the President will have a decisive role in implementing these words according to his/her understanding of the primacy of Islamic principles. Article 64, however, which contains a detailed list of the powers and duties of the President, is silent on Islam and its safe-keeping.

Article 157 foresees the establishment, through a separate law, of an Independent Commission for the Supervision of the Implementation of the Constitution. Commission members shall be appointed by the President with the approval of the National Assembly. What powers this Commission will have remains to be seen. It may, however, be expected that the task of checking the consistency of adopted laws with the *Shari'a* will be one of its functions.

Finally, mention should be made of Article 121, according to which "The Supreme Court at the request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, international treaties and international conventions, and interpret them in accordance with the law". This provision transforms the Supreme Court of Afghanistan into a constitutional court.¹⁷ As such, it will arguably have the competence to review the compatibility of laws and decrees with the "beliefs and provisions" of Islam.¹⁸

III. The Relation Between the *Shari'a* and Guaranteed Rights in the Afghan Constitution

As noted above, the new Constitution of Afghanistan explicitly recognises in Articles 130 and 131 a complementary role for *Hanafi* jurisprudence, and under certain conditions, for *Shi'a* legal rules. The consistency or contradiction of the Constitution's provisions with the *Shari'a* can be assessed from different angles.

¹⁵ The powers of the Afghan President have some similarity with those of the US President. He shall, for instance, appoint members of the government who will work under him/her, the director of the Central Bank, ambassadors and members of the Supreme Court. See Articles 64 and 117 of the Afghan Constitution.

¹⁶ A similar oath shall be taken by ministers and members of the Supreme Court. See Articles 72, 74 and 119 of the Constitution.

¹⁷ In this respect, the function of the Afghan Supreme Court becomes similar to that of the supreme courts of several other countries, e.g., the United States. Generally, the status of powers of the President and the relation between various powers are more or less similar in the two constitutions. The power of the Afghan President *vis-à-vis* the National Assembly as regards the approval of adopted laws resembles that of the US model. See Article 94 of the Constitution.

¹⁸ This is comparable with the power of Egypt's Supreme Constitutional Court in this regard. See *supra* note 6.

The most common approach is to study controversial areas such as family law, penal law and human-rights law in general. Contradictions in these areas between Islamic law and human rights as set out in international documents have been the subject of numerous scholarly studies.¹⁹

Given the massive, repeated and grave breaches of human rights under the Taliban regime, the question of respect for universal human-rights standards has apparently been a core issue for the authors of the Constitution. This is evidenced by the reference in the Preamble and in Article 7 to the Universal Declaration of Human Rights and Afghanistan's obligation to respect these rights.²⁰ Such reference in a constitution is rare, and is definitely unique in Islamic constitutions.²¹

The prominent place of human rights in the Constitution and the genuine concern of the drafters to ensure respect for such rights are evident in other provisions of the Constitution. To materialise an effective supervision of human rights obligations incumbent upon Afghanistan, Article 58 establishes the Independent Human Rights Commission of Afghanistan, which has more or less the function of an ombudsman.²² Such machinery with this specific function is unprecedented in the Islamic countries' constitutions. These are progressive features of the Constitution of a country whose previous government will be remembered as one of the most oppressive regimes with respect to the protection of human rights. The question is nonetheless whether full compliance with the requirements of the Universal Declaration can be possible when Article 3 explicitly requires the consistency of the enacted laws with Islamic provisions.

There is no straightforward answer to this question. Explicit reference to the requirement of consistency of all enacted laws with the *Shari'a* can be found in other Islamic constitutions such as in those of Egypt, Iran and Sudan.²³ None of these

¹⁹ In addition to Baderin's work (see *supra* note 1), mention can be made of, e.g., A. E. Mayer, *Islam and Human Rights*, 3rd ed., 1999; S.S. Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*, 2000.

²⁰ Point 5 of the Preamble underlines that the people of Afghanistan observe the UN Charter and respect the Universal Declaration of Human Rights. This is repeated in Article 7, which stipulates that the State shall respect the UN Charter, international agreements that Afghanistan has joined, and the Universal Declaration of Human Rights.

²¹ An earlier effort was made at the time of drafting the Constitution of the Islamic Republic of Iran in 1979. At that time, a group consisting of some members of the Iranian Association of Lawyers and the Iranian Committee for the Defence of Freedom and Human Rights proposed the inclusion of the Universal Declaration in the new Iranian Constitution. The proposal was rejected. See Mayer, *supra* note 19, 69.

²² Article 58 sets out that in order to supervise the improvement and protection of human rights in Afghanistan, the State shall establish the Independent Human Rights Commission of Afghanistan. Any person whose fundamental rights have been violated can file a complaint with the Commission. The Commission can refer cases of violation of human rights to the legal authorities and assist in defending the rights of the complainant.

²³ According to Baderin, "In 1998 ... the Government of Pakistan proposed a constitutional amendment Bill to its Parliament seeking to make the *Qur'an* and *Sunnah* the supreme law of Pakistan ... The bill was passed by the National Assembly ... but the Senate had not voted on it before it was suspended by the Musharraf regime that took power in October 1999". Baderin adds that there is,

constitutions refer to the Universal Declaration on Human Rights. The case of Afghanistan is thus unique; unlike any other Islamic country, Afghanistan expressly pledges itself to respect a significant human rights document, on the one hand and subordinates all its laws to the dictates of the *Shari'a*, on the other. The point of departure in the Afghan Constitution itself is obviously that there is no inconsistency between the requirements of Article 3 and human-rights obligations under the Universal Declaration. Note that the Constitution's unconditional recognition of the Universal Declaration as applicable law shows a positive attitude towards these rights. But conferring a superior place to the *Shari'a* and qualifying all laws of the country in this way is reminiscent of similar qualifications in the constitutions of countries such as Iran, Egypt and Sudan, and the fate of guaranteed rights in those documents. Having the cases of these countries in mind, the juxtaposition of the Universal Declaration and the *Shari'a* in the same document seems *prima facie* to be contradictory.

One significant implication of Article 3 in the new Constitution is that, in the event of a conflict between any legal norm applicable in Afghanistan and the *Shari'a*, it is the latter that applies. One possible case may be the conflict between a *Shari'a* rule which has become applicable due to a gap in the positive law (Articles 130 and 131) and a principle of human rights enshrined in the Universal Declaration. The assumed precedence of the *Shari'a* over any other applicable legal norm can curtail or impede the application of the rights declared in the Universal Declaration and render references in the Constitution to the Declaration meaningless or ineffective. Some examples elucidate this premise.

Chapter Two of the Afghan Constitution deals with the fundamental rights and duties of citizens. The majority of the rights in the Universal Declaration, the International Covenant on Civil and Political Rights²⁴ and the International Covenant on Economic, Social and Cultural Rights²⁵ find expression in the Afghan Constitution.²⁶ Some of these rights and freedoms are unequivocal and unqualified. An important example relates to the principles of non-discrimination and equality. Article 22 of the Constitution reads:

Any kind of discrimination and privilege among the citizens of Afghanistan is prohibited. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.

This formulation should be compared with Article 20 in the Iranian Constitution, which stipulates that “All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic,

however, an enforcement of the *Shari'a* Act of 1991 in force. Its Article 3 (1) provides that “The *Shari'ah* ... shall be the supreme law of Pakistan”. *Supra* note 1, 31.

²⁴ 999 United Nations Treaty Series, 171.

²⁵ 993 United Nations Treaty Series, 3.

²⁶ Mention can be made of freedom of religion (Article 2), equality among all ethnic groups (Article 6), freedom of publication in all languages (Article 16), equality of all citizens, men or women (Article 22), prohibition of torture and inhuman punishment (Article 29), freedom of expression (Article 34) and freedom of association (Article 35).

social, and cultural rights, in conformity with Islamic criteria". (emphasis added)

According to Article 2 of the Universal Declaration, everybody is entitled to all rights and freedoms set forth in that declaration, without discrimination of any kind, such as race, colour, sex, language, religion and political or other opinion. The principle of equality of all before the law finds expression also in Article 7 of the Universal Declaration, which establishes that "All are equal before the law and are entitled without any discrimination to equal protection of the law". Article 22 of the Afghan Constitution is obviously in full harmony with the requirements of the Universal Declaration with respect to the equality of the rights. The question is how much this provision harmonises with the dictates of Islamic law.

The distinction between men and women in Islam and between Muslims and non-Muslims has been often discussed by human rights experts as possible grounds of inconsistency between the *Shari'a* and the Universal Declaration. Some argue that Islam recognises equality of men and women, but does not advocate absolute equality of roles between them. They elaborate their stand by referring to the principle "equal but not equivalent".²⁷ Others refer to the practice of those Islamic states that give a predominant place to Islamic law in their constitutions and conclude that there is no consistency at all.²⁸ In the *Shari'a*, differences between men and women can be discerned *inter alia* in family law, in economic issues (inheritance, the obligation of maintenance), and in procedural law (the weight of testimony before a court of law).²⁹

Because of the named differences, Islamic countries have tried to formulate their own Islamic Declarations on Human Rights. These efforts have resulted most concretely in the adoption of the Cairo Declaration on Human Rights in Islam.³⁰

The Cairo Declaration declares that "Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage".³¹ This formulation has been criticised as being evasive, recognising equality of men and women in human dignity but not in rights.³² Others suggest that equality in human dignity entails equality in rights. They admit, however, that differentiation in gender roles under Islamic law "may amount to discrimination by the threshold of international human rights law".³³ The fact is that the very wording of the Cairo

²⁷ Baderin, *supra* note 1, 60.

²⁸ Mayer, *supra* note 19, particularly chapters 5 and 6, 83-130.

²⁹ Cf. J. Hjärpe, "Islamisk rätt och diskussionen om Mänskliga Rättigheter", 16 Retfærd, 1993, 3-14, at 10.

³⁰ Adopted by the Organization of Islamic Conference in August 1990 and submitted to the World Conference on Human Rights 1993, UN Doc. A/CONF.157/PC/62/Add.18, dated June 9, 1993. The background to this declaration is two earlier drafts prepared by the Organization of Islamic Conference in 1983 (Dhaka, Bangladesh) and 1989 (Tehran, Iran). See Hjärpe, *supra* note 29, 10.

³¹ Article 6 (A).

³² Mayer, *supra* note 19, 120.

³³ Baderin, *supra* note 1, 60.

Declaration by first recognising the equality of men and women and then focusing on certain rights specific to women according to Islamic law, testifies to the differences.

The unequivocal and unqualified reference in Article 22 of the Afghan Constitution to the equality of rights for all citizens of Afghanistan leaves no room for any doubt about its compatibility with the similar formulation in the Universal Declaration. It is at the same time unclear how women can exercise all the rights enumerated in the Universal Declaration if such exercise is subject to the test of consistency with the *Shari'a*.

Another area of *prima facie* contradiction between the *Shari'a* and international human rights law is crime and punishment. Article 5 of the Universal Declaration lays down that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".³⁴ A number of Islamic punishments can arguably be classified as torture or cruel, inhuman and degrading treatment. The rules concerning stoning to death of adulteresses, mutilation through the application of the principle of eye-for-eye, and flogging are in this category. These punishments or some of them are enforced in several Islamic countries such as Iran, Pakistan, Saudi Arabia and Sudan.

Islamic punishments are generally categorised into three groups. The first group consists of *hudud*, i.e. fixed punishments mentioned in the Koran for the most serious crimes. The second group, *qisas* or retaliation, is variable punishments at the discretion of the victim, and the third group, *ta'zir*, is punishments decided by the State or a judge.³⁵ Although all these three categories may contain cruel, inhuman and degrading treatment, the real problem arises with the first group – *hudud* – whose fixed punishments are written in the Divine Law and thereby cannot be ignored or changed.³⁶ The problem is particularly obvious in the case of those Islamic countries whose constitutions include a compatibility clause with respect to the relation between enacted laws and the *Shari'a*.

Article 29 of the new Afghan Constitution clearly and unconditionally prohibits not only torture in general but any punishment contrary to human integrity in particular.³⁷ This may be interpreted as an obvious contradiction with the *Shari'a* as expressed in the Koran and the *Sunna*. There are, however, respectful Islamic commentators who refuse an orthodox application of these rules and argue that, although the rules are God's words, they are time-bound and have to be taken as

³⁴ This wording is repeated in Article 7 of the International Covenant on Civil and Political Rights.

³⁵ Cf. Baderin, *supra* note 1, 69-70; Hjærpe, *supra* note 2, 142.

³⁶ In the case of *qisas* and *ta'zir*, the State has the possibility of imposing less harsh punishments and fulfil their international human rights law obligations. Cf. Baderin, *supra* note 1, 83.

³⁷ Article 29 reads: "Torture of human beings is prohibited. No person, even with the intention of discovering the truth, can resort to torture or order the torture of another person who may be under prosecution, arrest, or imprisoned, or convicted to punishment. Punishment contrary to human integrity is prohibited."

metaphors in employing more modern measures against crime.³⁸ It is also suggested that while it is impossible to proscribe *hudûd* punishments, it is possible to avoid the problem by applying procedural rules and imposing strict evidential requirements without impugning divine commands.³⁹

Two other Islamic States with constitutions including a requirement of consistency of all laws with the *Shari'a*, namely Iran and Sudan, regularly apply *hudûd* punishments. Article 38 in the Constitution of Iran stipulates "All forms of torture for the purpose of extracting confessions or acquiring information are forbidden". This wording of course leaves room for the exercise of Islamic punishments which are otherwise qualified as acts of torture. Egypt, another Islamic country with an explicit requirement of compatibility of enacted laws and the *Shari'a*, does not normally implement *hudûd* punishments. It remains to be seen how Afghanistan will meet the challenge of Islamic punishments with respect to the obligations under the *Shari'a* and the Universal Declaration of Human Rights.

Another possible ground of inconsistency between the *Shari'a* and the Universal Declaration is Article 16 of the latter, which pronounces "Men and women of all ages, without limitation due to race, nationality or religion, have the right to marry and found a family". The Cairo Declaration has modified this wording and declared that "The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right."⁴⁰ Reference to "religion" is absent in this part of the Declaration, because the marriage of a Muslim women and a non-Muslim man is prohibited in Islamic law. The Afghan Constitution is silent on this issue. It is difficult to imagine how the legislator can fulfil the requirement of the Universal Declaration in this respect without going directly against a very sensitive and old belief in Islamic countries. This rule is observed generally in all Islamic countries, even those that have secular legislation such as Tunisia and Turkey.⁴¹

Finally mention should be made of every person's freedom to change his/her religion as enshrined in Article 18 of the Universal Declaration.⁴² The views of Islamic jurists about the freedom of religion and the issue of apostasy are divergent.

³⁸ Hj ä r p e, *supra* note 29, 11; A.A. An-Na'im, Towards an Islamic Reformation. Civil Liberties, Human Rights, and International Law (Contemporary Issues in the Middle East), 1990; A.A. An-Na'im (ed.), Human Rights in Cross-Cultural Perspectives: A Quest for Consensus, 1995.

³⁹ B a d e r i n, *supra* note 1, 84-85.

⁴⁰ Article 5 (A).

⁴¹ B a d e r i n, who should be considered as a moderate commentator generally optimistic about the possibility of the compatibility of Islamic law with international human rights law, states that "The prohibition of Muslim women from marrying non-Muslim men ... seems to be one of the areas where achieving complete equality is difficult between Islamic law and international human rights law ...", *supra* note 1, 145.

⁴² Article 18 reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The traditional Islamic view has been that apostasy is prohibited and entails the death penalty (for men).⁴³ The majority of Islamic scholars nonetheless reject the idea of a punishment for apostasy and express the view that there should be no compulsion in religion.⁴⁴ They argue that it is not the changing of one's religion "that is prohibited under Islamic law but its manifestation in a manner that threatens public safety, morals, and freedom of others, or even the existence of the Islamic State itself".⁴⁵ The Afghan Constitution, like those of other Islamic States, is predictably silent on this point, and the fate in Afghanistan of Article 18 of the Universal Declaration will depend on how the courts interpret the freedom to change one's religion.

Whether the present constitution with its unprecedented built-in human rights guarantees will come into conflict with the *Shari'a* depends very much on how all these issues, which have no direct answer in the text of the Constitution itself, are dealt with in enactments of the National Assembly and in Supreme Court practice. If that assembly and the Supreme Court wish to make an orthodox interpretation of Islamic laws and assume their supremacy, it will be difficult to reconcile such an interpretation with many requirements of the present text. There are many indications in the text of the Constitution that this has not been the intention of those who have drafted the document.

VI. Appraisal

In some Islamic countries such as Iran and Sudan, the point of departure in the constitution is God's exclusive sovereignty and right to legislate. In such cases, it is God's will that becomes law. The will of the people must be harmonised with God's will. Article 4 of Sudan's Constitution of 1998 says "God, the creator of all people, is supreme over the State and sovereignty is delegated to the people of Sudan by succession ...". Article 2 of the Iran's Constitution also declares that "The Islamic Republic is a system based on belief in the One God (as stated in the phrase 'There is no God except Allah'), His exclusive sovereignty and right to legislate, and the necessity of submission to His commands ...".⁴⁶

⁴³ Hj ä r p e, *supra* note 29, 13.

⁴⁴ They base their argument on a number of verses in the Koran, particularly 2:256, which explicitly prohibits compulsion in religion.

⁴⁵ B a d e r i n refers to a number of contemporary Arab scholars who advocate this view. He also quotes a report by the Sudanese Government in which it is written that "conversion from Islam is not an offence in Sudan but only the manifestation of such conversion in a manner that adversely affects public safety". *Supra* note 1, 124–125.

⁴⁶ When the constitution was amended in 1989, Article 56 was rephrased to read "Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No-one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles."

The belief in God's sovereignty and will justifies a prominent place for the interpreters of the *Shari'a*, who as specialists have to check and establish what constitutes God's will. The result is normally strict application of the *Shari'a* irrespective of what modern ideas are inserted in the constitution. The cases of Iran and Sudan as well as the 1973 Constitution of Pakistan under General Muhammad Zia-ul-Haq are good examples.

Other Islamic constitutions recognise the sovereignty of the people. Article 4 of the Afghan Constitution is very clear on this point: "National sovereignty in Afghanistan belongs to the nation, which exercises it directly or through its representatives." In these countries, generally speaking, the constitutional tribute to Islam is normally no obstacle to the legislator's enacting laws that do not necessarily correspond to a traditional and orthodox understanding of the *Shari'a*.

In the Afghan case, there are many indications that the drafters have sought to create the most modern constitution in the Islamic world. The pressure of time and the very special political situation attending the drafting process⁴⁷ have led to inconsistencies and irregularities in the text. It can nevertheless still become a basis for the implementation of the authors' progressive ambitions. The unequivocal declaration in Article 22 of the equality of men and women as regards their rights and duties is probably the most significant indication in this respect. The fact that the leader of the country, the President, can according to Article 60 be a man or a woman is itself unusual. Even though there is no direct prohibition in the *Shari'a* for a woman to become the head of an Islamic State, the general attitude of Islamic law towards women, at least in its traditional interpretation, makes the provision of Article 60 a progressive and unprecedented one.

A traditional interpretation of the *Shari'a* distinguishes between Muslims and non-Muslims as regards their civil and political rights and their status before the law. The fact that the Afghan Constitution does not mention religion as a requirement for membership in the National Assembly or the Supreme Court shows that there is no discrimination against different religions in this respect.

The present constitution is based partly on the 1964 Constitution. The issue of consistency of national laws with Islamic provisions did not prove complex under that constitution. It is therefore possible that the legislator will, also in the framework of the new Constitution, adopt a pragmatic approach with respect to the requirement of Article 3.

The person of the President and the composition of the National Assembly will have a decisive role in shaping the relation between enacted laws and the *Shari'a*. In addition to his/her enormous powers in relation to the National Assembly and the Judiciary, the President is the one who finally approves laws (Article 94), and appoints members of the Supreme Court and members of the Independent Commission for Supervision of the Implementation of the Constitution (Article 157). If the President is a religiously moderate person, he/she may facilitate a modern interpre-

⁴⁷ One manifestation of the difficult political situation at the time of drafting is the last sentence of Article 105, which reads: "No one shall enter the building of the National Assembly by force."

tation of the Constitution. If the President is a fundamentalist, it can be expected that only radical Muslims would be appointed to the Court or Commission, turning them into instruments for stringent adaptation of enacted laws to the *Shari'a*.

In sum, the answer to the question posed in the title of this paper should be that the *Shari'a* is undoubtedly assumed to be a complement to the Afghan Constitution. As regards possible contradictions between the *Shari'a* and the Constitution, what makes the latter unique among the constitutions of Islamic countries is that it explicitly requires respect for the Universal Declaration of Human Rights at the same time as it demands harmony between all Afghan laws and the principles of Islam. This combination does not formally constitute a contradiction, but there is a potential inconsistency that may emerge in the actual implementation of the Constitution. This inconsistency can remain latent and be tolerated through moderate and modern interpretations. It may also turn into an actual conflict should the political situation permit traditional interpretations.