Afghanistan's Constitution between Sharia Law and International Human Rights

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In February 2006, the 41-year old Afghan national Abdul Rahman was arrested in Kabul. Rahman's family had reported him to the authorities. In an emotionally charged interview some days after the arrest his wife lamented that Rahman had never provided for their two daughters; his father confirmed that Rahman had failed to supported him too. The boy was on the wrong path. More than just a negligent husband and an average son, however, the primary reason for throwing Rahman into the broken windmills of Afghanistan's justice system lay in his apostasy from Islam and his conversion to Christianity.

Afghanistan's multi-ethnic population is overwhelmingly Muslim. Most Sikhs, Hindus, and Christians have sought refuge elsewhere during the unpleasant decade historians now call "the Taliban-years". The Taliban's injection of Wahhabi doctrines propelled the erosion of Afghanistan's rule of law, though, in all fairness, there was little left to erode. They also cared too little or too much about international norms. On 2 March 2001, in a characteristic act of defying international rules Taliban fighters drilled holes into two gigantic fourth-century Buddha statues and filled them with explosives.

Not everyone was convinced of straightforward vandalism after the detonation. A few academics proposed to view the demolition as a communicative act and a pathway for the Taliban to burst open the waiting room of history and dive straight into the exclusionary art historical discourse to critique the label "Greco-Buddhist" conventionally attached to the statues. Simply the fact that Alexander the Great had ridden through the city six centuries before the statues were built––apparently carrying Hellenism's entire architectural skill in his left horse-sachet––would not make them "Greco". But it seems more accurate to follow the Taliban chief Mullah Omar who lucidly put the reasons for the destruction in layman's terms: Buddhists had left the country a long time ago and since there was no indication of their return, the statues were now only violating religious feelings of Afghanistan's Muslim population.

Well-meaning American bombs and globally funded state building measures in the aftermath of 9/11 failed to stabilise the legal system as well. To garb this point in the technical jargon of comparative constitutional lawyers: 'After a number of constitutional transplants Afghanistan's legal system almost suffered a cardiac arrest.' To be sure, comparative constitutional scholars are averse to making the study of constitutionalism as complex as astrophysics. But there is a silent consensus that it should be a lot harder than conventional biology. Cardiovascular medicine offers an agreeable meeting ground.

Afghanistan's Attorney General, a man with several degrees from sharia faculties under his belt, prematurely exposed his trial strategy and trumpeted over Kabul's mud roofs: Rahman is going to hang! There was legal reasoning too. In a thoughtful moment, he disclosed to a reporter of The Times: "We will request him [Rahman] to become a Muslim again. In your country two women can marry I think that is very strange. In this country we have the perfect constitution, it is Islamic law and it is illegal to be a Christian and it should be punished." A fringe group amongst the 'ulema expressed dissent. They preferred more social-media effective methods for the upcoming execution––ending dramatically with a severed head on a stretched arm.

The international community was outraged. In a strongly worded letter to President Karzai, the German pope appealed for Rahman's pardoning. Silvio Berlus-

coni immediately clothed the Holy See's words––perhaps confusing the appeal with a papal bull––into the material threat of withdrawing Italian troops from Afghanistan. With disarming bluntness, the American foreign office pressed for Rahman's release "in the strongest possible terms" and even the German chancellor noted that a release was probably "a sensible signal to the international community and Afghanistan". This carrot and stick approached worked. On 27 March 2006, Rahman was released from prison (the court deemed that he was mentally ill, for what rational person would chose death over converting back to Islam) and Hamid Karzai arranged for him to be flown out to Italy. Berlusconi suspended his hard-line asylum policy for this "exceptionally courageous man". But Rahman's release after intense international pressure rendered visible some issues at the heart of Afghanistan's nascent constitutionalism.

Afghanistan's 2004 constitution is a compromise between liberal internationalists, local clerics and warlords. As in all good compromises nobody lost face and everyone was allowed to implement a handful constitutional provisions closest to their heart. Wearing gloomy bad-cop goggles one might say that the constitution therefore amounts to little more than a scrap of paper. Wearing rosy good-cop goggles one might respond that the agreement constitutes a watershed moment for liberal democracy and the rule of law. Afghan interest group with electoral backing sat together, discussed (rationally), and eventually ratified the constitutional document. There's hardly anything more democratic than that.

Apostasy cases are the constitution's litmus test. While no positive legal norm in Afghanistan's reformed penal code explicitly criminalises apostasy (or endorses the death penalty) judges from the local jirgas all the way up to the Supreme Court take their legal gun powder for sentencing apostates to death from a string of constitutional provisions. When it comes to basing their rulings on Hanafi jurisprudence (sharia), article 130 and article 3 of the constitution have emerged as judge's favourites. Article 3 enshrines that "no law shall contravene the tenants and provision of the religion of Islam" and article 130 empowers the court to use "Hanafi jurisprudence" within "the limits set by the constitution" for cases that lack a "provision in the constitution". Some of these limits are found in article 6 and 7, which include the "preservation of human dignity, protection of human rights, realisation of democracy", and the observation of the entire "United Nation Charter". There are two main ways of interpreting article 130:

a) as a cautious move towards limiting an immediate application of sharia law through a double review. In the first step, the individual case needs to be evaluated along positive constitutional provisions, which demand a balancing of constitutional rights with shariatic principles. If this approach remains inconclusive, article 130 prescribes a subsidiary reversal: now the application of Hanafi jurisprudence has to be used within the limits set out in the constitution. Here the constitution establishes the conclusive normative framework for arriving at "justice in the best manner".

b) as allowing for the application of sharia law directly with recourse to the repugnancy clause of article 3. To attain "justice in the best manner", Afghanistan's constitution is unable to override the binding normative framework outlined in sharia principles.

The first reading embeds the application of sharia jurisprudence into the broader constitutional design. Article 130 is read within the constitution, as a direct application of sharia law would conflict with a number of constitutionally endowed principle, like article 27 that "no deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offence". Or with the human right to freedom of religion stated in article 7, which includes the right to change one's religious persuasion. These rights would be entirely emptied out in case sharia law was applied without mediation.

The other reading contends that while all this may well be true, article 3 (read together with the preamble) trumps any such objections. Proponents of this view argue, that there is an embedded chronological hierarchy of constitutional provisions. Those related to Islam are clustered towards the beginning of the constitution and therefore superior.

From a constitutional perspective, the Supreme Court assumes final authority to lay out the interpretative paradigm for the application of Hanafi jurisprudence. But as much of sharia law is not properly codified a huge amount of legal ambiguity remains. Liberal internationalists, local clerics and warlords alike strive in this ambiguity to forward their desired interpretation. And while the constitutional commitment to Hanafi jurisprudence provides the necessary balm to heal the wounded social (and legal) tissue of Afghanistan––with Islam as a major unifying force for the national project––it is clear that in the twenty-first century such processes cannot occur at the expense of religious minorities and legal certainty.

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