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## Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk"

Michael Schoiswohl

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# Linking the International Legal Framework to Building the Formal Foundations of a “State at Risk”: Constitution-Making and International Law in Post-Conflict Afghanistan

Michael Schoiswohl\*

## Abstract

*This Article describes and critically assesses the recent constitution-making process in Afghanistan in relation to the international legal framework. The Article provides an account of that process within the larger context of the state-building efforts as envisioned in the 2001 Bonn Agreement. Focusing on the interaction between national state-building and international normative benchmarks, the Article evaluates the extent to which the recently adopted Constitution links to the international legal framework. While paying lip service to the adherence of international law, including international human rights law, the Constitution does not adequately address the relationship between international legal obligations and municipal law. This Article argues that the failure to adopt a specific mechanism as to how international law can be effectuated within the internal legal system provides ample leeway for an application of the Constitution which may*

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*challenge Afghanistan's commitment to abide by its international obligations.*

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## I. INTRODUCTION

In many ways, Afghanistan has served as a test case for the international community's ability to promote the establishment of democratic structures in a particular risk-state. As an extension of the discourse on "humanitarian intervention" and inspired by the assumption that non-democratic regimes and collapsed states pose a threat to international peace by providing a breeding ground for international terrorism, multilateral and even unilateral

interventionism in the name of democracy is increasingly eroding the opacity of state sovereignty.<sup>1</sup> Regime-change through the use of force is becoming a legitimate, though not necessarily legally justified<sup>2</sup> means of ensuring that democratic principles are either upheld or introduced in a given state at risk. With regard to the latter, the assumption is that democratic structures will ultimately serve international peace and stability by fostering human development and conflict prevention.<sup>3</sup> Thus, peace-building has become a matter of state-building with international institutions, such as the United Nations and its various agencies promoting the establishment of democratic institutions as the basis for “good governance.”<sup>4</sup> In either directly assuming functions of territorial administration or supporting transitional authorities in establishing participatory structures of governance,<sup>5</sup> the United Nations has become an “active participant in managing profound social and political transformations within sovereign states,”<sup>6</sup> exposing itself to the risks of “social engineering” by transplanting “western models of social, political and economic organization into war shattered states.”<sup>7</sup> Contrary to the

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1. See e.g., Peter Hilpold, *The Continuing Modernity of Article 2(4) of the UN Charter*, in Festschrift Rudolf Palme 281, 284 (Ingenhaeff et al. eds., 2002) (discussing the concept of humanitarian intervention and its facets in international law).

2. See U.N. High-Level Panel on Threats, Challenges and Change, *Report: A More Secure World: Our Shared Responsibility*, ¶ 164, U.N. Doc. A/59/565 (Nov. 29, 2004), available at <http://www.un.org/secureworld/> (discussing the distinction between legality and legitimacy in relation to the prohibition of the use of force under Art. 2 (4) of the U.N. Charter); see also Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 23 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1 (1999).

3. Cf. U.N. DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD (2002).

4. Ian Johnstone, *U.S.-U.N. Relations after Iraq: The End of the World (Order) As We Know It?*, 15 EUR. J. INT'L L. 813, 823 (2004).

5. See e.g., Simon Chesterman, *Transitional Administration, State-Building and the U.N.*, in MAKING STATES WORK 339, 340 (Simon Chesterman et al. eds., 2005) (discussing the role of the U.N. in transitional administration) [hereinafter MAKING STATES WORK]; see also BRUNO SIMMA, ET AL., THE CHARTER OF THE U.N.: A COMMENTARY 664–80 (2d ed. 2002) (providing an overview of the history of U.N. peacekeeping) [hereinafter U.N. CHARTER COMMENTARY]; U.N. Gen. Assembly Sec. Council, *Report of the Panel on U.N. Peace Operations*, ¶¶ 76–83, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000) (prepared by Lakhdar Brahimi) [hereinafter *Brahimi Report*]; Michael J. Matheson, *U.N. Governance of Post-conflict Societies*, 95 AM. J. INT'L L. 76 (2001).

6. Johnstone, *supra* note 4, at 823.

7. Roland Paris, *Peacebuilding and the Limits of Liberal Internationalism*, 22:2 INT'L SEC. 54, 82 (1997); see Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect* (Ctr. For Int'l Dev. At Harvard Univ. Working Papers, CID No. 39, 2000) (providing an interesting survey and analysis of legal transplants).

cases of Kosovo and East Timor, however, the United Nations in Afghanistan has, under the charismatic leadership of the Special Representative of the Secretary General, Lakhdar Brahimi,<sup>8</sup> followed a “light footed” approach, limiting its mandate to providing assistance to the transitional authority.<sup>9</sup> This approach, though often criticized for being entirely rhetorical and inadequate,<sup>10</sup> builds on the assumption that the role of the United Nations should be limited to that of partner, rather than sovereign administrator, to facilitate state-building “owned” by the national authorities.<sup>11</sup> Inherently an exit strategy, the light footed approach seeks to limit the level of dependency created by the assumption of direct executive functions so the departure of the United Nations will not result in a reversal of reforms undertaken.

Since December 2001, the United Nations, in conjunction with bilateral initiatives, worked towards the establishment of democratic institutions in post-Taliban Afghanistan. Under the mandate of the “Bonn Agreement,”<sup>12</sup> and the recently adopted Afghanistan Compact,<sup>13</sup> the United Nations has supported the implementation of

8. Lakhdar Brahimi served as Special Representative of the Secretary-General from 2001 to 2004, biography *available at* <http://www.un.org/News/dh/iraq/brahimi-bio-jan04.htm>. Since 2004, the U.N. Assistance Mission in Afghanistan is headed by Jean Arnault, biography *available at* U.N. Information Service, Jean Arnault Appointed Special Representative of Secretary-General for Afghanistan and Head of U.N. Assistance Mission in Afghanistan, <http://www.unis.unvienna.org/unis/pressrels/2004/sga865.html>.

9. See S.C. Res. 1401, ¶ 1, U.N. Doc. 5/RES/1401 (Mar. 28, 2002) (regarding the establishment of a “U.N. Assistance Mission in Afghanistan”) (emphasis added by the Author); The Secretary-General, *Report of the Secretary General on the Situation in Afghanistan and its Implications for International Peace and Security*, ¶¶ 94–98, U.N. Doc. A/56/875–S/2002/278 (Mar. 18, 2002) [hereinafter *2002 Report of the Secretary-General*].

10. See Chesterman, *supra* note 5, at 344 (providing a critique of the “light footed” approach and the axiom of ‘national ownership’).

11. *2002 Report of the Secretary-General*, *supra* note 9, ¶ 98(b), (d).

The overall objective of UNAMA should be to provide support for the implementation of the Bonn Agreement processes, including the stabilization of the emerging structures of the Afghan Interim Authority, while recognizing that the responsibility for the Agreement’s implementation ultimately rests with the Afghans themselves . . . UNAMA should aim to bolster Afghan capacity (both official and non-governmental), relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate ‘footprint’.

12. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Bonn, F.R.G., (Dec. 5, 2001), *available at* <http://www.afhangovernment.com/AfghanAgreementBonn.htm> [hereinafter *Bonn Agreement*]; see also S.C. Res. 1383, ¶ 1, U.N. Doc. S/RES/1383 (Dec. 6, 2001) (endorsing the Bonn Agreement).

13. The Afghanistan Compact, adopted at the London Conference on Afghanistan, Jan. 31-Feb. 1, 2006, Annex to the Letter dated Feb. 9, 2006, from the

the roadmap for the establishment of the interim administration and the introduction of constitutional as well as legislative reforms necessary for the functioning of a democratic state. As noted in the recently released National Human Development Report,

the process envisaged in Bonn was built on the international community's assumption that a democratic and representative state would allow Afghans to exit the vicious cycle fuelled by a history of internal armed conflict, natural disasters and underdevelopment, as well as foster stability in the region, which would cut the roots of terrorism.<sup>14</sup>

To generate continuous donor support (i.e., bilateral and multilateral funding), references to the need to build a democratic Afghanistan in furtherance of international peace and stability are often made.<sup>15</sup> However, one should be cautious in viewing Afghanistan entirely through a realist security paradigm because there is a risk of focusing exclusively on specific security related issues, such as military campaigns against the remnants of the Taliban and the security sector reform, to the detriment of an overall human development agenda.<sup>16</sup>

While most would agree on the ultimate "vision" for Afghanistan, namely the existence of a democratic state in which human development can thrive,<sup>17</sup> the question of the means by which it can be attained remains subject to contention. It is inherent in the United Nations' mandate, particularly the requirement of consent by the affected state in cases falling short of any Chapter VII enforcement measures—that the international community adopt an institutional approach to state-building ("top-down")—in the hope that services provided by newly built or reformed institutions of governance will eventually trickle down and generate the level of acceptance required for a state structure to become effective. Such an approach, when

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Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2006/90.

14. UNDP, AFGHANISTAN NATIONAL HUMAN DEVELOPMENT REPORT 2004: SECURITY WITH A HUMAN FACE 125–26 (2005) [hereinafter AFGHANISTAN NHDR].

15. See e.g., GOVERNMENT/INTERNATIONAL AGENCY REPORT, SECURING AFGHANISTAN'S FUTURE: ACCOMPLISHMENTS AND THE STRATEGIC PATH FORWARD 8 (2004), <http://www.adb.org/Documents/Reports/Afghanistan/securing-afghanistan-future-final.pdf> (providing President Hamid Karzai's statement that "a stable Afghanistan is a precondition for regional stability and global security").

16. AFGHANISTAN NHDR, *supra* note 14, at 6 ("For too long, Afghanistan's security problem has been interpreted narrowly as the security of the 'state' from internal and external aggression, or as the protection of the interests of fragmented groups claiming political legitimacy in the absence of a state, or from the position of global and regional interests.")

17. The contentious issue remaining is, to what extent traditionalism practiced in most areas of the country on the basis of tribal "laws" can and should be reconciled with (Western) modernism based on such a democratic vision.

preached and practiced exclusively, no doubt merits substantial criticism, particularly in the dimensions of the rule of law paradigm.<sup>18</sup> However, when it comes to laying the foundation of a democratic state in a post-conflict context, such as Afghanistan, it seems indispensable to focus first on re-creating an enabling political environment, i.e., basic state structures and their underlying legal framework (legislature, executive, and judiciary), for development and stability to evolve.<sup>19</sup> In a way, this institutional approach is premised on the assumption that feeding the chicken will ultimately generate the eggs. For these democratic institutions to evolve on the basis of certain democratic legal parameters, it is necessary to carve out a formal framework that would function as the conceptual foundation for all branches of government.<sup>20</sup>

The basic legal framework of a modern democratic state is promulgated by a constitution that serves as the basic law of the state. In the aftermath of non-democratic regimes, the process of constitution-making is as important as the product—the Constitution itself. A Constitution that does not adequately reflect the will of the majority and thus is not commonly accepted will suffer from a lack of effectiveness that threatens to undermine the emergence of a culture of constitutionalism.<sup>21</sup> Naturally, any attempt at constitution-making will grapple with the tension between adopting a revolutionary or evolutionary approach and always entails a considerable measure of imposition by a minority—the drafters—on the majority the

18. See Stephen Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, 7–25 (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Working Paper No. 41 Oct. 2003).

19. See Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The U.N. Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 58 (2001) (discussing the difficulties in establishing such a legal framework, particularly for the administration of justice, in Kosovo and East Timor); see also Antonia Potter, *The Rule of Law as The Measure of Peace? Responsive Policy for Reconstructing Justice and the Rule of Law in Post Conflict and Transitional Environments* (Ctr. for Humanitarian Dialogue, Paper for UNU-WIDER Conference on "Making Peace Work", Helsinki, May 4–5, 2004) available at <http://www.hdcentre.org>; J. Alexander Thier, *Re-establishing the Judicial System in Afghanistan* (Ctr. On Democracy, Dev. and the Rule of Law, Working Paper No. 19, Sep. 1, 2004), [http://iis-db.stanford.edu/pubs/20714/Reestablishing\\_the\\_Judiciary\\_in\\_Afghanistan.pdf](http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf).

20. This is not to say that the formal framework will automatically lead to the establishment of functioning democratic structures. In fact, there has traditionally been a wide gap in Afghanistan between the formal (legal) framework as promulgated by the Constitution and implementing laws on the one hand, and the (rural) reality on the other. Afghanistan's constitutions and laws have been notorious for their inefficacy. Simultaneously, it should be borne in mind that Afghanistan had its own formal structures even during the time of the Taliban regime. However, the point here is that a formal framework is a precondition for any democratic state to evolve, without being sufficient in itself.

21. Cf. VIVIEN HART, UNITED STATES INSTITUTE OF PEACE [USIP], SPECIAL REPORT: DEMOCRATIC CONSTITUTION MAKING (2003), <http://www.usip.org/pubs/specialreports/sr107.pdf>.

constituents.<sup>22</sup> The democratic deficit inherent in the self-appointment of a transitional authority mandated to re-institute permanent state structures after civil war can only be overcome by designing a process that sufficiently allows for the emergence of a democratic dialogue and participation. Naturally, transitional authorities, particularly those emanating from the victorious party of an internal armed conflict, will be reluctant to cede powers and share governmental authority with representatives from the defeated camp. However, in circumstances such as the one prevailing in Afghanistan in late 2001, where the international community or a few exponents of “regime change” had effectuated the main thrust for the ousting of the non-democratic regime,<sup>23</sup> it was feasible to gradually introduce democratic processes to furnish the legitimacy of the future state and its administration. In inducing democratic—i.e., participatory—processes, the primary focus will be on the holding of presidential and parliamentary elections and not necessarily on processes envisaged for crafting a new constitutional framework which is to provide the legal terrain on which the elections can be held. However, public participation in the building of the foundations of a democratic state has been seen as a valid and effective means of furnishing an emerging culture of democracy.<sup>24</sup> In fact, numerous claims were made by national and international actors that the constitution-making process needed to be as participatory as possible to safeguard the legitimacy of the outcome, thus creating an environment for democracy to thrive.<sup>25</sup> This becomes important in circumstances in which military intervention—i.e., regime-change—was morally based on the premise and promise that non-democratic structures needed to be replaced by democracy in furtherance of the common good. Accordingly, while focusing its initial assistance efforts on the expedited creation of such a framework for Afghanistan, the international community acknowledged the need for public participation to safeguard some measure of common acceptance by the people and hence the public as well as international legitimacy.

The constitution-making process in Afghanistan, however, has not been immune from substantive criticism as to its lack of sufficient

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22. See Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191 (1995).

23. Cf. Simon Chesterman, *Humanitarian Intervention in Afghanistan*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 163, 170 (Jennifer M. Welsh ed., 2004).

24. HART, *supra* note 21, at 11–12; Yash Ghai, *A Journey Around Constitutions: Reflecting on Contemporary Constitutions*, 1, 20 (2005) (paper on file with the Author).

25. See e.g., International Crisis Group [ICG], *Afghanistan's Flawed Constitutional Process* 27–29 (June 12, 2003), <http://www.crisisweb.org/home/index.cfm?id=1639&l=1>.

public dialogue and participation.<sup>26</sup> It may be tempting to compare Afghanistan's constitution-making efforts with the simultaneous drafting of a new Constitution for the European Union, which offered far fewer opportunities for participation and remained the subject of an exclusive circle. A comparison, however, is improper. In Afghanistan, the international community's heavy attention and involvement fueled the efforts by the national transitional authority to strive for national as well as international legitimacy. Such a balance is difficult to achieve, particularly in a context where various ideological forces within a state are pulling into opposite directions of modernism and traditionalism. The internationality of the process, even though only accompanied by a "light footed" approach, had visible implications, not only in terms of process, but also in substance.

This Article highlights some of these implications by describing and analyzing the constitution-making process with a particular focus on how it was linked to the international legal framework. Apart from presenting the components of the process itself, this Article analyzes the international community's impact on the crafting of the constitution. Based on the understanding of the interaction between national state-building and international benchmarks, this Article evaluates how the recently adopted constitution links to the international legal framework and argues that the constitution, while paying lip-service to the adherence of international human rights law, does not adequately address the relationship between international legal obligations and municipal law. This Article will argue that the failure to adopt a specific mechanism to effectuate international law within the internal legal system may work against efforts by the international community to facilitate strong links to the international normative regime and its human rights standards in the new democratic state. The vagueness of the Constitution with respect to Afghanistan's international legal obligations in combination with the prevalence of Islamic principles may obviate the progressive features that the constitutional framers agreed upon in early-January 2004.

## II. THE INTERNATIONAL LEGAL FRAMEWORK FOR THE REBUILDING OF AFGHANISTAN (THE "BONN PROCESS")

The war against terrorism in Afghanistan had barely begun when the U.N.-brokered talks in Bonn in early-December 2001 led to

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26. *E.g. id.*; see also ICG, *Afghanistan: The Constitutional Loya Jirga* 1-2 (Dec. 12, 2003), <http://www.crisisweb.org/home/index.cfm?id=2417&1=1>.

the “Bonn Agreement,”<sup>27</sup> which was to set the roadmap for Afghanistan’s transition from collapsed state to democracy. While suffering from a lack of proper representation,<sup>28</sup> the agreement envisaged specific processes by which democratic institutions of governance were to be established in a country which had witnessed decades of occupation and civil war.<sup>29</sup> Ambitious in its timeline, the Preamble recognizes “the need to ensure broad representation in these interim arrangements of all segments of the Afghan population, including groups that have not been adequately represented at the U.N. Talks on Afghanistan” and noted that “these interim arrangements are intended as a first step toward the establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative government, and are not intended to remain in place beyond a specified period of time.”<sup>30</sup> In essence, the Bonn Agreement foresaw that under the guidance and scrutiny of the international community, a non-representative elite would follow the process agreed upon to eventually cede interim authority to the democratically established institutions. Naturally, such an approach in itself bears considerable risks depending on the benevolence of the non-representative interim authority. However, taking into consideration the international military attention Afghanistan had received a few weeks prior to Bonn and the apparent commitment of the international community to effectuate a lasting regime-change,<sup>31</sup> there was considerable military and financial leverage to initiate (if not impose) a process that would lead to the replacement of the interim authority by governmental institutions accountable to the people. The Bonn Agreement makes ample reference to the role of the United Nations “as the internationally recognized impartial institution,” that would have a “particularly important role to play . . . in the period prior to the establishment of permanent institutions in Afghanistan.”<sup>32</sup> It must be emphasized, however, that the degree to which the United Nations was to assume direct

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27. Bonn Agreement, *supra* note 12; see Ebrahim Afsah & Alexandria Ghur, *Afghanistan: Building a State to keep the Peace*, in 9 MAX PLANK U.N.Y.B. 373, 410–16 (2005) (discussing the negotiations in Bonn).

28. Barnett R. Rubin, *Crafting a Constitution For Afghanistan*, 15 J. DEMOCRACY 5, 7 (2004).

29. See Afsah & Ghur, *supra* note 27, at 384 (noting that the focus of the Bonn Agreement is to create a process instead of a formal agreement over substantive issues).

30. Bonn Agreement, *supra* note 12, pmb1.

31. Strictly speaking, the removal of the internationally non-recognized Taliban regime was not a case of regime change, as it co-existed next to the internationally recognized Islamic State of Afghanistan headed by Professor Rabbani and the legitimate representative at the United Nations.

32. Bonn Agreement, *supra* note 12, pmb1., annexes II-III (providing for specific roles of the United Nations in the state-building processes envisaged therein).

responsibilities for the state-building process was deliberately limited to the so-called “light-foot” approach.<sup>33</sup> Drawing upon the experiences in Kosovo and East Timor,<sup>34</sup> the approach largely focused on assisting the national authorities, the interim and transitional government, in the implementation of the Bonn Agreement,<sup>35</sup> with the latter to retain overall political accountability and control, at least in theory. The model of such partnership between a recently instituted transitional authority and the United Nations to bring about the realization of the state-building process according to previously defined benchmarks agreed upon a few days after a military intervention marked an evolution of U.N. peace-building.<sup>36</sup>

Viewed from the international law perspective, the Bonn Agreement escapes traditional distinctions between domestic agreements and international treaties. Nor is it a peace-treaty concluded between various factions of a civil war, which may enjoy international legal personality and thus limit treaty-making capacity even though technically defined as insurgents.<sup>37</sup> It is tempting to question how the so-called “participants in the UN Talks on Afghanistan,”<sup>38</sup> who were mostly representatives of the Northern Alliance forces fighting alongside the Coalition Forces next to delegations from Cyprus, Rome, and the Peshawar *Loya Jirga* processes,<sup>39</sup> could enter into an agreement that arguably created rights and obligations for the United Nations, which was only a witness to the agreement.<sup>40</sup> That raises the crucial issue of the

33. 2002 Report of the Secretary-General, *supra* note 9, ¶ 98(d).

34. Brahimi Report, *supra* note 5, at 3; Daniel Fitzpatrick, *Developing a Legal System in East Timor: Some Issues of U.N. Mandate and Capacity*, 5 AUSTL. REV. INT'L & EUR. L. [ARIEL] 5 (2000).

35. See Bonn Agreement, *supra* note 12, annex III, ¶¶ 3–4 (noting, however, that in Annex III of the Agreement, the Bonn participants requested that the United Nations conduct the registration of voters for general elections and a census of the population of Afghanistan).

36. Thilo Marauhn, *Konfliktfolgenbewältigung in Afghanistan zwischen Utopie und Pragmatismus: Die völkerrechtlichen Rahmenbedingungen der Übergangsverwaltung*, 40 ARCHIV DES VÖLKERRECHTS (AVR) 480, 507 (2002); see also Chesterman, *supra* note 5, at 339, 341.

37. Cf. Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'*, 221–22 (2004); Michael Schoiswohl, *De Facto-Regimes and Human Rights Obligations—The Twilight Zone of Public International Law*, 6 AUSTL. REV. INT'L & EUR. L. (ARIEL) 45 (2001).

38. Bonn Agreement, *supra* note 12, pmb.

39. Rubin, *supra* note 28, at 5–6, 8; Helena Malikyar & Barnett R. Rubin, *Center-periphery Relations in the Afghan State: Current Practices, Future Prospects* (Ctr. On Int'l Cooperation, New York Univ., Dec. 2002), <http://www.cic.nyu.edu/archive/pdf/CPReport0107031.pdf>, [hereinafter *Center-Periphery*].

40. After the list of signatories the Bonn Agreement makes reference to “Witnessed for the U.N. by Mr. Lakhdar Brahimi, Special Representative of the Secretary-General for Afghanistan.” See Bonn Agreement, *supra* note 12. It is also

capacity in which the participants to the U.N. talks on Afghanistan were actually acting. Were they acting as internationally recognized and thus legitimate representatives of Afghanistan or as a continuation of the Islamic State of Afghanistan under Professor Rabbani, the Head of the Islamic State of Afghanistan since 1992? Or were they merely recognized as a group of individuals, who enjoyed the military power and international support to form a government, which, upon its formal inauguration, would become the legitimate, internationally recognized, government of that state? On its face, the Bonn Agreement would seem to imply the latter understanding by stipulating that "upon the official transfer of power, the Interim Authority shall be the repository of Afghan sovereignty" which shall "represent Afghanistan in its external relations and shall occupy the seat of Afghanistan at the U.N. and in its specialized agencies, as well as in other international institutions and conferences."<sup>41</sup>

In the absence of any clear legal categorization of the Bonn Agreement under international law, attempts were made to apply the theory of self-determination to elevate the Agreement to the level of other international agreements. The argument put forth in this regard hinges upon the presumption that the groups participating in the talks acted as representatives of various ethnic groups and thus were temporarily and collectively exercising the right to self-determination on behalf of the Afghan population.<sup>42</sup> However, such a legal interpretation of the Bonn Agreement as a treaty under international law is impaired by the fact, acknowledged by the Agreement itself, that not all groups were adequately represented.<sup>43</sup> Analogies to cases where *de facto* governments were held to possess treaty-making capacity, such as the Palestine Liberation Organization, fail to recognize the factual circumstances underlying the Bonn Agreement, most importantly the fact that the representatives of the various ethnic groups did not purport to exercise any right to self-determination on behalf of their constituencies. Nor were they internationally recognized as a

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noteworthy that the Bonn Agreement, according to its final provisions, is to be deposited in the archives of the United Nations. *See id.*

41. *Id.*, § I, ¶ 3.

42. Marauhn, *supra* note 36, at 491. It should be noted that Professor Marauhn's reading of the Bonn Agreement as explicitly entrusting the interim authority with the function to act as the "repository of the Afghan right to self-determination" does not correspond to the wording of the pertinent provision in the Agreement. *See id.* (emphasis added). In fact, the Agreement in regard of the Interim Authority speaks of "repository of Afghan sovereignty" while not mentioning the right to self-determination throughout all provisions. *See Bonn Agreement, supra* note 12, § I, ¶ 3.

43. Bonn Agreement, *supra* note 12, pmb.; *see also* Rubin, *supra* note 28, at 5, 7.

collective representation of the Afghan people. To the contrary, as stipulated in the Bonn Agreement, it was understood that full representation had yet to be achieved.<sup>44</sup> However, even if one were to qualify the participants to the Bonn talks as ‘collective repository of the Afghan right to *self-determination*’ it still remained doubtful that the agreement could be interpreted as one being entered into between two or more subjects of international law.<sup>45</sup> After all, the United Nations signed the Bonn Agreement only as witness and not as a party.<sup>46</sup> It follows that one would have to qualify each of the signing parties to the Agreement as subjects of international law, which would contradict the assumption of a collective exercise of self-determination vis-à-vis the United Nations. While the contents of the Bonn Agreement could arguably be understood as a direct invocation of the right to internal self-determination—the peoples’ right to assert their will, to choose a government, and be represented<sup>47</sup>—it is

44. The terms of the Bonn Agreement, in particular its Preamble, would seem to aim at laying the foundation for full representation to be achieved by the processes envisaged for the building of democratic state institutions. The Agreement notes the “need to ensure broad representation in these interim arrangements or all segments of the Afghan population, including groups that have not been adequately represented at the UN Talks on Afghanistan,” and also notes that the interim arrangements are “intended as a first step towards the establishment of a broad-based, gender sensitive, multi-ethnic and fully representative government.” See Bonn Agreement, *supra* note 12, pmb1.

45. The (authoritative) 1969 Vienna Convention on the Law of Treaties stipulates that it applies to treaties between states (Art. 1), while acknowledging in Article 3, that this exclusion shall not affect the legal force as well as the application of the rules set out in the Convention with respect to international agreements concluded between states and other subjects of international law. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 333–34; 8 I.L.M. 679 (*entered into force* Jan. 27, 1980). [hereinafter Vienna Convention].

46. One scholar, stating that a copy “shall remain deposited in the archives of the U.N.,” argues that the final provision of the Bonn Agreement may be cited in support of the Agreement’s qualification as a treaty under international law by insinuating that the provisions of Article 102 of the U.N. Charter may be applied flexibly. See Marauhn, *supra* note 36, at 493 n.65. However, in the view of the Author, such an interpretation not only stretches the terms used in Article 102, para. 1, which refers to “treaty and international agreements entered into by any Member of the U.N. . . . shall as soon as possible be registered with the Secretariat,” too far but also overlooks that the Bonn Agreement merely calls for being “deposited” and not registered and published as required by Art. 102. *Id.*; see Bonn Agreement, *supra* note 12, § V.

47. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 101 (1995) (defining self-determination as “the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime . . . . It is an ongoing right”). However, the exact specifications of a right to internal self-determination, in particular, whether or not it includes a right to democratic governance and ultimately a right to autonomy, unfortunately seem to remain rather in the dark, largely as a result of ongoing development. See U.N. CHARTER COMMENTARY, *supra* note 5, at 56; Felix Ermacora, *Autonomie als innere Selbstbestimmung*, 38 ARCHIV DES VÖLKERRECHTS (AVR) 285, 289 (2000); Daniel

presumably safe to speculate that the Bonn Agreement does not qualify as an agreement that is enforceable under international law and that those provisions that relate to the United Nations should be interpreted as a declaration concerning the latter's mandate in the political reconstruction of Afghanistan. This view is confirmed by the conduct of the U.N. Security Council, which endorsed the Bonn Agreement with a U.N. Security Council Resolution.<sup>48</sup> Such a resolution would not have been necessary if the Bonn Agreement were to be read as an international agreement between the United Nations and "Afghanistan" represented by the participants to the Bonn talks.<sup>49</sup> Though the Security Council adopted the same mechanism, the 1995 Dayton Peace Agreement for the conflict in Bosnia-Herzegovina qualified as an inter-state agreement, given the parties involved represented state entities, namely Bosnia Herzegovina, Croatia, and Serbia.<sup>50</sup>

While these issues undoubtedly merit closer scrutiny, they are beyond the scope of this Article. Nevertheless, it is noteworthy to observe that the democratic legitimacy of the participants vis-à-vis the Afghan constituency, and thus the democratic legitimacy of the agreement as such, remains an unresolved matter. This amply demonstrates the difficulties attached to building a democratic state on the fragments of war, in a context where legitimacy is to be generated on the basis of a non-representative transitional de facto authority. One may further be tempted to conclude that the building blocks for democracy after a regime change effectuated with the military support of the international community, or at least one of its strongest representatives, will inescapably and inherently be non-democratic.

The building-blocks for democratic reform are spelled out in the Bonn Agreement. It envisages the establishment of an Interim Authority consisting of the Interim Administration, a Special Independent Commission for the Convening of the Emergency *Loya Jirga*,<sup>51</sup> and a Supreme Court of Afghanistan, as well as any other

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Thürer, *Das Selbstbestimmungsrecht der Völker*, 22 ARCHIV DES VÖLKERRECHTS (AVR) 113, 126 (1984);

48. See S.C. Res. 1383, ¶ 1, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

49. This is not to understate the importance of the U.N. Security Council endorsement in reinforcing the adherence by all parties involved in the Bonn talks to the compromises reflected in the Bonn Agreement as well as in facilitating reform.

50. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75, 77.

51. A *Loya Jirga* represents the traditional consultative mechanism in Afghan community affairs. *Loya Jirgas*, which essentially are composed of community leaders with high (political) standing, have formed an important mechanism in the political developments of Afghanistan in the past, such as the adoption of previous constitutions and resolutions of matters of fundamental interest to the state. See Christine Noelle-

courts as may be established by the Interim Administration.<sup>52</sup> The Emergency *Loya Jirga* was then, according to the terms of the Agreement, to “decide on a Transitional Authority, including a broad-based transitional administration to lead Afghanistan until such time as a fully representative government can be elected through free and fair elections . . . .”<sup>53</sup> To lay the necessary legal framework of the future State of Afghanistan in general and for the holding of Presidential and Parliamentary elections in particular, the Bonn Agreement provides for a process by which Afghanistan’s new constitution was to be developed and adopted. Again, it draws upon the concept of *Loya Jirga* to root the state-building exercise in Afghan traditions<sup>54</sup> to furnish the democratization process with a measure of participation in furtherance of generating legitimacy. Assisted by the United Nations, a Constitutional Commission was to be established which would prepare the convening of the Constitutional *Loya Jirga* within eighteen months of the establishment of the Transitional Authority, to adopt a new constitution for Afghanistan.<sup>55</sup>

### III. OVERVIEW OF THE CONSTITUTION-MAKING PROCESS IN AFGHANISTAN UNDER THE INTERNATIONAL LEGAL FRAMEWORK

Under the aegis of the transitional administration indirectly elected by the Emergency *Loya Jirga* in June 2002 and headed by Hamid Karzai as the President of the Transitional Islamic State of Afghanistan,<sup>56</sup> the preparations for the drafting of a new constitution commenced with the establishment of the Constitutional Drafting Commission in October 2002.<sup>57</sup> The nine members of the Drafting Commission, supported by a Secretariat and the United Nations, were not to develop a comprehensive Draft Constitution, but rather to produce recommendations for the President of the Islamic Transitional State of Afghanistan, so as to form of the first consensus on key constitutional issues with the involvement of Pushtun representation, including influential returnees. They produced a first text based on the 1964 Constitution,<sup>59</sup> which the Bonn Agreement

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Karimi, *The Loya Jirga: An Effective Political Tool? A Historical Overview*, in AFGHANISTAN: A COUNTRY WITHOUT A STATE? 37 (Christine Noelle-Karimi et al. eds., 2002); Rubin, *supra* note 28, at 7; Ali Wardak, *Building A Post-War Justice System In Afghanistan*, 41 CRIME L. & SOC. CHANGE 319, 326–28 (2004).

52. Bonn Agreement, *supra* note 12, § I, ¶ 2.

53. *Id.* § I, ¶ 4.

54. See Noelle-Karimi, *supra* note 51, at 37.

55. Bonn Agreement, *supra* note 12, § I, ¶ 6.

56. See Rubin, *supra* note 28, at 9 (discussing the Emergency *Loya Jirga*).

57. The Constitutional Drafting Commission was inaugurated by King Zahir Shah in his capacity as “Father of the Nation.” See *infra* Part IV.1.

59. Rubin, *supra* note 28, at 10.

had largely revived as the transitional constitutional framework to the extent that its provisions were not inconsistent with those in the Agreement and with the exception of those provisions relating to the monarchy.<sup>60</sup> The recommendations on the content as well as format of the constitution were presented to the transitional President in March 2003, which paved the way for the appointment of the Constitutional Review Commission in April 2003. The thirty-five members of the Review Commission—including seven women—were chosen to represent the country's diverse regional and ethnic composition and to satisfy the political, constitutional, economic, social, and religious requirements necessary for general acceptance by the population. To facilitate a constitutional dialogue with the Afghan constituencies, a public consultation process was launched in May 2003 accompanied by various efforts towards public information.<sup>63</sup> In total, more than 460,000 questionnaires were distributed by the Secretariat of the Commission out of which 80,000 completed questionnaires were received along with numerous memoranda and other recommendations.<sup>64</sup> In addition, the members of the Review Commission attended more than five-hundred public consultation meetings held in all thirty-two provinces of Afghanistan as well as refugee groups in Iran and Pakistan. These completed questionnaires along with the views expressed by the people in the course of the public consultation meetings were recorded by the Secretariat and, with the support of the United Nations, compiled in the Public Consultation Report on the basis of which the members of the Constitutional Review Commission prepared the Draft Constitution. The President released the Draft Constitution to the public on November 3, 2003.<sup>67</sup>

In anticipation of the Constitutional *Loya Jirga* (CLJ) itself and based on the procedure decreed by President Hamid Karzai,<sup>68</sup> provincial registration meetings were conducted in thirty-two provinces to register the Emergency *Loya Jirga* district

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60. Bonn Agreement, *supra* note 12, § II, ¶ 1.

63. Rauf Roashan, *Afghan Constitution Building Exercise: Taking the Case to the People* (2003), <http://www.cic.nyu.edu/archive/pdf/TakingtheCasetothePeople.pdf>.

64. UNDP, SUPPORT TO THE CONSTITUTION-MAKING PROCESS IN AFGHANISTAN: FINAL REPORT (2002–2004), at 15 (2005).

67. Rubin, *supra* note 28, at 10.

68. Decree of the President of the Islamic Transitional State of Afghanistan on the Convening of the Constitutional *Loya Jirga*, No.24.04.1382 (July 15, 2003) (Afg.) [hereinafter Decree].

representatives who formed the electorate for the 344 CLJ delegates in early December. The elections for the 106 representatives of the so-called “Special Category Groups”—women, refugees in Pakistan and Iran, internally displaced peoples, Kuchis, Hindus, and Sikhs—took place throughout the month of November.<sup>69</sup> In preparation for the CLJ, the Secretariat of the Constitutional Commission with the support of the U.N. Assistance Mission in Afghanistan and the U.N. Development Programme, organized and conducted general orientation meetings and sessions for the incoming delegates and special training and orientation for female delegates based on a manual developed by the working group of the Ministry of Women’s Affairs.

As envisaged in the Bonn Agreement—and still within the timeframe called for therein—the CLJ Convention convened on December 14, 2003, and after lengthy stalemates, adopted the Constitution by consensus on January 3, 2004.<sup>70</sup> The President officially proclaimed the Constitution on January 26, 2004.<sup>71</sup>

#### IV. THE MAIN FEATURES OF THE 2004 CONSTITUTION

##### A. Background

As any other constitution, Afghanistan’s basic law adopted on January 3, 2004, cannot be fully understood without reference to Afghanistan’s socio-political history and context.<sup>72</sup> Most important, the population of Afghanistan consists of various ethnic groups, reflecting the geopolitical influence of its neighboring states of Iran, Pakistan, China, Tajikistan, and Uzbekistan. Its society is characterized as multi-ethnic, with the Pushtuns claiming to represent the majority, followed the Tajiks, Uzbeks, Hazaras, Turkmens, Baluchs, and Nuristanis, to name but the most common groups existing in Afghanistan today.<sup>73</sup> While the extent to which ethnic fragmentation and domination have played a role in Afghanistan’s struggle for stability and peace remains a matter of controversy,<sup>74</sup> the debate over how to constitute the Afghan state was

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69. *Id.* art. 5.

70. Rubin, *supra* note 28, at 5.

71. *Id.*

72. With regard to the history and fabric of Afghan society, see e.g., RALPH H. MAGNUS & EDEN NABY, AFGHANISTAN: MULLAH, MARX AND MUJAHID (rev. & updated ed. 2002); CHRIS JOHNSON ET AL., OVERSEAS DEV. INST., AFGHANISTAN’S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 4–5 (2003), available at <http://www.odi.org.uk/hpg>; Malikyar & Rubin, *supra* note 39, at 4.

73. MAGNUS & NABY, *supra* note 72, at 11.

74. AFGHANISTAN NHDR, *supra* note 14, at 100; Afsah & Guhr, *supra* note 27, at 378–82.

heavily influenced by ethnic politics: “Pushtuns have tended to want a strong and Pushtun-run central state. Tajiks have focused on power sharing in the central state, while Uzbeks and Hazaras have desired recognition of their identities and mechanisms of local self-government.”<sup>75</sup> Moreover, the main ethnic groups were divided along those who advocated centralized reforms to counteract the warlords that had evolved as a result of foreign intervention,<sup>76</sup> and those who rejected a centralized system as a pretext for the Pushtun’s reassertion of power and demanded the institution of a strong National Assembly (as well as a Prime-Minister) to curtail the power of the President, who, as most of the CLJ delegates took for granted, would continue to be Hamid Karzai. There were also those who sought the reinstatement of a constitutional monarchy which governed in a period of relative stability and peace under the reign of King Zahir Shah (1933–1973). Many Afghans considered the aging King, who had returned from his exile in Rome after the defeat of the Taliban, as the sole unifying figure to re-introduce a measure of stability after the years of internal conflict. However, the former King—officially named the “Father of the Nation” at the Emergency *Loya Jirga* and affirmed as such by Article 158 of the 2004 Constitution—had rejected the restoration of monarchy well before the convening of the CLJ.<sup>77</sup> Finally, while adherence to Islam as the religion of Afghanistan was never disputed, significant controversy emerged between those who advocated for the secularization of the State and those who insisted on the primacy of Islam to be upheld by the Supreme Court acting as a constitutional watchdog. These predispositions, which to varying degrees had also been articulated by the public, shaped the debate over key provisions of the Constitution to be adopted by the 502 CLJ delegates, who early into the Convention formed various alliances accordingly within the CLJ, resulting in cumbersome stalemates and daily stand-offs. The significant ethnic divide that surfaced at the CLJ escalated around the issues of parliamentarism versus presidentialism, official languages of the state, reformism or secularization versus

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75. Rubin, *supra* note 28, at 11.

76. See Antonio Giustozzi, *Respectable Warlords? The Transition from War of All Against All to Peaceful Competition in Afghanistan* (Jan. 29, 2003), <http://www.crisisstates.com/download/others/SeminarAG29012003.pdf> (discussing the “phenomenon” of warlordism in Afghanistan)

77. See CTR. INT’L COOPERATION (N.Y.U.), *AFGHANISTAN: TOWARDS A NEW CONSTITUTION 2* (2003) [hereinafter *NEW CONSTITUTION*]. It should be noted that the King was prevented from standing for office at the Emergency *Loya Jirga*, which had outraged many among the Afghan population. See JOHNSON ET AL., *supra* note 72, at 6.

79. See e.g., *Id.*; *NEW CONSTITUTION*, *supra* note 77; ActionAid, *What Poor Afghans Think: The New Afghanistan Constitution: A Need for Consultation and Participation* (2003), [http://www.actionaid.org.uk/\\_content/documents/af\\_survey.pdf](http://www.actionaid.org.uk/_content/documents/af_survey.pdf).

traditionalism, and centralism versus de-centralization. While difficult to measure, there is reason to assume that the heavy involvement of the international community, along with the broad media exposure of the constitution-making process, particularly the CLJ, significantly contributed to, if not determined, the compromises reflected in the Constitution. The international community influenced the constitution-making process not only through the United Nations, which worked closely with the Afghan authorities in the constitutional design and monitored the process intensively, but also bilaterally through the representations of the United States and the European Union in Kabul. In addition, internationally renowned scholars, national and international NGOs, and think tanks provided support to the Constitutional Commission and the *Loya Jirga* delegates in formulating various options based on comparative research and surveys with regard to the main features of the Constitution.<sup>79</sup>

*B. The 2004 Constitution—A Brief Overview and Discussion of its Main Features*

To a large extent, the 2004 Constitution is a mirror of the 1964 Constitution, which had been praised as liberal and relatively progressive, particularly in view of the priority it gave to parliamentary legislation over Islamic law.<sup>80</sup> However, apart from abandoning the model of constitutional monarchy envisaged in Article 1 of the 1964 Constitution, the 2004 Constitution departs significantly from its early predecessor in contentious areas, such as the relationship between Islam and statutory law, and the structure of government.

1. The Role of Islam and Constitutional Review

According to the letter of the Constitution, Afghanistan is an “Islamic Republic” with “the sacred religion of Islam” being the religion of the state.<sup>81</sup> Crucially, Article 3, which had been the subject of intense debates during the drafting and adoption process, provides that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” Initially, the October 2003 Draft Constitution had envisaged that “no law can be contrary to the sacred

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80. ICG, *supra* note 25, at 5. The text of the 1964 Constitution is reprinted in AFG., THE CONSTITUTIONS OF AFGHANISTAN: 1923–1996, (2004).

81. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN arts. 1–2 (2004), adopted Jan. 3, 2004, available at [www.oefre.unibe.ch/law/icl](http://www.oefre.unibe.ch/law/icl) [hereinafter AFG. CONST. (2004)].

religion of Islam *and the values of this Constitution.*"<sup>82</sup> A proposal had been made, supported by 105 CLJ delegates, to revise the language to "no law can be against the beliefs and provisions of the holy religion of Islam," and the Reconciliation Committee—consisting of the CLJ Chairs and the Chairpersons of the ten Working Committees—adopted the proposed change. While the variances seem nominal, they reflect the compromise reached in satisfying the demands of conservative Islamists and the international community, which insisted that reference to Islamic law (*shari'a*) be omitted from the text. Moreover, contrary to previous constitutions,<sup>83</sup> Article 3 does not specify one particular school of *shari'a*, such as the *Hanafi* or *Shia* jurisprudence.<sup>84</sup> As will be discussed in more detail below,<sup>85</sup> the formulation in Article 3 is considerably flexible and vague, bearing witness to the negotiations that ultimately led to its adoption. The potential for legal complexity arises in the context of international human rights standards, which may be seen as conflicting with the tenets of Islam. The matter is particularly sensitive in view of the Constitution's lip-service to international human rights standards (Article 7) on the one hand, and the Supreme Court's authority to "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*" spelled out in Article 121 of the 2004 Constitution on the other.<sup>86</sup> The review authority of the Supreme Court coupled with the primacy of Islam enshrined in Article 3 offers a backdoor through which the commitment to international human rights standards is potentially

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82. Draft Const. of Afg. art. 3 (Oct. 2003) [hereinafter Draft Const.], available at [www.constitution-afg.com](http://www.constitution-afg.com) (emphasis added).

83. Article 2 of the 1964 Afghan Constitution stipulated that, "Religious rites performed by the State shall be according to the provisions of the Hanafi doctrine." CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN art. 2 (1964) [hereinafter AFG. CONST. (1964)]; see THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 80.

84. Cf. Rubin, *supra* note 28, at 13; see also Said Amir Arjomand, *The Role of Religion and the Hanafi and Jafari Jurisprudence in the New Constitution of Afghanistan*, in NEW CONSTITUTION, *supra* note 77, at 18; JOHNSON ET AL., *supra* note 72, at 18. It should be noted, however, that the most recent Constitution contains references to both schools of thought, with an arguable preference for the former, when addressing the sources of law to be applied by courts. In Article 130 it states that, "the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the court shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner." AFG. CONST. art. 130 (2004). On the other hand, Article 131 provides that "the courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect." *Id.* art. 131.

85. See *infra* Part V.2.

86. AFG. CONST. art. 121 (2004) (emphasis added by the Author).

undermined.<sup>87</sup> To avoid an inherently conservative interpretation of Article 3 and role of Islam in relation to statutory law by the Supreme Court, proposals had been made during the drafting and adoption stage to establish some kind of Constitutional Court.<sup>88</sup> However, the idea of a Constitutional Court next to the Supreme Court did not find sufficient support within the *Loya Jirga* and was firmly rejected by the President's office.<sup>89</sup> Instead, an "Independent Commission for the supervision of the implementation of the Constitution" (Article 157) was established.<sup>90</sup> In the absence of any powers granted by the Constitution and the Supreme Court's prerogative to constitutional review, it remains doubtful that the Commission will have any significant role to play in being the guardian of constitutionality.

## 2. A Strong President

Another striking feature of the 2004 Constitution, which had been the subject of contentious debate, is the role of the President vis-à-vis the Parliament.<sup>91</sup> Initially, the Constitutional Commission had proposed a semi-presidential system, a President and Prime Minister, to furnish an ethnic equilibrium by balancing a Pushtun President with a non-Pushtun Prime Minister, the latter being subject to a confidence vote by the National Assembly. In the review stage prior to the CLJ, however, the confidence vote requirement had been dropped, resulting in a Prime Minister being solely appointed by the President while being subject to a vote of no-confidence by the National Assembly.

The semi-presidential system was finally abandoned entirely in the Draft Constitution announced by President Karzai in November 2003, giving rise to a full presidential system.<sup>92</sup> The CLJ finally

87. A key factor in this regard is the composition of the Supreme Court, which usually is comprised of Islamic scholars (*ulamas*) with little background in statutory (constitutional) law.

88. Cf. Donald L. Horowitz, *Constitutional Courts: Opportunities and Pitfalls*, in NEW CONSTITUTION, *supra* note 77; Herman Schwartz, *A Constitutional Court for Afghanistan*, in NEW CONSTITUTION, *supra* note 77, at 119; Said Amir Arjomand & Kim Lane Scheppele, *Constitutional Court for Afghanistan*, in NEW CONSTITUTION, *supra* note 77, at 125; Pasquale Pasquino, *Options for a Constitutional Court in Afghanistan*, in NEW CONSTITUTION, *supra* note 77, at 141; JOHNSON ET AL., *supra* note 72, at 114.

89. A proposal from the CLJ floor to establish a Constitutional High Court or High Constitutional Council to exercise the review powers enshrined in Article 121 did not attain a sufficient number of signatures to be further considered by the Reconciliation Committee.

90. See AFG. CONST. art. 157.

91. Cf. Jose Cheibub, *Systems of Government: Parliamentarism & Presidentialism*, in NEW CONSTITUTION, *supra* note 77, at 114; JOHNSON ET AL., *supra* note 72, at 101.

92. Cf. Rubin, *supra* note 28, at 12.

witnessed a revival of claims to strengthen the Parliament to the detriment of presidential powers. A strong parliamentary system was favored by non-Pushtun, who sought to control the presumably Pushtun President (Karzai), and even advocated for the CLJ to assume the role of Parliament in the interim until elections were conducted.<sup>93</sup> In the end, fears of a fragmented and dysfunctional National Assembly combined with a historic resentment against the role of political parties and international support for a strong President, resulted in full presidentialism with a system of checks and balances to be exercised by the National Assembly. Accordingly, the President, to be elected by popular vote,<sup>94</sup> serves as head of state and chairs the government.<sup>95</sup> The President enjoys considerable powers ranging from determining the fundamental policies of the state to the appointment of key officials.<sup>96</sup> In exercising the constitutional functions, however, the President is in many regards tied to the approval of the National Assembly, which may launch impeachment proceedings when the President is accused of having committed a “crime against humanity.”<sup>97</sup> While, similar to the Iranian model, the President himself is not authorized to dissolve the National Assembly.

### 3. Centralism

Closely linked to the arguments behind the debate over presidentialism or parliamentarism, the issue of decentralization in Afghanistan has remained contentious throughout the constitution-making process. The overarching theme concerned the extent to which an ethnically diverse Afghanistan could achieve political stability and development by either retaining and reinforcing central governance or leaning towards a federal structure, which would delegate significant executive and legislative powers to sub-units of that state.<sup>98</sup> Traditionally, Afghanistan has followed the principle of centralism with an administration that is “meant to enable the center to control the periphery, not to help local communities to exercise self-government.”<sup>99</sup> Despite initiatives within the CLJ to adopt

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93. Two proposals were made from the floor in this regard: (1) the formation of a Parliament from the members of the CLJ and (2) the establishment of an Interim National Assembly, consisting of the CLJ delegates, to assume all legislative authority until parliamentary elections.

94. AFG. CONST. art. 61 (2004).

95. *Id.* arts. 60–61.

96. *Id.* art. 64.

97. *Id.* art. 69.

98. Yash Ghai, *Unitary or Federal: A False Choice? Decentralization of State Powers in Afghanistan*, in NEW CONSTITUTION, *supra* note 77, at 145.

99. Rubin, *supra* note 28, at 15; *cf.* Malikyar & Rubin, *supra* note 39, at 37.

measures to prevent Pushtun imposition through the center, the fear of disintegration in view of the ethnic diversity characterizing Afghanistan coupled with the assumption that a strong centralized government would be required to ensure political stability after the years of internal conflict resulted in the affirmation of the principle of centralism. However, some measure of local governance is provided for in the Constitution, particularly Article 137, which provides that the government, in preserving the principles of centralism, shall transfer necessary powers to local administrations to accelerate and improve economic, social, and cultural matters and foster people's participation in developing national life.<sup>100</sup> Moreover, the Constitution envisages the establishment, through popular vote, of provincial councils in every province and local councils in districts.<sup>101</sup> Apart from the role in the establishment of the Upper House of the Parliament, the provincial council is to participate in the attainment of the development objectives of the state and improvement of affairs of the province and shall advise the provincial administrations on related issues.<sup>102</sup> The district councils are meant to organize activities and attain active participation of the people in provincial administrations in districts and in villages.<sup>103</sup> The specific mandates and powers vis-à-vis the administration of the province and district council are deferred to further implementing legislation currently being developed.

#### 4. Ethnic Diversity and Minority Rights

Not surprisingly, the constitutional debate was significantly shaped by diverging approaches on how Afghanistan's ethnic diversity should be adequately reflected in the Constitution. To complicate a matter already difficult to resolve, the debate on issues such as official languages, recognition of minorities and their language, national anthem, etc., was closely linked to the formation of opposing groups within the CLJ on broader political issues, such as the debate between presidentialism and parliamentarism outlined earlier. In other words, parallel debates on various contentious issues were increasingly associated with ethnic considerations and concessions sought or made on one end entailed implications on the other. Among all the areas of disagreement, whether driven by ethnic or other considerations, the language of Afghanistan aroused the most controversy. The extent to which various languages spoken in Afghanistan should be recognized by the Constitution, if not become

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100. AFG. CONST. art. 137 (2004).

101. *Id.* arts. 138, 141.

102. *Id.* art. 139.

103. *Id.* art. 140.

official languages of the state, swiftly evolved into a venting device for ethnic politics lurking underneath most of the debate. Among all the languages spoken in Afghanistan, Pushtu (the language of the previously ruling group) spoken by 35% and Dari (a form of Persian) spoken by at least 50% are the most common.<sup>104</sup> With a reasserted sense of political significance, the Pushtuns were keen on strengthening their ethnic heritage and thus strongly advocating for Pushtu being one of the, if not the only, official languages. Conversely, the northern groups—the Tajiks and Uzbeks—demanded the recognition and promotion of Turkic languages being spoken by 11%.<sup>105</sup> Add the relationship between Dari and Pushtu, the issue of citizenship, and the language of the national anthem to the equation and the dilemma seemed irresolvable.<sup>106</sup> The CLJ delegates, however, against massive mobilization of Pushtun delegates close to Hamid Karzai threatening to render the assembly dysfunctional, managed to reach a compromise on the basis of the 1964 Constitution and the 2003 Draft Constitution.<sup>107</sup> In both, Dari and Pushtu were proclaimed as the official and “national” language of the state.<sup>108</sup> Article 16 of the 2004 Constitution reconciles the diverging views by declaring Pushtu and Dari as official languages of the state, while recognizing Uzbeki, Turkmani, Baluchi, Pachaie, Nuristani, Pamiri, and others as current languages of the country. It adds that,

[i]n areas where the majority of the people speak in any of Uzbeki, Turkmani, Pachaie, Nuristani, Baluchi or Pamiri languages, any of the aforementioned language, in addition to Pashto and Dari, shall be the third language, the usage of which shall be regulated by law.<sup>109</sup>

Moreover, the Constitution provides that effective programs are to be designed and applied to foster and develop *all* languages of Afghanistan and that the usage of all languages in the country is to

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104. Central Intelligence Agency (CIA), *The World Factbook*, Afghanistan, <http://www.cia.gov/cia/publications/factbook/geos/af.html>.

105. *Id.*

106. Rubin, *supra* note 28, at 17.

107. *Id.* (noting that, in fact, the matter could initially not be resolved through the Working Committees and the Reconciliation Committee. Several proposals for amendments were made from the floor of the CLJ, ranging from the recognition of all languages to the promotion of Pushtu to the “national language” to preserve the national identity. While the latter was supported by 193 of the 502 delegates, the compromise reached was based on a proposal supported by a slight majority (265 signatures)).

108. AFG. CONST. art. 3 (1964); Draft Const. art. 16. It should be noted that Article 23 of the 1977 Constitution, Article 8 of the 1987 and the 1990 Constitution, and Article 8 of the 1992 Draft Constitution (1992–1996) recognized Dari and Pushtu as official languages of the state. See THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 80.

109. AFG. CONST. art. 16, § 2 (2004).

be free in press publications as well as mass media.<sup>110</sup> Consistent with the recognition of ethnic diversity in Afghanistan, the Constitution calls upon the state to “design and implement effective programs and prepare the ground for teaching mother tongues in areas where they are spoken.”<sup>111</sup> The extent to which the government will have the capacity and resources to devise and implement these programs is, of course, questionable in view of the currently pressing demands for the reconstruction of infrastructure and for the re-establishment of functioning institutions. In return for the concessions made with regard to the recognition of languages spoken in Afghanistan, agreement was reached to keep the national anthem in Pushtu despite a proposal from the CLJ floor to introduce it in both Dari and Pushtu.<sup>112</sup> The anthem, however, must mention the names of the tribes in Afghanistan.<sup>113</sup>

##### 5. Fundamental Rights of Citizens and Non-Discrimination

In view of Afghanistan’s recent history of human rights violations and gender discrimination, the international community paid particular attention to ensuring that human rights were adequately safeguarded. Complementing the international community’s efforts, the United Nations and national and international NGOs, launched numerous initiatives to raise awareness and lobby key actors—such as the CLJ delegates—concerning human rights issues that should be reflected in the Constitution; these groups also proposed draft language, some of which was incorporated in the final version.<sup>114</sup> It should be noted, however, that the CLJ experienced serious cases of intimidation and human rights violations, particularly with regard to the ability of women to freely express their political views in the CLJ tent.<sup>115</sup>

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110. *Id.* art. 16, §§ 3–4.

111. *Id.* art. 43, § 3.

112. It should be noted, however, that that issue has remained contentious. See Rubin, *supra* note 28.

113. AFG. CONST. art. 20 (2004).

114. For example, some of the changes proposed by the *Gender and Law Working Group*, such as the one relating to female representatives at the Lower House of the National Assembly (Article 83), were incorporated. See AFG. CONST. art. 83, § 6 (2004); see also Gender and Law Working Group, *Recommendations for the Constitution*, reprinted in LAURYN OATES & ISABELLE SOLON HELAL, *AT THE CROSSROADS OF CONFLICT AND DEMOCRACY: WOMEN AND AFGHANISTAN’S CONSTITUTIONAL LOYA JIRGA* annex C (2004). Moreover, the community of persons with disabilities, supported by the United Nations through (legal advisors of) the Comprehensive Afghanistan Disabled Programme, effectively lobbied for and achieved changes to the Draft Constitution with regard to disability. AFG. CONST. arts. 53, 84 § 4 (2004).

115. Even though a complaints mechanism had been instituted under the aegis of the United Nations, serious incidents occurred, such as the moving speech by

Article 7 of the Constitution which, among other things, calls upon the state to “observe the U.N. Charter [and] the Declaration of Human Rights” may be seen as the result of strong international pressure on the transitional government and key participants at the *Loya Jirga*.<sup>116</sup> Starting with freedom of religion—even though subject to further legislation<sup>117</sup>—the Constitution follows the tradition of previous constitutions,<sup>118</sup> by providing for a catalogue of fundamental rights as well as numerous human rights-related guarantees.<sup>119</sup> These range from civil and political rights to economic, cultural, and social rights.<sup>120</sup> Most notably, Article 22 explicitly prohibits any kind of discrimination and provides that “[t]he citizens of Afghanistan—whether *man or woman*—have equal rights and duties before the law.”<sup>121</sup> Moreover, the Constitution guarantees specific economic and social rights of every citizen, such as to education,<sup>122</sup> preventive health care and medical treatment.<sup>123</sup> With regard to education, the Constitution calls upon the state to provide free education at all levels (including university education up to the bachelor’s level).<sup>124</sup> In a careful attempt to address the problem of Afghan traditionalism the Constitution instructs the state to adopt “necessary measures to ensure the physical and psychological well being of the family, especially of [the] child and mother, upbringing of children, and *the elimination of traditions contrary to the principles of [the] sacred religion of Islam*.”<sup>125</sup>

While the implementation of a majority of these rights enshrined in the Constitution are subject to further legislation and presumably

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Malalai Joya which triggered death threats and silenced women’s participation in the CLJ proceedings. See OATES & SOLON HELAL, *supra* note 114, at 29.

116. See discussion *infra* Part V.2.

117. AFG. CONST. art. 2 (2004).

118. AFG. CONST. arts. 9–26 (1931); AFG. CONST. arts. 25–40 (1964); AFG. CONST. arts. 27–47 (1977); AFG. CONST. arts. 27–34 (1980); AFG. CONST. arts. 33–64 (1987); AFG. CONST. arts. 33–64 (1990); Draft Const. arts. 47–64 (1992).

119. See AFG. CONST. arts. 22–59 (2004).

120. For example, right to life (Article 23), right to liberty and human dignity (Article 24), presumption of innocence (Article 25), judicial guarantees (Articles 26–28, 31, 135), prohibition of torture and punishment contrary to the human dignity (Article 29), right to political participation (Article 33), freedom of expression (Article 34), freedom of association (Article 35), freedom of assembly (Article 36), freedom and confidentiality of correspondence (Article 37), inviolability of premises (Article 38), freedom of movement (Article 39), inviolability of property (Article 40), right to education (Article 43), right to work (Article 48), prohibition of forced labor (Article 49), and right to healthcare (article 52). AFG. CONST. (2004).

121. *Id.* art. 22 (emphasis added).

122. *Id.* art. 43.

123. *Id.* art. 52.

124. *Id.* art. 43, §§ 1–2.

125. *Id.* art. 54 (emphasis added); see OATES & SOLON HELAL, *supra* note 114, at 38.

not directly enforceable, the Constitution mandates the creation of an Independent Human Rights Commission to monitor, respect, and foster human rights in Afghanistan.<sup>126</sup> The Commission has the authority to receive human rights complaints from individuals and to refer them to the judiciary.<sup>127</sup> In practice, the Human Rights Commission established in the Bonn Agreement has already played an important role in reporting human rights violations, lobbying for human rights (including with regard to the constitution-making process), and addressing the issue of transitional justice and national reconciliation.

#### V. THE 2004 CONSTITUTION AND INTERNATIONAL LAW—A “LOVE AND HATE” RELATIONSHIP

While considerable international attention focused on ensuring that the new Constitution would be democratic and would reconcile the political and religious preconditions of a conservative Islamic nation, less attention was paid to legal technicalities. In fact, because of compromises made by the CLJ, the language contained in the 2004 Constitution contains numerous loopholes and areas open to conflicting interpretation. The Draft Constitution, largely based on the 1964 Constitution, similarly suffered from insufficient legal considerations because important political issues overshadowed a focus on details.

In the Constitution-drafting process culminating in the adoption of the 2004 Constitution, the focus was on meeting the deadlines stipulated in the Bonn Agreement rather than on developing a legally sound and consistent document. The composition of the Constitutional Drafting and Review Commissions was not driven by legal considerations, but by the need for establishing a balanced platform for a basic structural conception of the future of Afghanistan. Perhaps a function of the “light footed” approach and its emphasis on national ownership, neither the Drafting Commission nor the Review Commission perceived the technical assistance offered by the international community as anything but advisory.<sup>128</sup> Indeed, the technical assistance focused on providing large conceptual choices based on comparative studies and was not geared towards providing legal technicalities of constitutional drafting. The little constitutional expertise available within the United Nations concentrated on commissioning comparative studies.<sup>129</sup> The few attempts to highlight

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126. AFG. CONST. art. 58 (2004).

127. *Id.*

128. Rubin, *supra* note 28.

129. *Id.*

technical concerns were either not taken seriously or were functionally deficient.

Tellingly, even though the Presidential Decree concerning the convening of the CLJ envisaged that candidates to be elected as CLJ delegates should possess adequate literacy and authority and “*relative knowledge of constitutional principles*,”<sup>130</sup> most of the influential delegates to the CLJ, including some of the Chairpersons of the ten Working Committees, were not known for their knowledge of constitutional principles. The difficulties one encounters in post-conflict state-building—in particular the lack of sufficient technical capacity combined with the need to swiftly implement reform processes to overcome the volatile security conditions generated by post-conflict power vacuums—contributed to a neglect of technical concerns of a pure legal nature. There is an inherent danger that these technical inconsistencies may ultimately give rise to severe impediments to the implementation of the Constitution. Moreover, they may unintentionally give rise to interpretations contrary to the spirit of the Constitution as well as the object and purpose pursued by its drafters. In view of the broad review authority of the Supreme Court, the technical loopholes in the Constitution may yield vast discretionary power to the members of the Court inclined to reverse certain progressive accomplishments reflected in the Constitution.

One of the technical shortcomings of the 2004 Constitution concerns the relationship between international law and the Afghan domestic legal system. On its face, it is a rather doctrinal and arguably old-fashioned issue, but the lack of constitutional clarity may reflect negatively on Afghanistan’s commitment to international obligations, whether based on treaties or customary law. In particular, it may give rise to jurisprudence by the Supreme Court and the lower courts that contravenes Afghanistan’s human rights obligations. As will be addressed in more detail, the matter is aggravated by the dual function of the Supreme Court as a court of *cassation* and constitutional review.

Before taking a closer look at the relationship between international law and the municipal legal system, in particular the extent to which international law forms part of the Afghan legal system, it seems appropriate to briefly outline international doctrine and practice.

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130. President of the Islamic Transitional State of Afghanistan on the Convening of the Constitutional Loya Jirga art. 3(c) (July 15, 2003)(emphasis added), available at <http://unama-afg.org/docs/Docs.htm>, follow “Presidential Decree about convening the Constitutional Loya Jirga.”

A. *Brief Look at the Theory: International Law and Municipal Law*

The doctrinal discourse between international and municipal law is almost as old as public international law itself. Yet, in the absence of consistent and uniform state practice, doctrine remains at odds with formulating a unified and intrinsically consistent theory as to the legal value of international law within a municipal legal system. Instead, there are two competing jurisprudential theories explaining the practice of states. In public international law parlance, the competing approaches are captured in the distinction between the “monist” and “dualist” schools.<sup>131</sup> The monist theory is based on a unitary perception of the law and views both international and municipal law as forming parts of the same legal order with either municipal or international law being supreme over the other.<sup>132</sup> The dualist theory, on the other hand, assumes that international law and municipal law are two separate legal systems, which exist independently of each other.<sup>133</sup> Depending on the theoretical approach, international law may be *incorporated* into the municipal legal system either through the mechanism of “transformation” (dualism) or “adoption” (monism).<sup>134</sup> In the latter case, retaining

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131. 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 35 (H. Lauterpacht ed., 8th ed. 1955); 1 ÖSTERREICHISCHES HANDBUCH DES VÖLKERRECHTS 144, (H. Neuhold et. al. eds., 4th ed. 2004), [hereinafter *HANDBUCH*]; Veijo Heiskanen, *The Relation of International and Municipal Law*, 1 FIN. Y.B. INT'L L. 154 (1990); Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 254 (2001); Ignaz Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 INT'L & COMP. L.Q. 88 (1963); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936); Quincy Wright, *International Law in Its Relation to Constitutional Law*, 17 AM. J. INT'L L. 236 (1923).

132. HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 553 (Robert W. Tucker ed., 2d ed. 1966); Hans Kelsen, *Die Einheit von Völkerrecht und staatlichem Recht*, 19 ZAÖ R.V. 234 (1958).

133. 1 D. ANZILOTTI, *COURT DE DROIT INTERNATIONAL*, 51 (1929); 1 HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* 111 (1899).

134. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 41 (6th ed. 2003); see also Andrew D. Mitchell, *Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: Nulyarimma v. Thompson*, 24 MELB. U. L. REV. 15, 25 (2000). Some doctrinal difference appears to exist with regard to the terminology used in relation to the mechanisms envisaged under the respective (monist or dualist) approaches. The term “incorporation” is sometimes used to reflect the monist approach (i.e., that international law is considered part of domestic law), while “transformation” is referred to in relation to the dualist school (i.e., that international law, as separate legal system, needs to be transformed into the internal law). Such terminological distinction is primarily found in common law literature, such as BROWNLIE, *supra*; Mitchell, *supra*. The terminology used in this Article, however, reflects the tradition of the Vienna School of International Law, which refers to “incorporation” as the general term to encompass the various mechanisms by which international law may become part of the domestic legal system. Accordingly, international law may be incorporated either through “transformation” (dualist approach) or adoption (monist approach). See *HANDBUCH*, *supra* note 131, at 114.

international character is the norm, while in the former, purely domestic is the norm.<sup>135</sup> More recently, scholars have sought to abandon the dichotomy of monism and dualism in light of their apparent inability to dogmatically explain the way international and national courts behave.<sup>136</sup> The focus has shifted away from establishing any doctrinal truisms of abstract legal theory based on simplifications to assessing the actual practice through the lens of pragmatism.<sup>137</sup>

While the distinction between monism and dualism has only academic value, has become outdated in light of the growing pragmatic rhetoric, and is criticized as being a convenient reminder of the frivolity of abstract jurisprudential speculation,<sup>138</sup> it highlights the need for a conscious determination within the municipal legal order of each state, of the extent to which international law becomes part of municipal law. Such a determination is not necessarily made in the Constitution of a state; it may be developed through legislation or judicial practice. Leaving the resolution of the relationship between international and municipal law to the judiciary, however, attaches significant importance to the jurisprudence of the highest courts, which may not be inclined to adequately address both the domestic and international dimensions of the matter.<sup>139</sup> As a general rule, states are at liberty to define the extent to which international law is incorporated into their internal legal order.<sup>140</sup> States are obliged to perform their international legal obligations in good faith, however, and as is firmly established, may not invoke the provisions of internal law as a justification for failure to perform international obligations.<sup>141</sup> Moreover, there is a general duty to bring internal law into conformity with international obligations, both treaty and

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135. HANDBUCH, *supra* note 131, at 114.

136. BROWNIE, *supra* note 134, at 33; see 1 CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 37 (1970); Jonkheer H. F. van Panhuys, *Relations and Interactions between International and National Scenes of Law*, 112 RECEUIL DES COURS 7 (1964-II).

137. For a paradoxically theoretic discussion of the pragmatic approach and critique thereof, see Heiskanen, *supra* note 131, at 165.

138. *Id.* at 175.

139. Cf. Vlatin S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EUR. J. INT'L L. 29 (1996) (finding that some states incorporate international law into domestic legal systems).

140. van Panhuys, *supra* note 136, at 78.

141. Vienna Convention, *supra* note 45, art. 27; Articles on the Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n art. 3, *annexed to* G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter Articles on State Responsibility]. For an overview of international jurisprudence on the principle, see Commentaries on the *Articles on the Responsibility of States for Internationally Wrongful Acts*, Int'l L. Comm'n, 53rd Sess., U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter ILC Commentary]. Cf. BROWNIE, *supra* note 134, at 35.

customary law.<sup>142</sup> Failure to implement international obligations will entail specific consequences as provided for by the law of state responsibility.<sup>143</sup>

Given the doctrinal discrepancies resulting from the difficulties in explaining state practice on the assumptions envisaged by the dualist or monist approaches, the generalities offered above can merely serve as an introduction to the issues that may arise in the relationship between international and municipal law. For purposes of the topic at hand, these doctrinal considerations can safely be set aside and left to more authoritative analysis.<sup>144</sup> After all, doctrinal considerations did not inform the constitutional debate in Afghanistan. Instead, this Author's interest is in the specific regulatory mechanisms that were available to the drafters of Afghanistan's Constitution in 2003, taking into consideration the various mechanisms applied in practice around the globe.

In practice, states are inclined to follow a "dualist" model that works on the assumption that a constitutional or statutory mechanism is required for incorporation of international law into the municipal legal system.<sup>145</sup> In other words, the applicable norms deriving from the international legal framework do not automatically become part of the internal law, unless incorporated by either a clause in the state's Constitution by implementing legislation. A superficial look at more than forty constitutions containing clauses pertaining to the relationship between international law and municipal law<sup>146</sup> reveals that more than one-third of these constitutions prioritize, in principle, international treaty obligations over internal laws, whether or not those constitutions specified that international norms were directly applicable.<sup>147</sup> The majority of

142. Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21); Greco-Bulgarian "Communities", Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 17 (July 31); BROWNIE, *supra* note 134, at 35; Gerald Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 1, 89 (1957-II).

143. Articles on State Responsibility, *supra* note 141, art. 1; ILC Commentary, *supra* note 141, at 63.

144. See Jean-Marie Henckaerts, *Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide*, 26 INT'L J. L. INFO. 56 (1998) (providing a comprehensive review of available literature).

145. See *infra* notes 148–49 and accompanying text.

146. A collection of national Constitutions is available on various internet sites. See International Constitutional Law, <http://www.oefre.unibe.ch/law/icl/>; WashLaw, Constitutional Law—International, <http://www.washlaw.edu/forint/alpha/c/constitutionallaw.htm>; Chan Robles Virtual Law Library, Constitutional Laws of Nations, <http://www.chanrobles.com/worldconstitutions.htm>; National Constitutions, <http://www.constitution.org/cons/natlcons.htm>; University of Richmond, Constitution Finder, <http://confinder.richmond.edu>.

147. See CONST. OF THE PEOPLE'S DEMOCRATIC REP. OF ALG. art. 132; CONST. ARG. § 31; CONST. OF THE REP. OF ARM. art. 6; BELR. CONST. art. 8; CONGO CONST. art. 176; CONST. OF THE REP. OF CYPRUS art. 169; CONST. OF EST. art. 123; 1975 Syntagma [SYN] [Constitution] art. 28 (Greece); HAW. CONST. § 3; CONST. OF THE FED. DEM. REP.

constitutions contain a general incorporation clause under which international law—either general principles and customary law, treaty law, or both—forms an integral part of the municipal legal system.<sup>148</sup> Only a few constitutions contain general statements proclaiming the state's adherence to international law without further specifications as to the relationship between international and municipal law.<sup>149</sup>

As demonstrated above, constitutions of many modern countries include clauses that provide for the adoption of international treaties into the internal legal order. Becoming part of the internal legal order, however, should not be confused with the treaty's applicability. In other words, although constitutions may provide for the incorporation of international law into domestic law, it does not necessarily follow that treaties are applicable internally. Most common law countries—even those incorporating international law through a corresponding constitutional provision<sup>150</sup>—deny any direct internal effect without implementing legislation.<sup>151</sup> Thus, while treaties become effective upon ratification in terms of the state's obligation to perform by its terms, they will have no effect in municipal law until a legislative act is passed.<sup>152</sup> Moreover, while a

OF ETH. art. 9; 1958 CONST. art. 55 (Fr.); CONST. OF MAURITANIA art. 80; Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15 (Russ.); CONST. OF TUNIS. art. 32; U.S. CONST. art. VI; *see also* Vereshchetin, *supra* note 139 (providing further examples using the constitutions of Armenia, Bulgaria, Belarus, Kazakhstan, Tadjikistan, Turkmenistan, and Uzbekistan).

148. Bundesverfassungsgesetz [BVG][Constitution] as amended 1920, arts. 9, 16, 50, 65, 66 (Austria); CONST. OF THE AZERBAIJAN REP. art. 148; 1973 CONST. OF THE STATE OF BAHRAIN art. 37; CONST. OF BOSN. & HERZ. ¶ 3; CONST. OF BULG. art. 5; CONST. OF CROAT. art. 5; Ústava ČR (Const. of the Czech Rep.) art. 10, 52; CONST. OF EST. art. 3; GRUNDGESETZ [GG] art. 25 (F.R.G.); 1975 Syntagma [SYN] [Constitution] art. 28 (Greece); CONST. OF KUWAIT art. 70; CONST. OF LITH. arts. 7, 138; CONST. OF MACED. art. 118; CONST. OF MONG. art. 10; CONST. OF NAMIB. art. 144; GW [Constitution] art. 93 (Neth.); THE BASIC LAW OF THE SULTANATE OF OMAN [Constitution] art. 80; CONST. OF PARA. art. 141; CONST. OF POL. arts. 8, 87, 91; CONST. OF PORT. art. 8; CONST. OF ROM. art. 11; Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15 (Russ.); CONST. OF THE REP. OF SLOVN. art. 8; S. AFR. CONST. 1996, §§ 231–233; CONST. OF S. KOREA art. 6; C.E. art. 96 (Spain); CONST. OF YUGO. art. 16; *see also* Vereshchetin, *supra* note 139 (providing examples of the constitutions of Kirghizstan and Hungary).

149. CONST. OF ALB. art. 5; CONST. LAW OF THE REP. OF ANGL. art. 15; COST. art. 10 (Italy); CONST. OF MONG. art. 10.

150. *See, e.g.*, U.S. CONST. art. VI.

151. BROWNIE, *supra* note 134, at 45, 48; Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); Ludwikowski, *supra* note 131, at 268; Mitchell, *supra* note 134, at 26.

152. In countries following the civil law tradition, the legislature (or part of it) participates in the process of ratification, so that ratification becomes a legislative act, which may entail the incorporation of the treaty into the state's municipal legal order depending on the incorporation mechanism previewed in the Constitution. *See* Katherine L. Doherty & Timothy L.H. McCormack, "Complimentarity" as a Catalyst for

treaty may automatically—or through legislation—be incorporated into municipal law, the treaty's applicability may still depend on whether the treaty is worded in a self-executing manner, that is, in such a manner that allows courts to directly refer to its terms.<sup>153</sup>

The rules concerning the incorporation of customary law and general principles into the internal sphere are either laid down in the Constitution or are gradually formulated by the national courts. This applies generally to both common law and civil law traditions. However, a procedure by which a legislature would separately have to transform each principle of customary international law into municipal law would be largely impractical because it would require a regular review of all changes of norms and principles of international law. Such a task is difficult to master for legislative purposes. Thus, many states, such as Austria, Belgium, Germany, Greece, Italy, France, Portugal, Switzerland, Liechtenstein, the Netherlands, Spain, the United Kingdom, and the United States,<sup>154</sup> have adopted the principle that customary rules and general principles are to be considered part of the law of the land. Customary international law and general principles are therefore enforceable unless inconsistent with legislation or judicial decisions.<sup>155</sup>

Public international law does not oblige states to, in their constitutions, address the incorporation of international law into the internal legal order. However, recent practice has displayed what one author has called the 'internationalization' of constitutions.<sup>156</sup> The tendency towards constitutional codification of the relationship between international and domestic law is particularly visible in constitutions drafted in the aftermath of the Cold War.<sup>157</sup> Those constitutions display a "tendency towards 'de jure recognition' of the primacy of international law," at least with regard to international human rights law vis-à-vis the municipal legal system.<sup>158</sup> The advantages attached to such a practice are eminent. First and foremost, it clarifies the relationship between international law and

*Comprehensive Domestic Penal Legislation*, 5 U.C. DAVIS J. INT'L L. & POL'Y 147, 155 (1999).

153. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 320 (1992); cf. David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002) (finding that U.S. constitutional rules, not the intent of the parties, determine if a treaty is not self-executing).

154. Bundesverfassungsgesetz [BVG] [Constitution] as amended 1920, arts. 9, 16, 50, 65, 66 (Austria); GRUNDGESETZ [GG] art. 25 (F.R.G.); 1975 Syntagma [SYN] [Constitution] art. 28 (Greece); COST. art. 10 (Italy); 1958 CONST. art. 55 (Fr.); CONST. OF PORT. art. 8; GW [Constitution] art. 93 (Neth.); C.E. art. 96 (Spain); U.S. CONST. art. VI.

155. BROWNLIE, *supra* note 134, at 41, 48.

156. Vereshchetin, *supra* note 139, at 31.

157. Ludwikowski, *supra* note 131, at 287.

158. *Id.* at 290; Vereshchetin, *supra* note 139.

municipal law and thereby contributes to the consistency of a state's legal order. Second, it provides a clear mechanism for the state's implementation of its international obligations and prevents uncertainty that may lead to the state's failure to abide by international law. Finally, it provides national courts with valuable guidance as to the applicability of international obligations and prevents conflicting jurisprudence. These advantages have little costs since the explicit determination of the relationship between international and domestic law by a Constitution does not entail the creation of any additional obligations under international law, but merely clarifies the legal effects, if any, of international law within the internal legal order. The state remains bound to international law and the obligations deriving from its various sources regardless of whether or not the Constitution contains a clause.

### B. *Afghanistan's Constitution and International Law*

The 2004 Constitution of Afghanistan contains several references to international law, in general, and international human rights, in particular. These references, especially those alluding to Afghanistan's adherence to international human rights obligations, must be viewed in the context of Afghanistan's history of human rights violations and the international community's efforts to establish a democratic state that will be a recognized member of the international community. Accordingly the preamble to the 2004 Constitution declares, among other things, that the Constitution is being approved in observance of the "U.N. Charter as well as the Universal Declaration of Human Rights" to "establish an order based on the peoples' will and democracy" and to "form a civil society void of oppression, atrocity, discrimination as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining peoples' freedoms and fundamental rights."<sup>159</sup> As described earlier, Chapter II of the Constitution contains a promising catalogue of fundamental rights.<sup>160</sup> A systematic reading of all 162 Articles is necessary, however, to determine the extent to which international human rights standards and international law are actually incorporated into the domestic legal system of Afghanistan.

The constitutional provision forming the core of the subsequent analysis is Article 7, read in conjunction with Articles 3 and 121. On its face, Article 7 purports to address the relationship between international human rights law and the domestic legal system, by providing that, "[t]he state shall *observe* the U.N. Charter, inter-state

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159. AFG. CONST. pmb. ¶¶ 5, 7, 8 (2004).

160. *Id.* arts. 22-59.

agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.”<sup>161</sup>

It is noteworthy that this provision was in the 2003 Draft Constitution and remained unchanged during the CLJ.<sup>162</sup> Leaving aside inconsistencies in terminology—which are partly based on the difficulties of adequately translating the original text in Dari and Pushtu<sup>163</sup>—the content of Article 7, paragraph 1, does little, if anything, to clarify the relationship between international and domestic Afghan law. Similar to the declarations of intent contained in the constitutions of Albania, Angola, Italy, and Mongolia,<sup>164</sup> the provision merely reaffirms Afghanistan’s commitment to previously-entered international treaties with particular reference to the U.N. Charter.<sup>165</sup> The obligations arising from international treaties, however, are binding upon Afghanistan regardless of the commitment expressed in Article 7; those treaties are binding by virtue of signature and ratification not constitutional incorporation. Simply put, Article 7 does nothing other than pay lip service to Afghanistan’s pre-existing obligation to uphold the terms of international treaties.

The superficiality of the Article becomes evident when read in light of Articles 3 and 121. Article 121 endows the Supreme Court with the mandate to act as the guardian of the Constitution and provides that,

The Supreme Court upon the request of the Government or the Courts can review compliance with the Constitution of laws, legislative decrees, *international treaties and international covenants*, and interpret them in accordance with the law.<sup>166</sup>

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161. *Id.* art. 7, § 1.

162. *See* Rubin, *supra* note 28, at 14–15. While paragraph 1 of Article 7 remained unaltered, a reference to the state’s obligation to prevent the “production and consumption of intoxicants” was added by the CLJ Reconciliation Committee. A separate proposal calling for a definition of “terrorism” did not succeed absent sufficient support (number of valid signatures from CLJ delegates).

163. AFG. CONST. (2004). One may note the redundancy in referring to “international treaties to which Afghanistan has joined,” in addition to “inter-state agreements.”

164. CONST. OF ALB. art. 5; CONST. LAW OF THE REP. OF ANGL. art. 15; COST. art. 10 (Italy); CONST. OF MONG. art. 10.

165. Article 7 somewhat resembles Article 16 of the 1980 Constitution of Afghanistan, which reads: “The Democratic Republic of Afghanistan will respect and observe the U.N. charter and the generally accepted principles of international law and supports the United Nation’s activities in strengthening peace and developing international cooperation.” AFG. CONST. art. 16 (1980), *reprinted in* THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 80. The same applies to the 1987 Constitution, which further expanded the reference to international obligations contained in the 1980 text. Article 133 provided that, “the Republic of Afghanistan respects and observes the U.N. Charter, the Universal Declaration of Human Rights and other accepted principles and norms of international law.” AFG. CONST. arts. 33–64 (1987), *reprinted in* THE CONSTITUTIONS OF AFGHANISTAN, *supra* note 80.

166. AFG. CONST. art. 121 (2004) (emphasis added).

Leaving aside inconsistencies in terminology, Article 121 discloses the true nature of Afghanistan's approach to international law. Most importantly, it establishes the supremacy of domestic law over international treaty obligations by elevating the Constitution above international law and adopting a radical monist approach with regard to the primacy of domestic law.<sup>167</sup> The Supreme Court is obligated to declare international treaties unconstitutional if they contradict the terms of the Constitution.

While decisions of the Supreme Court as to the constitutionality of treaty obligations will not per se result in the nullification of Afghanistan's corresponding obligations under international law, the authority of the Supreme Court to uphold the supremacy of domestic vis-à-vis international provisions may considerably limit the government's maneuverability to assume and comply with its international obligations. The Supreme Court's authority to question the compatibility of international obligations with provisions of municipal law renders Afghanistan's conduct within the international legal framework dependent on the orientation of the Supreme Court. In this regard, the Supreme Court is merely restricted by the requirement of judicial or governmental referral as provided for in Article 121.<sup>168</sup> Considering, however, the conduct of the Supreme Court in the past, it is likely that the Supreme Court—at least in its current composition—may deem itself competent to assume its constitutional review functions *motu proprio*. While the wording of Article 121 in conjunction with Article 7 could lend itself to an interpretation in favor of the incorporation of international law into the domestic legal system to the extent international law does not contravene the constitutional law of Afghanistan, the latter qualification merits closer scrutiny. In particular, the Constitution must be assessed to determine if it provides any benchmarks against which international treaty instruments are to be measured. It is also necessary to determine which principles, in case of conflict between the Constitution and international law, might override the rights and obligations deriving from international law. Given the importance of Islam in Afghanistan and its varying interpretations in tribal laws throughout the country, one crucial benchmark could be the Constitution's position on the role of Islam. While it is necessary to distinguish the provisions of Islam from quasi-judicial practices based on tribal laws claiming to be Islamic, the extent to which the

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167. In this regard, the monistic approach taken by the 2004 Constitution of Afghanistan corresponds to the assertion that "the nature of Islamic law of nations is 'monistic' and not 'dualistic', thereby giving greater judicial validity to the acceptance of this law as indeed 'law.'" Farooq A. Hassan, *The Sources of Islamic Law*, 76 AM. SOC'Y INT'L L. PROC. 65, 71 (1982).

168. AFG. CONST. art. 121 (2004).

Constitution takes recourse to extra-statutory sources may entail significant consequences on the potential of extra-constitutional sources to serve as measurement for the “constitutionality” of international obligations as envisioned in Article 121. In view of the possible contradictions between allegedly Islamic tribal practices and international human rights standards, it is crucial to determine whether the letter of the Constitution offers a margin of interpretation that would allow an application of *shari’a* that does not conform with Afghanistan’s obligations under international law.

Islam forms an essential part of Afghanistan’s legal tradition and the extent to which it would be linked to the constitutional framework was at the core of the constitutional debate.<sup>169</sup> The compromise reached in Article 3 to reconcile demands for a strong link and a progressive statutory approach reads states that “[i]n Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”<sup>170</sup> Therefore, read in conjunction with Article 121,<sup>171</sup> the Supreme Court has the authority to strike down legislation and declare international obligations unconstitutional if they are contrary to the tenets and provisions of Islam. The wording, particularly the reference to “tenets and provisions of Islam” instead of *shari’a*,<sup>172</sup> is strikingly broad and the provision accordingly lends itself to multiple interpretations that extend beyond the realm of statutory law and require recourse to religious sources.<sup>173</sup> Ultimately, whenever norms of international law are interpreted to contradict Islamic principles, the Supreme Court may consider them unconstitutional. Such an approach reflects the understanding of Muslim scholars that there is no other source of law, whether domestic or international, other than the divine will of God.<sup>174</sup> The relationship and compatibility of *shari’a* with the international

169. See *supra* Part IV.B.1.

170. AFG. CONST. art. 3 (2004).

171. AFG. CONST. art. 121 (2004) (emphasis added).

172. As a matter of introduction, *shari’a* derives from the Koran as the supreme source and guiding principles provider for the formation of legal rules, the prophetic tradition and reports (the *Sunnah* and *Hadith*), Islamic jurisprudence (*Fiqh*), consensus among those who are learned in the law (*Ijma*), and analogical reasoning (*Al-Qeyas*). Moreover, various schools of law (*Madahib*) played an important role in developing the law on the basis of the four sources mentioned previously. See SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 11 (2003); Hassan, *supra* note 167; Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT’L L. 358, 359 (1956); David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT’L L. 819, 823 (1993).

173. The omission of any explicit reference to *shari’a* may either be interpreted as limiting its scope to the main principles of Islam or including Islamic law as provisions of the holy religion of Islam. See Khadduri, *supra* note 172.

174. Husayn Salimi, *Introduction to Irano-Islamic Views on Human Rights*, in ISLAMIC VIEWS ON HUMAN RIGHTS: VIEWPOINTS OF IRANIAN SCHOLARS, at I (Husayn Salimi ed., 1st Indian ed. 2003); Khadduri, *supra* note 172.

human rights framework has been the subject of continuous academic debate.<sup>175</sup> While the argument is often made in the West that specific aspects of *shari'a* are inconsistent with international human rights standards, Islamic legal scholars would argue that, "human rights lie at the heart of Islam,"<sup>176</sup> and that the human rights standards established in various instruments correspond to the teachings of Islam.<sup>177</sup> The latter proposition appears to be reflected in the 2004 Constitution, which has a catalogue of fundamental rights in Chapter II.<sup>178</sup> Moreover, the Constitution seeks to eradicate tribal practices that are based on an aberrant interpretation of Islam by calling upon the state to eliminate "traditions contrary to the principles of [the] sacred religion of Islam."<sup>179</sup>

By disqualifying those practices as un-Islamic, the Constitution promotes an application of Islam that is not contrary to its human rights guarantees. Any interpretation that holds that fundamental human rights are contrary to the principles and tenets of Islam would result in an irreconcilable contradiction within the Constitution between Article 3 and the provisions contained in Chapter II. Additionally, the wording of Article 3 refers to the prohibition of *laws* contrary to the tenets and provisions of Islam, which seems to confine the potential cases in which issues of compatibility with Islamic principles were to arise to simple legislation. Moreover, the Constitution's reference in Article 7 to international human rights instruments—for example, the Universal Declaration of Human Rights—would be contrary to Article 3 if the provisions contained in those international human rights instruments were in conflict with

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175. Cf. ISAM KAMEL SALEM, *ISLAM UND VÖLKERRECHT: DAS VÖLKERRECHT IN DER ISLAMISCHEN WELTANSCHAUUNG* (1984); FARHAD MALEKIAN, *THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE STUDY* (1994); C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* (1988); Gamal M. Badr, *A Survey of Islamic International Law*, 76 AM. SOC'Y INT'L L. PROC. 56 (1982); Hassan, *supra* note 167; Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 RECUEIL DES COURS 205 (1966-I); Westbrook, *supra* note 172.

176. See, e.g., Sa'idah Lutfiyan, *Human Rights in Practice: The Violation of the Muslims' Rights Throughout the World and the Position of the U.N. Toward this Issue*, in *ISLAMIC VIEWS ON HUMAN RIGHTS*, *supra* note 174, at 345, 350; cf. Salimi, *supra* note 174; MIRIAM A. NAWABI, *WOMEN'S RIGHTS IN THE NEW CONSTITUTION OF AFGHANISTAN* 4 (2003), <http://www.cic.nyu.edu/archive/pdf/E22Womens%20RightsFullVersionNawabi.pdf>.

177. Cf. *The Cairo Declaration on Human Rights in Islam* pmb. ¶ 4, in COLUMBIA UNIV., CTR. FOR THE STUDY OF HUM. RTS., *TWENTY-FIVE HUMAN RIGHTS DOCUMENTS* 190 (1994); Kirmani, *Survey of the Similarities and Differenced of Human Rights in Islam and the West*, in *ISLAMIC VIEWS ON HUMAN RIGHTS*, *supra* note 174, at 97.; Riffat Hassan, *Are Human Rights Compatible With Islam? The Issue of the Rights of Women in Muslim Communities*, <http://www.religiousconsultation.org/hassan2.htm>.

178. See discussion *supra* Part IV.2.

179. AFG. CONST. art. 54 (2004).

Islamic principles. The 2004 Constitution requires a harmonizing interpretation of the principles and tenets of Islam on the one hand, and international human rights standards on the other, at least in theory.

In practice, however, it may be presumed that such a systematic interpretation in favor of constitutionalism is not a given. Rather, it is conceivable that in contentious cases, local courts and the Supreme Court would adopt an interpretation that disregards any conflicting human rights standards prescribed by international law and in favor of Islamic principles. Ultimately, the Supreme Court may be inclined to view international human rights instruments as *laws* in contravention of the tenets and provisions of Islam and exercise its mandate in Article 121 to declare specific provisions of international human rights instruments unconstitutional. To illustrate the constitutional dilemma that may arise as a consequence, one may refer to the obligations deriving from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>180</sup> In notable contrast to many Islamic states,<sup>181</sup> Afghanistan deposited its instrument of ratification on March 5, 2003, without reservation. Given the tribal interpretations of *shari'a* commonly found throughout the informal justice sector, Afghanistan's reservation-free ratification of the CEDAW stands as a manifestation of the international community's pressure to promote the eradication of judicial practices contrary to international human rights. According to Article 16 of the CEDAW, Afghanistan is obliged to "ensure on a basis of equality of men and women . . . the same right to enter into marriage[,] the same right to freely choose a spouse and to enter into marriage only with their free and full consent[, and] the same rights and responsibilities during marriage and at its dissolution."<sup>183</sup> Moreover, under the terms of the Convention the "betrothal and the marriage of a child shall have no legal effect, and

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180. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

181. *E.g.* The Kingdom of Bahrain entered into reservations concerning, among other things, Articles 2 and 16 "in so far as it is incompatible with the provisions of the Islamic Shari'a"; similarly the reservations entered into by Egypt, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Syrian Arab Republic, and the United Arab Emirates. See U.N. Dept. of Econ. & Soc. Affairs, Div. for the Adv. of Women, Declarations, Reservations and Objections to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (providing the texts of the respective reservations and objections to CEDAW). With regard to the validity of the treaty reservations vis-à-vis the object and purpose of the CEDAW, and in light of the objections made, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 439 (2nd ed., 2000). *But see* Nasrin Musaffa, *International Rules for Women's Rights: A Challenge of Values*, in ISLAMIC VIEWS ON HUMAN RIGHTS, *supra* note 174, at 191, 199.

183. CEDAW, *supra* note 180, art. 16.1 (a)-(c).

all necessary action, including legislation, shall be taken to specify a minimum age for marriage . . . .”<sup>184</sup> However, the practice of arranged marriages prevails throughout Afghanistan, particularly in the rural areas where tribal laws de facto derogate statutory laws, such as the 1977 Civil Law of Afghanistan.<sup>185</sup> Moreover, women continue to be stoned to death for adultery as prescribed by *shari’a*,<sup>186</sup> even though they have sought a divorce or were the victims of rape.<sup>187</sup> While these may be extreme cases, partly based on a misapplication of the provisions of Islam by *shuras* (local councils),<sup>188</sup> it demonstrates the extent to which Afghan women continue to be deprived of their rights through the application of ancient tribal laws and traditions.<sup>189</sup> This is not to argue that the formal legal system is currently in violation of Afghanistan’s obligations under the CEDAW—that is an issue that requires considerably more attention than can be afforded within the framework of this Article.

Rather, the argument is, that the wording of Article 3 provides ample opportunity for courts to find international norms to be in violation of what is locally understood as being part of the “principles and tenets” of Islam, potentially halting Afghanistan’s commitment to international human rights standards. The same reasoning may apply to the Supreme Court, under its Article 121 authority. It may be conceivable that the Supreme Court construes Article 121 in conjunction with Article 3 in such a fashion that would allow the Supreme Court to give preference to the application of what it considers Islamic principles over international law.<sup>190</sup> To follow the

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184. *Id.*

185. AMNESTY INTERNATIONAL, AFGHANISTAN: WOMEN STILL UNDER ATTACK: A SYSTEMATIC FAILURE TO PROTECT (2005), [http://web.amnesty.org/library/pdf/ASA110072005ENGLISH/\\$File/ASA1100705.pdf](http://web.amnesty.org/library/pdf/ASA110072005ENGLISH/$File/ASA1100705.pdf).

186. Article 426 of the 1976 Penal Code of Afghanistan (in Chapter 8 entitled “Adultery, Pederasty, and Violations of Honour”) provides for the application of *shari’a* punishment when the conditions spelled out by *shari’a* are fulfilled. PENAL CODE ch. 8, art. 426 (1976)(Afg.).

187. Reports documenting the application of *shari’a* principles in contravention of the rights set out in the CEDAW are frequent, particularly in the rural areas of Afghanistan. See, e.g., N.C. Aizenman, *A Killing Commanded by Tradition: Afghan Adultery Case Reflects Challenge of Extending Modern Law to Tribal Lands*, WASH. POST, May 7, 2005, at A1; see also AMNESTY INTERNATIONAL, *supra* note 185.

188. Malikiyar & Rubin, *supra* note 39, at 24; see also AMNESTY INTERNATIONAL, *supra* note 185.

189. See, e.g., The Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights on The Situation of Women and Girls in Afghanistan*, U.N. Doc. A/58/421 (Oct. 6, 2003); NAWABI, *supra* note 176, at 9–12.

190. Judging from the wording of the Constitution, the Supreme Court would, in this regard, not appear to be bound by the programmatic provision calling upon the state to adopt measures to attain the elimination of traditions contrary to the principles of Islam. See AFG. CONST. art. 54 (2004).

examples just illustrated, the Supreme Court may be called upon to decide on the constitutionality of CEDAW in relation to the principles and tenets of Islam concerning the right of women to enter or dissolve a marriage.<sup>191</sup> On such occasions, the Supreme Court could declare that specific provisions of the CEDAW are incompatible with *shari'a* principles. This would be functionally equivalent to the reservations made to the CEDAW by other Islamic states.<sup>192</sup> Thus, by holding that these *shari'a* provisions amount to principles and tenets of Islam, the Supreme Court could simply override any treaty obligations arising from Afghanistan's ratification of the CEDAW.

Additionally, the 2004 Constitution remains silent on the relationship between sources of international law other than treaties, such as customary international law and general principles of law<sup>193</sup> as well as decisions of international organizations. Moreover, the Constitution leaves considerable uncertainties as to the processes through which Afghanistan enters into treaty obligations and participates in international organizations.<sup>194</sup> On the positive side (though with some measure of controversy) the declaration contained in Article 7 to abide by the Universal Declaration of Human Rights<sup>195</sup> could assume significance under international law; it may render a non-committal document binding on Afghanistan by virtue of a unilateral act or estoppel.<sup>196</sup> Overall, however, the 2004 Constitution of Afghanistan contains substantial loopholes prone to nourishing a judicial practice to the detriment of Afghanistan's explicit commitment to the international normative framework.

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191. As mentioned earlier, according to the Constitution the Supreme Court assumes a dual function as court of ultimate resort and constitutional court. With regard to the former, the Supreme Court may review cases on revision (on matters of law). See AFG. CONST. arts. 116, 120 (2004).

192. See STEINER & ALSTON, *supra* note 181, at 439.

193. Statute of the International Court of Justice art. 38, para.1, available at <http://www.icj-cij.org/icjwww/basicdocuments.htm>.

194. The 2004 Constitution of Afghanistan merely mentions in Article 64, paragraph 17, which enumerates the powers of the President, that the President shall "issue credential letters for the conclusion of international treaties in accordance with the provisions of the law." It does not specify whether the President has the authority to sign international treaties, though it may be inferred by virtue of *nemo plus iuris transfere potest quam ipse habet*. AFG. CONST. art. 64, § 17 (2004). It should, however, be noted that the Constitution clarifies that the National Assembly is vested with the authority to ratify international treaties or abrogate the membership of Afghanistan in them. *Id.* art. 90, § 5.

195. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948).

196. See BROWNIE, *supra* note 134, at 613 (discussing "unilateral declarations" and the principles of "estoppel").

### *C. Legal Uncertainties and Missed Opportunities*

The recently adopted Afghan Constitution does not provide clarification or mechanisms concerning the implementation of international obligations because it was largely perceived to be an academic question amid the numerous fundamental political and religious issues that overshadowed the debate. Moreover, there was little understanding and capacity to understand the legal principles that needed to be addressed. In summary, the main concern relates to the lack of clarification, and the arising uncertainty, with regard to the relationship between international law and Afghanistan's internal legal order. The facially ambitious Article 7 of the 2004 Constitution merely re-states that Afghanistan will abide by its international obligations, without providing for a specific incorporation mechanism.<sup>197</sup> Viewed from the public international law perspective, the legal value of the provision is minimal because Afghanistan remains bound to its international obligations regardless of whether the Constitution re-affirms its commitment to abide by its international obligations. The inclusion of a reference to the relationship between these international obligations and municipal law would have greatly enhanced the legal value of Article 7 without any political compromises.

While numerous states have adopted a similar approach in their Constitutions, the case of Afghanistan stands out as a missed opportunity in view of the heavy international exposure and involvement. By failing to address the legal "technicalities" of whether international law affects domestic law or requires implementing legislation, Article 7 in conjunction with Articles 3 and 121 could easily reverse a progression that came at great political cost. The effects would have been the same if the Constitution had not addressed international human rights at all. Instead of determining to what extent, if any, international law created an obligation within the legal system of Afghanistan, the drafters of the Constitution delegated the task to a judiciary that is currently unlikely to fully appreciate the complexities of incorporation theories and the consequences thereof. Rather, it is likely that the national dimensions of Afghanistan's membership to the international normative framework will receive little attention in judicial practice, particularly when considering the inherent tensions between the constitutional exhortation that no law shall contravene the tenets and provisions of Islam and international human rights standards.

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197. AFG. CONST. art. 7 (2004).

VI. CONCLUSION: ASSESSMENT, LESSONS LEARNED AND DILEMMAS  
INHERENT IN MULTILATERAL CONSTITUTION-MAKING AND STATE-  
BUILDING

Afghanistan's current quest for achieving stability and peace cannot be viewed in isolation from the international normative framework that continues to determine and drive the state-building processes on various levels. First, the origin of reform is based on the international community's endeavor to effectuate regime change on the assumption that a thriving democratic Afghanistan will spur human development and contribute to international peace and stability. Second, the international dimensions of the military intervention in the aftermath of September 11, 2001, influenced the context of the basis on which Afghanistan was to be rebuilt. In attempting to strike a balance between the detrimental effects on the sustainability of reform attached to full-fledged international (U.N.) administration and the political risks associated with insufficient international involvement, the Bonn Agreement reflects a compromise between a domestic program for the consolidation of power and specific benchmarks to ensure that the state-building agenda evolves in a manner acceptable to the international community. In the latter regard, the international community acts as a watchdog of democracy, whose financial means in the form of bilateral and multilateral "benevolence" entail significant leverage to inform the way by which Afghanistan is to rise to the circle of democratic states. Third, and as a consequence of the international engagement that ultimately led to the ousting of the Taliban regime, the state-building processes themselves are not purely domestic, but closely tied to the assistance provided by individual donors in conjunction with the United Nations and other organizations. This assistance is not imposed, at least technically, but provided on the basis of the normative framework enshrined in the 2001 Bonn Agreement.

These international dimensions have certainly contributed to the successful implementation of the state-building agenda envisaged in the Bonn Agreement starting with the establishment of the transitional government in 2002 and culminating in the recent establishment of the National Assembly. While the transition from a collapsed state to a domestic and internationally legitimate democratic state has initially been governed by the processes stipulated in the agreement reached in Bonn under the auspices of the United Nations, the formal foundations for the longevity of democracy in Afghanistan are dependent on the terms and provisions of the state's Constitution. Recognizing the importance of the constitutional framework as a social compact on which the structures of a state are to be laid, the Bonn Agreement envisioned a quasi-participatory constitution-making process that was to ensure the

legitimacy and effectiveness of Afghanistan's new constitutional framework. Afghanistan's constitutional legitimacy would allow the establishment of a government headed by a President elected by popular vote as well as the establishment of a National Assembly through general elections.

The constitution-making process in Afghanistan therefore remained closely linked to the international community's efforts to delimitate the borders within which political compromises were to be reached to accommodate political and cultural preconditions for the popular acceptance of the constitutional framework. These borders were a reflection of the fundamental pre-requisites of any democratic state as determined and formulated by the international normative framework through its international human rights standards. The international community accordingly placed significant emphasis on the reinforced acceptance of and compliance with human rights standards to be incorporated in Afghanistan's post-conflict constitution. This emphasis, however, has yielded limited results in view of the 2004 Constitution's insufficient attention to the technicalities with regard to the relationship between the international legal framework and the domestic legal system.

Despite a common perception that doctrine concerning the linkages between municipal and international law is largely academic and practically obsolete, recent constitutional debates in post-conflict situations demonstrate the importance these legal issues may assume.<sup>198</sup> Particularly in contexts where the international community is exercising a strong measure of support to and influence over the re-establishment of state structures, international human rights standards serve as an important basis for the promotion of "good governance" and the rule of law. The extent to which these international standards can actually be implemented directly or indirectly will, from a legal perspective, be determined by the legal system of a particular state in relation to international law. Such a determination will usually be found in the Constitution or constitutional jurisprudence with regard to the specific mechanism by which international law is incorporated into the municipal law of the state. This mechanism assumes particular importance in legal systems and jurisprudences that may challenge the application of international human rights standards vis-à-vis conflicting customary principles traditionally applied within some countries, in which Islam assumes absolute supremacy and in which traditional interpretations of *shari'a* may be in conflict with international obligations. In the absence of a constitutional basis, the municipal legal system can

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198. For an analysis of the international law aspects of post-Cold War Constitutions, see Vereshchetin, *supra* note 139.

disregard international human rights standards enshrined in treaty instruments or customary international law, unless such a vacuum is remedied by clarifying legislation or coherent jurisprudence by the highest court.

In conclusion, it may be worthwhile to capitalize on the experiences of Afghanistan's constitution-making process as part of the larger state-building exercise and thus draw on some lessons learned to explore avenues for future, internationally sponsored, state-building exercises in similar contexts. First, it has become evident that the drafting of a new Constitution that meets legal, political, and cultural requirements can be a considerable challenge in the context of post-conflict societies that have experienced massive exodus of human intellectual capital. The success of the drafting process and the outcome manifested in the Constitution depends on the drafters' understanding of constitutional law, in general, and the particularities of the given political, cultural, and legal environment in a transitional state, in particular. Accordingly, the composition of constitutional drafting commissions will usually reflect various professional fields to address and accommodate all requirements for a broad acceptance of the future Constitution. Such acceptance is a precondition for the emergence of a "culture of constitutionalism."

In a context in which constitutionalism has played a limited role throughout past conflict and in which the intellectual elite was largely forced to seek refuge in Western countries, it may be difficult to identify impartial national experts who have the necessary knowledge and expertise to produce a sound legal foundation for the state. The difficulty of the task is exacerbated by the international community's inclination to provide technical assistance in the form of advisors whose impact is contingent upon the acceptance of the advisors by the national drafters and the advisors' ability to adapt their expertise to the country-specific context. This requires that advisors spend time to becoming familiar with the peculiarities of each state and its history. For the international community to meaningfully assist in any constitution-making process, sufficient understanding of both constitutional law and the particular socio-political situations are required to develop an internally consistent Constitution that is able to serve as a legally sound foundation of a state. Second, given the pace of the constitutional process and the broader political issues which needed to be resolved in the Constitution, the constitutional debate in Afghanistan often could not touch upon issues relating to the "fine-print" of each constitutional document, but remained focused on the key constitutional decisions, such as whether the state structure would follow the model of *presidentialism* or *parliamentarism*.

Overall, the time-frame for the development of a draft Constitution was breathtakingly short in comparison with the tasks associated with the drafting of such a document, particularly with

regard to the compromises that had to be made between upholding Islamic principles and democratic structures. Moreover, it proved difficult to sensitize the Commission to important technical issues that bear the potential to become major obstacles in the implementation of the Constitution. As an overall lesson, time can play a critical factor in the quality of the Constitution and the extent to which the international community is able to provide meaningful technical assistance. The difficulty of drafting a Constitution for a society in transition lays in finding the proper balance between the need to provide a legal framework for the state-building exercise and the quality of the document. Also, a proper balance needs to be struck between pressuring the national counterparts towards the adoption of international human rights standards and national traditions. While the latter may result in hastily drawn-up constitutional provisions paying lip-service to international standards, they may not necessarily reflect a real commitment and thus are prone to become law in the "books," with little application in practice.

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