

# Afghanistan's Constitution 2004 : An Islamic Perspective on Interpretation

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This essay addresses the following three questions: 1) jurisdiction to interpret the constitution; 2) who can bring a claim on matters of constitutional interpretation? And 3) whether the interpretation so provided is binding or advisory. However, before taking up these questions, a brief entry is provided into the Islamic tradition on textual interpretation.

## I. Textual Interpretation: an Islamic perspective

The rules of interpretation in the Islamic tradition are concerned mainly with the Qur'an and hadith. Authority to interpret these sources was historically been exercised by the learned scholars of Shari'ah who were capable to conduct independent interpretation and *ijtihad*, and to some extent also by the Qur'an commentators (*mufasssirin*). They have left a rich legacy of *ijtihad* and *tafsir*, both of which are regulated by the methodology of interpretation that is articulated in the science of *usul al-fiqh*.<sup>1</sup> The interpretation so provided is either based on valid precedent, which in the case of the Qur'an is known as *tafsir bi'l-ma'thur*, or it is based in personal opinion, in which case it would fall under *tafsir bi'-ra'y*, or interpretation based on a considered opinion. The latter would remain as an opinion until such a time when it is endorsed by general consensus (*ijma'*) of the learned. There were no formal procedures for any of this. Recognition and consensus was gradual and known through subsequent scholarship and the respect and confidence of the community for particular scholars.

In the event of any ambiguity arising in the reading of a text, the first recourse must be had to the text itself, that is, to interpret the text by the other relevant parts of the same text. This is one of the golden rules of interpretation in Islamic jurisprudence. Thus in the event of a need for interpreting a general ('aam) text or ruling of the Qur'an, it is highly recommended to interpret the Qur'an by the Qur'an itself. To give a brief example, with regard to witnesses as means of proof in judicial disputes, the Qur'an text in one place requires two witnesses, and in another place it stipulates two upright witnesses. It is then concluded as a general rule that all witnesses in judicial disputes must be upright ('adl). It is a matter of detail then for the jurists to specify the requirements of uprightness ('adalah) in a witness. The question also arose whether this conclusion was binding in all cases, or was it open to exceptions. Other questions asked were whether the text only meant male witnesses, and only two in number, or could it be interpreted such as to subsume combinations of male and female witnesses, and also whether the plaintiff's own claim supported by a solemn oath could fulfil the requirement. On all of these questions Muslim jurists have found some relevant data in the various passages of the Qur'an itself, failing which they looked into the hadith and precedent of the Prophet, p.b.u.h and that of his Companions, and finally resorted to their own unfettered *ijtihad*. They also developed a set of rules that sought to regulate the valid exercise of interpretation. Allegorical and remote interpretation (*ta'wil*) which goes beyond the confines of the words of the text is normally avoided in favour of textual interpretation

(tafsir) which is confined to the given words and sentences of the text - unless there be compelling evidence to recommend recourse to ta'wil. This could be when tafsir caused rigidity of the sort that violated the essence of justice and the goals and purposes (maqasid) of the Shari'ah. In the history of Islam, many a juristic and theological movement, faction and doctrine lost credibility and public confidence because of their distorted and far-fetched interpretations of the Qur'an. Islam stands for moderation (wasatiyyah -cf. Q: 2:134) that avoids extremism and partisan indulgence.<sup>2</sup>

We do not draw a direct parallel between the rules of interpretation that Muslim commentators have formulated in conjunction with the Qur'an text, which has a devotional (ta'abbudi) aspect that is lacking in man-made law. Our brief expose may nevertheless provide a background for analysis on matters of interpretation that often provides a ready recourse for Muslim scholars and commentators in Afghanistan.

A balanced interpretation of the constitutional text must naturally take into consideration, not only the semantics and phraseology of the national charter but also the structure of values it has articulated and upheld. A good interpretation must also be adequately informed by the people's welfare and the changing conditions of society in their quest for greater attainments in education and culture, science and technology and so forth. This is because Islam itself validates healthy adjustment and reform into the fabric of its law, the Shari'ah, that should respond to the changing conditions of society. The 2004 Constitution contains many references to Islam but also to such other sources as the Universal Declaration of Human Rights, the UN Charter, international standards of justice, the rule of law, Afghanistan's own valid traditions as well as its treaty obligations – all of which would constitute valid reference points to provide a balanced reading of the text. Then we note also from our reading of the history of constitutionalism that a constitution essentially serves two main objectives: as a bulwark for the basic rights of individuals that sets limits to the exercise of coercive power of the state, and also as an authoritative blueprint for organisation and distribution of power in the state organs. One would thus be naturally reluctant to use the constitution as an instrument of restriction on people's basic rights, nor indeed to disturb the structure of checks and balances in the exercise of power.

Issues of particular nature must naturally be viewed in their own immediate context before one turns one's attention to general concerns, but it is important that one does not isolate the broader concerns for justice and balance from one's more particular objectives. We are all too familiar in our society with rigidities and difficult readings of text, often through pious intentions but imbalanced nevertheless and poorly informed by the rich intellectual legacy of Islam itself.

I now turn to the three questions I posed earlier on, and I take up the question over jurisdiction first.

When a constitution pursues its valid objectives of building a just society and **a system** of government that promotes the people's welfare and it is also ratified through valid consultative processes, then it may be described as the ordinance of those, to use the Qur'anic terminology, who are in charge of the community affairs (ulu al-amr) that

commands the citizens' obedience. Notwithstanding the difficult post-conflict situations in which the 2004 Constitution was formulated and introduced, in my capacity as a participant in that process, I can say that the scholarly input and consultative procedures that culminated in the formulation of the 2004 Constitution effectively rendered the final document into a credible Shari'ah instrument that pursued the valid objectives of Islam and the welfare of the people of Afghanistan. I now turn to the three questions I posed at the beginning of this paper.

## **II. Jurisdiction to Interpret the Constitution**

Article 121 of the Constitution provides a response to the first two of the questions over the locus of authority to attempt an interpretation and also with regard to those who may initiate the process. To quote the relevant text:

Article 121: The Supreme Court on the request of the Government or the Courts shall review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law.

The text before us is clear in what it stands for, except perhaps in its final clause when it says that the interpretation should be in accordance with the law. I shall elaborate on this last point but at this juncture it should be noted that the text before us is silent as to the status of the interpretation supplied by the Supreme Court (henceforth as S/C) whether such interpretation carries a binding force, or could it only be advisory and persuasive. It is also not known whether the interpretation in question can strike down, suspend or abrogate the law it finds to be in conflict with the Constitution. A question also arises as to the precise meaning of "Government": does it include the Parliament, and whether "the Courts" also includes the S/C itself that can initiate review and interpretation of a particular provision of the law without it having been referred to by "the Government or the Courts."

Afghanistan's own precedent in constitutional interpretation is limited and may not provide answers to these questions. During the brief "experiment in democracy" period following the introduction of the 1964 Constitution up to 1973 (when Daud's coup toppled the monarchy), an independent S/C came into being for the first time in Afghanistan and only became functional some two years later. That S/C then was also entrusted with the authority to interpret the constitution but hardly played that role in a visibly effective way. Yet on many occasions the S/C was faced with questions over clarification and better understanding of certain aspects of the 1964 Constitution. In its quest to provide relevant answers, the S/C took a consultative approach and convened conferences of the leading judges in the country and issued judicial circulars based on conference resolutions. These were subsequently published in about three volumes.<sup>3</sup> The issues reviewed were for the most part concerned with court jurisdiction and procedural streamlining and not so much with constitutional interpretation on substantive themes. Without engaging into details, a point of precedent one can identify here would be that the S/C then hardly suspended any law nor did it accord any notable prominence to constitutional interpretation. It also seemed that the S/C took a functionalist, as opposed to a well-regulated methodical, approach to constitutional interpretation.

A point of weakness to be noted in Article 121 is its phrase “in accordance with the law” whereby the Constitution makes itself dependent on something which is not specifically known at the time, and then also that it is downward looking: a law of higher ranking is made contingent on one of a lower profile. An additional weakness here arises as to the scope of the law. There are laws in Afghanistan that were passed long before the 2004 Constitution, and one is not sure whether they are all compatible with the letter and spirit of the new Constitution.<sup>4</sup> The words “Government or the Courts” in Article 121 also give rise to questions as to what they exactly mean. Does “Government” refer to the leading decision makers therein or everyone in the rank and file.

Questions have also arisen on the status of Article 157 and how it relates to Article 121 in respect particularly of constitutional interpretation. Article 157 provides:

The Independent Commission for the Supervision of the Implementation of the Constitution will be established by the provisions of the law.

Members of this Commission shall be appointed by the President with the confirmation of the Wolesi Jirga.

As a participant in the process, the present writer can confirm that the basic purpose and intention of Article 157 was to provide for an orderly implementation of the new Constitution. For this was a post-conflict Constitution formulated at a time when uncertainties of the transitional periods were looming ahead, and this included introduction of literally dozens of decree laws that needed to be introduced during the one year (transitional period) following promulgation of the new Constitution. Article 157 was not intended to assign the Independent Supervisory Commission any role in constitutional interpretation. It was simply meant to supervise a step by step implementation of the new Constitution.<sup>5</sup> It would in any case be incorrect to entrust the powers to interpret the Constitution in an independent S/C, and then assign an executive body to share that task with the judiciary.

### **I.B. The Repugnancy Clause**

This is provided in Article 3 on the Constitution which reads:

In Afghanistan no law may contravene the beliefs and ordinances (mu'taqadat wa ahkam) of the sacred religion of Islam.

This is a well-established feature of Afghanistan's constitutional law. Almost all of the 20<sup>th</sup> century constitutions of Afghanistan (with the exception of that of 1980 under the communist rule of Karmal) contained similar clauses to ensure conformity of the statutory law with the principles of Islam. The equivalent clause in the 1964 Constitution provided that no law may contradict “the basic principles of the sacred religion of Islam” (Art. 64). The 2004 Constitution seems to have expanded the scope of the repugnancy clause in its wording which does not feature the reference to “basic” principles but includes virtually all the “beliefs and ordinances” of Islam. The question that arose under the 1964 constitution was as to what precisely were the basic principles, as opposed to say the subsidiary rules, of the sacred religion of Islam! A question also arises as to the

significance of “sacred” in both of these connections. Although the beliefs and articles of the faith are sacred, there are parts of Islamic law in the areas of civil transactions (mu’amalat) that are not sacred as they are based on rationality and public interest and may be amended or even omitted on those grounds.

The implications of the repugnancy clause of the 1964 Constitution, and the frequently asked question as to the manner of its implementation, has not received a considered response. The question asked then was over the identification of the basic principles of the sacred religion of Islam. Now that the 2004 Constitution widens the scope and includes the “beliefs and ordinances” of Islam, the obvious reading would seem to refer to both the theological (mu’taqadat) and legal principles (ahkam) of Islam. The reference here is evidently to ‘aqidah and Shari’ah, the two principal constituents of Islam itself.<sup>6</sup> The beliefs of Islam refer, in the first place, to the five basic articles, or testimonials, of the faith (iman), which consist mainly of affirmation in words of a state of mind,<sup>7</sup> - and then the renowned Five Pillars of Islam, which are mostly of a practical nature.<sup>8</sup> This much can be said with a degree of certainty, but one would not really think that the sanctity of these aspects of Islam would really be at issue in the context of Afghanistan’s Constitution, simply because of the strength of the people’s adherence of Islam. Islam is the religion of almost 100 per cent of the population of Afghanistan and there is a sense of universal respect for the religion. When it comes to the passing of laws in Parliament, one is surely concerned, not so much with the ‘aqidah and ‘ibadah (dogma and worship) aspects of Islam but with what is known as the mu’amalat, or civil transactions that constitute the business of **government**. It is also my understanding that the **repugnancy** clause under review is concerned more with the clear and definitive (qat’i) rulings and injunctions of Islam, and those of the Qur’an and hadith in the first place, and less so with the speculative (zanni) rulings thereof that remain open to interpretation and *ijtihad*. One can go on to expatiate on the scope of this discussion. But it would be somewhat arbitrary for anyone to draw up a list of items and say with any degree of certainty that these are the aspects of Islam that the text of **Article 3** had intended. It looks very likely that the five sub-themes each that I have highlighted respectively under the two heading of beliefs and ordinances are relevant, and it is also not difficult to draw up a list of themes and principles with a view to identify the scope and content of the repugnancy clause, but I am not sure at all that such a list would command authority unless it is duly ratified by Parliament/Loya Jirga and, preferably also, attached to the Constitution itself. I also believe that this is precisely what is needed. Unless there is an authoritative framework to verify the referential points of the repugnancy clause the subject would remain open to debate by both the conservative minded and the liberal commentators of Islam. Our past experience also indicates that ambiguity of this kind is likely to play in the hands more of the hard line conservatives, and those who have little knowledge of Islam, more that it be can used as a basis of healthy adjustment and reform.

I may in this connection propose, perhaps, the approach taken by the Federal Constitution of Malaysia 1957, which consists of 183 Articles and 13 Schedules attached to it. The 9<sup>th</sup> Schedule of the Constitution (Legislative Lists) provides three Lists: the Federal List, State List, and Concurrent List. The State List in turn articulates the scope of the

jurisdiction of the Shari'ah Courts in Malaysia in a thematic and conclusive manner in about one full page. A direct parallel is not suggested here as there are many differences in the laws and governments of the two countries. For instance, the application of Islamic law in the federation of Malaysia is basically confined to Islamic family law, which falls under the jurisdiction of the states, especially the Shari'ah courts, Muftis, and Councils of Religious Affairs in each state. Islamic law is applied only to persons professing the religion of Islam, who constitute only about 50 per cent of the population. Each of the Muslim majority states of Malaysia has in turn regulated its Islamic affairs under a series of State Enactments, usually bearing titles such as the Administration of Islamic Law Enactment, or Islamic Family Law Enactment, which further regulate the areas that fall under List II of the Constitution.<sup>9</sup>

The details of List II in the Constitution of Malaysia specify the scope of the Articles 3 and 11 of that **Constitution** that declare Islam as the religion of the **Federation** and guarantees freedom of religion for followers of other faiths in the country. This kind of approach is good in that it verifies the scope and application of the general references to Islam in the Constitution of Malaysia.

It will also be noted that the repugnancy **clause** of Article 3 of the 2004 Constitution, lays down a negative test, which falls short of a demand for affirmative conformity. A law can thus be passed in Afghanistan which is not in conflict with the beliefs and principles of Islam, but then the scope remains wide open otherwise, especially with regard to matters on which no text or ruling can be found in the sources of Islam. From the viewpoint of Islamic jurisprudence, legislation on such matters also falls within the ambit of the Islamic public law doctrine of siyasah shar'iyyah as explained below.

### **I.C. Beyond the Text: A Glance at Siyasah Shar'iyyah**

This is an extensive area of the principles of government in Islam. Siyasah shar'iyyah (judicious policy) provides for a measure of flexibility and discretion in the administration of justice and the quest for good governance. In addition to following the given textual injunctions of Islam and the established Shari'ah, which is the general position, siyasah shar'iyyah authorises the lawful ruler, judge and jurist to take initiative, introduce new measures, policy guidelines and procedures that facilitate the administration of justice and good governance, respond to emergency situations, curb mischief and distortion in society. The measures so taken are guided by the spirit and objectives (maqasid) of the Shari'ah and people's welfare (maslahah) even when no particular text or ruling can be found in the established Shari'ah. In this sense introducing a Constitution in itself may be seen as an instrument of siyasah shar'iyyah, at least in those of its parts which may not be founded in a textual injunction of Islam. The basic idea of siyasah shar'iyyah is that the Shari'ah must be implemented with insight and wisdom ( hikmah, firasah) in a people-friendly and judicious manner. The Shari'ah is also not all about text and rules for the sake of rules. No society can lead its daily existence by applying the text to everything; judicious leadership and flexibility within the structure of legal rules always play important roles. Textual interpretation may, in other words, also require policy measures, and exceptional circumstances may even mean that judicious policy has to take priority, temporarily at least, over the text.



I may draw in this connection on the case of the Foreign Minister Spanta on whom the Wolesi Jirga passed a no-confidence vote under Article 92 of the Constitution. There is some ambiguity in this Article and also in its succeeding Article 93, which regulate the no-confidence vote but which are silent as to the consequences, if any, of such a vote. Spanta had been censured apparently over his negligence to act diligently to protect the interests of Afghan refugees in Iran. President Karzai disagreed with the Wolesi Jirga and referred the case to the S/C to review the constitutionality of the act of the Wolesi Jirga. The S/C found the no-confidence vote to be unconstitutional as it was based on something that was not within the control of the Foreign Minister, and also that the vote did not observe correct procedures. Articles 92-93 do not rule one way or another whether the Minister in question should resign or be terminated when so censured by the Wolesi Jirga. Then also Article 121 entitles the “Government or the Courts” to challenge the constitutionality of “a law or legislative decrees...” before the S/C. A question arises as to the nature of the no-confidence vote of the Wolesi Jirga: Could that be considered as law? The President’s act was in the nature of exercise of a veto power and the Constitution is also silent over the manner of its exercise with regard to something that does not qualify as “law” although it may be called a legislative decree, but not quite, as a legislative decree is usually issued by the Executive in the absence of a Parliament!

My reading of the constitutional theory of Islam suggests that the President probably does have the authority to take a stand over the acts and measures of all the three organs of state. Yet I am of the opinion that the legalities of this case is one thing, and that can admittedly be argued in different ways, but when one sees the case in the light of the broader interests of Afghanistan, the time and circumstances surrounding it, one is inclined to think that finer legalities are somewhat subsidiary to the concerns of unity and effective governance in the country. Afghanistan is facing a crisis of confidence of its people in their government. The international community also does not see it as a success story. Administrative corruption, perennial security preoccupations, worsening scenarios of unemployment and poverty etc., would suggest that this was not a time for the leadership to take a confrontational stance with the Wolesi Jirga. I do not propose to vindicate the latter either, as I am also aware of the somewhat questionable internal dynamics of the Wolesi Jirga. Yet I do believe that some other way could surely have been found to resolve that issue – and that is precisely what siyasah shar’iyyah is all about.<sup>10</sup>

As for the question whether the S/C is also empowered to apply the purport of Article 121 with regard to any conflict between a text of the Constitution and “the beliefs and ordinances of the sacred religion of Islam,” a tentative response may be given as follows:

Article 3 provides the governing principle here which clearly says that in Afghanistan no law may contravene “the beliefs and ordinances of the sacred religion of Islam.” This is addressed in the first place to law-makers, namely the Wolesi Jirga, Meshrano Jirga and the President. But since the review and interpretation of any conflict encountered with the principles of Islam falls within the jurisdiction of the S/C, the latter also becomes the audience of Article 3. A unitary system of adjudication and justice is the preferred approach in the Islamic theory of government, which does not encourage artificial boundaries and jurisdictions if such could be avoided. Unlike some other Muslim

countries that apply a dual system of courts and jurisdictions in the name often of civil courts and Shari'ah courts, Afghanistan has opted for a unified system of courts that is headed by an independent S/C. Hence the jurisdiction of the S/C over matters of interpretation extends equally to matters of concern to Islamic principles. It follows then that the S/C takes necessary measures to develop the specialist input and combine within its leading judges persons who are fully conversant in the Shari'ah and other laws of Afghanistan. This would normally be the case and a requirement of appointment for a Justice of the S/C. But more specifically the S/C may preferably establish a bench, or an appellate jurisdiction, that is entrusted with the task of reviewing issues of conflict with Islam and then presents its recommendations to the plenary session of the nine justices of the S/C.

Questions, however, are bound to arise, as already indicated, on the subject matter of the conflict between the Constitution and the beliefs and ordinances of Islam. To narrow down the scope of uncertainty and unwarranted claims that are likely to arise in the future, the open and unqualified terms of the beliefs and ordinances if Islam should be specified. This would not only help the judges of the lower courts and the Government, who initially receive the claims of contradiction, to verify the accuracy of such claims, but would also provide a frame of reference for further deliberations by the S/C itself.

## **II. Standing**

In response to the question as to who may bring a claim of unconstitutionality of a law, our first recourse is again to Article 121 of the Constitution which identifies "the Government and the Courts" who may request the S/C for an interpretation. This Article clearly refers to interpretation, which evidently means that the S/C does not make new law and the exercise of its jurisdiction is also limited to that framework. The basic terms of this Article were also adopted in the initial draft of the Constitution which provided for a separate High Constitutional Court (art. 146 of the initial draft) but which chapter was later omitted just before the text went to the Loya Jirga. But then questions also arise as to the precise meaning of "Government or the Courts" as to whether Government also includes Parliament and all whether it includes all parts of the Government or only that part which is faced with an issue.

In the opinion of the present writer, "Government" in Article 121 does not include Parliament. For if it did, it would mean that Parliament asks the S/C to interpret its own resolutions. The best interpreter in that context, one would assume, would be Parliament itself to interpret the law or decree it has approved, or better put, to provide the necessary qualification to a disputed text. Then again by "Government" I understand the leading decision makers that are accountable before Parliament. In his capacity as the head of all the three organs of state, the President himself is also included and may refer a matter of interpretation to the S/C. It would appear that once the law has been duly passed and ratified by the Parliament and the President, issues of interpretation should only be entertained when the law in question has been enforced and in reference also to a particular case. Any amendment, addition or exception that is made to the text before that stage would be an extension of the text and not interpretation or review thereof.



Moreover, if the S/C interprets a law before it is enforced, it would be theoretically exercising a supervisory role over the Parliament and or the President, which would seem somewhat arbitrary and go against the spirit of the separation of powers. Yet I am of the opinion that there are also issues of correct procedure that need to be addressed and regulated by an act of Parliament. It may be even better if such a document is ratified as an addition/attachment to the Constitution itself and if so, that may involve ratification by the Loya Jirga.

The Islamic tradition is characteristically concerned with substantive principles and not so much with procedural regulation. Procedural matters falls within the ambit of *siyasah shar'yyah* as explained above. Textual interpretation in Islamic jurisprudence is a prerogative of those who are learned of the Shari'ah and the customs and mores of society. In response to the question as to who may raise an issue, a fairly open attitude is maintained, which means basically anyone who is faced with a problem and needs a considered response may approach the learned scholar/mufti for a response, and the latter in under a religious duty to give a response or a fatwa. Thus we have a fairly extensive genre of literature in the name of *fatawa*, or *responsa*, that consists not only of responses Muslim scholars and muftis have provided to actual issues but also to theoretical questions they have themselves conceived in their scholarly deliberations. The Hanafi school of jurisprudence tends to differ from the other madhhabs in its tendency to engage in theoretical issues before they are actually encountered, but the general tendency is one of pragmatism and the advice to face issues once they have arisen.

I recall our discussion when we were reviewing the draft chapter of the constitution on the proposed High Constitutional Court, when it was being deliberated at the Constitution Review Commission (CRC) in 2003. I actually spoke on this on more than one occasion over the question as to whether one should devise a fairly open approach and access to all citizens or whether a narrowed down approach should be taken to the question of standing and access. A basic question also arose whether the formation of a separate constitutional court was a good idea. On the point of access, there was general agreement that an open and unregulated access would not be advisable as it would open the process to unwarranted claims. But responding to these questions were not deemed, either by myself or by my other CRC colleagues, as questions of Shari'ah or Islam as such, but matters that were to be determined through consultation and good advice. I understand that a 2005 proposed amendment to Article 24 of the Law on the Organisation and Jurisdiction of the Courts, which is still before Parliament, further articulates a procedure as to the time when a court decides to refer a case of constitutional interpretation to the S/C. At this point the court is to stop proceedings in the case and await the required interpretation. The proposed amendment to that Article also authorizes the S/C to address hypothetical and abstract issues over constitutional interpretation. As earlier stated, it would seem advisable for the S/C to set up a separate bench, or an appellate jurisdiction within the S/C especially for those individuals and organisations whose claims for fresh interpretation has been turned down by the lower courts.

### **III. The Effect of Interpretation**

In response to the question whether the interpretation that the S/C provides is binding or advisory, it would appear that the S/C itself would be likely to provide the necessary

indication to address this question. The position is also likely to relate to the nature and gravity of the conflict at issue. If the conflict at issues is over sensitive matters that may have damaging consequences to the integrity of the law and legal system, a decisive interpretation of a binding nature would be in order, but an advisory and persuasive opinion or interpretation may suffice on other occasions. On technical and procedural matters, the S/C may be likely to rectify the position and issue correct guidance to the courts or authorities concerned without actually taking the more drastic position of striking down a law. Yet these matters should preferably be regulated and a set of authoritative statutory guidelines and procedures.

From the perspective of Islamic jurisprudence, when one bears in mind the juristic literature on conflict and preference (ta'arud wa tarjih) and abrogation (naskh) of the text whether of the Qur'an or of authentic hadith, a restrictive position is advisable. Muslim jurists of the past have hardly taken an expansive position on issues of conflict and abrogation. There is a clear tendency in their writings to opt for a kind of interpretation that leads to clarification that explains and put an apparent conflict in its proper perspective. They were inclined to reconcile differential positions and retention (al-jam') of the apparently conflicting positions that could upon scrutiny be reconciled. If this is not possible then the next step is to prefer the one over the other and merely consider one preferable without seeking to suspend or strike down the other. If all of these approaches turn out to be unfeasible, then one of the two positions is abrogated. Yet in explaining the Islamic Jurisprudence tradition, I merely advance a perspective, without proposing a direct parallel. But even so a restrictive approach to the wider reaches of interpretation, if so preferred, would be in line with the Islamic tradition.

### **Conclusion**

The basic Qur'anic guidance that is also venerated and upheld in the approved traditions of Afghanistan is for the people to find solutions to issues of through consultation (shura), and the people of Afghanistan have shown the ability through their own traditional jirga methods to nurture engagement and resolution of differences in the spirit of reconciliation and give and take. Yet the Afghans are also known for their strong sense of individuality and independence that can carry them in the direction of confrontation. What Afghanistan needs most at this time, and is undoubtedly a momentous challenge it is facing, is the question of unity within and outside its Government and in the larger society. This is a matter of concern for all Afghans, the ruler and ruled alike, including the present writer, for our country and people to unite themselves behind the valued objectives of good governance, people's welfare and the economic viability of Afghanistan.

At the root of some of the hurdles that have arisen, and which were touched upon in this essay, between the Executive and the Legislative branches also lies the political modality of developing unity in the Government. And here arises the question over the absence to this day of political parties in Afghanistan. Legislative bills and important decisions are often turned into moots which could lose focus and effectiveness. Afghanistan needs to have effective governance, and it is unlikely to materialise without properly regulated

democratic procedures that enhance unity and strength for its initiatives within the Parliament and outside.

<sup>1</sup> For details on *usul al-fiqh* and its rules of interpretation, M.H. Kamali, *Principles of Islamic Jurisprudence*, Cambridge(U.K), 2003 which contains two chapters on the rules of interpretation pp.117-187.

<sup>2</sup> The word forms of the Qur'an text involved in these examples are absolute (*mutlaq*) and qualified (*muqayyad*), general ('*aam*) and particular (*khaas*), ambiguous (*mujmal*) and clarified (*mubayyan*, or *mufassar*).

<sup>3</sup> The three volumes of S/C publications appeared under the title *Majmo'a-e Muttahidul Ma'al-hae Stera Mahkama*, Kabul: Supreme Court Research Department, c. 1970

<sup>4</sup> Further details on the compatibility of a previous law with the 2004 Constitution can be found in M.H. Kamali, "Gender Justice and Women's Rights: a Critique of the Afghan Civil Law 1977," (due to appear in a collection of conference essays by the Max Planck Institute of Hamburg) where I have discussed some of the articles of the 1977 law which stand at odds with the 2004 Constitution and made proposals for suitable changes in that law.

<sup>5</sup> I also recall some of my colleagues in the Constitution Review Commission who in informal conversation mentioned that if the former king Zahir Shah were to have a role, then he could be made Chairman of the proposed Supervisory Commission.

<sup>6</sup> This may be seen somewhat parallel to the title of the renowned book of the late Sheikh of al-Azhar University, Mahmud Shaltut (d. c 1965), *Al-Islam 'Aqidah wa Shari'ah*.

<sup>7</sup> That is belief in God, truth of the prophethood of Muhammad and all his predecessors, the scriptures, the angels, resurrection and the Day of Judgement

<sup>8</sup> **These** are: reciting the *shahadah* (testimonial of the faith), ritual prayers, the fasting of Ramadan, the poor-due (*zakah*), and the *hajj* pilgrimage.

<sup>9</sup> List II of the Constitution of Malaysia thus include: Islamic law of succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, *wakafs*, charitable and religious trusts, *zakat*, *fitrah* and *Baitulmal* or similar Islamic religious revenues, mosques or any Islamic public places of worship, religious offences(except in regards to matters included in the Federal List), the constitution, organization and procedure of *Syariah* courts, the Malay custom etc.

<sup>10</sup> See for fuller details on *siyasah shar'iyah*, M. H. Kamali, *Shari'ah Law: An Introduction*, Oxford: One world Publications, 2008, chapter 11 entitled "Beyond the Shari'ah: An Analysis of Shari'ah-oriented policy (*siyasha shari'iyah*)", pp.225-246.