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# Finding Their Own Voice? The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy

Jason Lawrence Reimer\*

An entire and perfect union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms.<sup>1</sup>

— John Jay

## I. Introduction

After a United States-led coalition defeated the ruling Taliban forces in Afghanistan in December of 2001,<sup>2</sup> the Afghani people began developing a democratic system of government.<sup>3</sup> The new Afghani democracy, charged with respecting human rights,<sup>4</sup> replaced a regime

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1. THE FEDERALIST NO. 5 (John Jay) [hereinafter Jay].

2. See Bob Woodward, *CIA Told to do "Whatever Necessary" to Kill Bin Laden; Agency and Military Collaborating at "Unprecedented" Level; Cheney Says War Against Terror "May Never End,"* WASH. POST., Oct. 21, 2001, at A-01. The United States invasion of Afghanistan (Operation Enduring Freedom) occurred in Oct. 2001. The United States government believed the Taliban regime controlling Afghanistan harbored the al Qaeda terrorist network responsible for the September 11, 2001 attacks on New York and Washington. The attack marked the beginning of the United States' "War on Terrorism" that Vice President Richard Cheney described as a war that "may never end." See *id.*

3. See Woodward, *supra* note 2, at A-01.

4. See CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN ch. I, art. 6,

with one of the world's worst human rights records.<sup>5</sup>

The United States-backed Pashtun majority<sup>6</sup> led a "*loya jirga*"<sup>7</sup> that drafted the Afghanistan Constitution.<sup>8</sup> The assembly approved a constitution that created a bicameral legislature and a strong president (who also serves as the commander-in-chief of the military).<sup>9</sup> Strong opposition to the document emerged, and almost forty percent of the delegates refused to cast their ballot on the document.<sup>10</sup> The primary objection focused on the strength of the executive branch (similar to the U.S. model) and rejection of the parliamentary model opposition leaders were promoting.<sup>11</sup> Despite the objections and protests, assembly approval of the Afghanistan Constitution came in December of 2003.<sup>12</sup> Adoption of the document occurred in January of 2004 with interim President Hamid Karzai's signature.<sup>13</sup>

United States President George W. Bush proudly recognized the development of this new Constitution in Afghanistan by stating, "We've witnessed, in little over a generation, the swiftest advance of freedom in the 2,500-year story of democracy."<sup>14</sup> United States Secretary of Defense Donald Rumsfeld recognized the process that led to the sixth Constitution in Afghanistan since 1923,<sup>15</sup> declaring the result "a breathtaking accomplishment."<sup>16</sup> Despite the optimism of the United States President and the Secretary of Defense, the Afghanistan Constitution fails to meet the standards of a western democracy.

On October 9, 2004, President Karzai won the election for the office

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translated in A. Tschentscher, International Constitutional Law, [http://www.oefre.unibe.ch/law/icl/af00000\\_.html](http://www.oefre.unibe.ch/law/icl/af00000_.html) (last visited Jan. 22 2006) [hereinafter AFGHAN CONST.].

5. See Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4, 1 (2005).

6. See *Afghanistan Passes Constitution by Consensus*, CNN, Jan. 4, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/01/04/afghan.constitution/> (last visited Nov. 20, 2005) [hereinafter *Consensus*].

7. The word is from the Pashto language—*loya* means "great" or "grand" and *jirga* means "council," "assembly" or "meeting." See generally Q&A: *What is a Loya Jirga?*, BBC NEWS, July 1, 2002, [http://news.bbc.co.uk/1/hi/world/south\\_asia/1782079.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1782079.stm) (last visited Jan. 4, 2006).

8. See *Consensus*, *supra* note 6.

9. See *id.*

10. See *id.*

11. See *id.*

12. See Office of Int'l Info. Programs, U.S. Dep't of State, *Afghanistan's Road to Democracy: A Chronology Since the Fall of the Taliban*, <http://usinfo.state.gov/sa/Archive/2004/Oct/08-140678.html> (last visited Nov. 20, 2005) [hereinafter *Chronology*].

13. See *id.*

14. See *id.*

15. See Office of Int'l Info. Programs, U.S. Dep't of State, *Rumsfeld Calls Afghanistan Model of Success for Iraq*, Aug. 9, 2002, <http://usinfo.state.gov/regional/nea/sasia/afghan/text/0809dodrpt.htm> (last visited Nov. 20, 2005).

16. See *id.*

of President as a result of the general election.<sup>17</sup> During his inaugural address on December 7, 2004, Karzai said, “[W]e have now left a hard and dark past behind us, and today we are opening a new chapter in our history, in a spirit of friendship with the international community.”<sup>18</sup> He also emphasized that the people of the country were “determined to leave behind the suffering and oppression they once endured and [to] move forward to rebuild this great nation.”<sup>19</sup>

The Constitution, under which President Karzai serves, places Islam first, democracy second.<sup>20</sup> The first chapter of the Constitution states: “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”<sup>21</sup>

One year after the implementation of the Constitution of the Islamic Republic of Afghanistan, President Bush pronounced:

[W]hen the soul of a nation finally speaks, the institutions that arise may reflect customs and traditions very different from our own. America will not impose our style of government on the unwilling. Our goal instead is to help others find their own voice, attain their own freedom, and make their own way.<sup>22</sup>

As President Bush delivered these remarks in his second inaugural address, he signaled support of the newly implemented Afghanistan Constitution despite its theocratic leanings. The United States Department of State publicly compared it to the United States Constitution yet criticized the theocracy.<sup>23</sup> Assistant Secretary of State Christina Rocca told Congress that, “As with our own Constitution, the Constitution of Afghanistan is meant to be a document of the people, by the people, and for the people of Afghanistan.”<sup>24</sup>

This comment explores whether the Afghanistan Constitution truly represents a “document of the people, by the people, and for the people.”

17. See Chronology, *supra* note 12.

18. See Jane Morse, Office of Int’l Info. Programs, U.S. Dep’t of State, *Afghanistan Takes Huge Step towards Democracy*, Dec. 7, 2004, <http://usinfo.state.gov/sa/Archive/2004/Dec/07-742270.html> (last visited Nov. 20, 2005).

19. See Morse, *supra* note 18.

20. See AFGHAN CONST. ch. I, art. 3.

21. *Id.*

22. See President George W. Bush, Second Inaugural Address to the United States (Jan. 20, 2005).

23. *Afghanistan: Democratization and Human Rights on the Eve of the constitutional Loya Jirga*, Joint Hearing Before the Subcommittee on the Middle East and Central Asia and the Subcommittee on International Terrorism, Nonproliferation and Human Rights of the Committee on International Relations, 108th Cong. 16 (2003) [hereinafter *Hearing*] (statement of Christina B. Rocca, Assistant Secretary of State for Bureau of South Asian Affairs).

24. See *Hearing*, *supra* note 23 (statement of Christina B. Rocca, Assistant Secretary of State for Bureau of South Asian Affairs).

Despite public assertions by the United States and its western democratic allies, the document shows a close alignment with the Islamic Republic of Iran. The Afghanistan Constitution reflects the nation's determination to value Islam over western values and democratic thought. Additionally, the comment concludes that the Afghanistan Constitution's blending of theocracy and democracy will lead to its ultimate failure.

## II. Afghanistan: A Rebuilding Nation

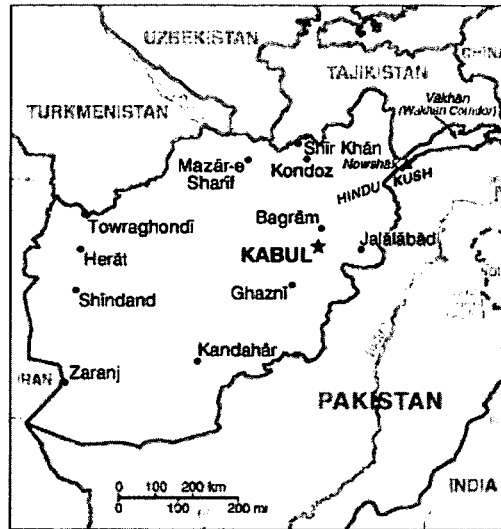
A land-locked nation, Afghanistan shares borders with six neighboring states: Pakistan, China, Tajikistan, Uzbekistan, Turkmenistan, and Iran.<sup>25</sup> All of the countries, except China, which has the smallest shared border with Afghanistan,<sup>26</sup> have large Muslim populations.<sup>27</sup> Figure 1 depicts the geographic layout of the nation.

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25. See U.N. HIGH COMMISSIONER FOR REFUGEES, UPDATE OF THE SITUATION IN AFGHANISTAN AND INTERNATIONAL PROTECTION CONSIDERATIONS 4 (2003) [hereinafter HIGH COMMISSIONER].

26. See CIA World Fact Book: Afghanistan, <http://www.cia.gov/cia/publications/factbook/geos/af.html> (last visited Jan. 4, 2006).

27. The Muslim populations for the bordering countries are: Pakistan: 97% (Sunni 77%, Shi'a 20%), see CIA World Fact Book: Pakistan, <http://www.cia.gov/cia/publications/factbook/geos/pk.html> (last visited Jan. 4, 2006); Tajikistan: 90% (Sunni 85%, Shi'a 5%), see CIA World Fact Book: Tajikistan, <http://www.cia.gov/cia/publications/factbook/geos/ti.html> (last visited Jan. 4, 2006); Uzbekistan: 88% (mostly Sunnis), see CIA World Fact Book: Uzbekistan, <http://www.cia.gov/cia/publications/factbook/geos/uz.html> (last visited Jan. 4, 2006); Turkmenistan: 89%, see CIA World Fact Book: Turkmenistan, <http://www.cia.gov/cia/publications/factbook/geos/tx.html> (last visited Jan. 4, 2006); Iran: 98% (Shi'a 89%, Sunni 9%), see CIA World Fact Book: Iran, <http://www.cia.gov/cia/publications/factbook/geos/ir.html> (last visited Jan. 4, 2006); China: 1-2%, see CIA World Fact Book: China, <http://www.cia.gov/cia/publications/factbook/geos/ch.html> (last visited Jan. 4, 2006).

Figure 1: Afghanistan and Bordering Nations<sup>28</sup>

The majority of the 22.2 million Afghans live in rural areas.<sup>29</sup> The state religion of the nation is Islam,<sup>30</sup> and almost the entire population is Muslim.<sup>31</sup> Eighty percent of the population is Sunni Muslim,<sup>32</sup> while nearly twenty percent is Shi'a Muslim.<sup>33</sup>

#### A. *The Taliban Regime*

In 1994, members of a group calling itself the Taliban launched a campaign to establish law and order in Afghanistan after three years of anarchy following the end of communist rule.<sup>34</sup> After the Taliban rose to power, the group persecuted the Shi'a Muslim.<sup>35</sup> Some sources estimate that 20,000 Shi'as were murdered or raped in one region alone.<sup>36</sup>

Saudi Arabia and Pakistan, two of the primary supporters of the Taliban,<sup>37</sup> served as models for the Taliban state.<sup>38</sup> The Taliban Attorney

28. See CIA World Fact Book: Afghanistan, <http://www.cia.gov/cia/publications/factbook/geos/af.html> (last visited Jan. 4, 2006).

29. See HIGH COMMISSIONER, *supra* note 25, at 4.

30. See *id.* at 5.

31. See *id.*

32. See *id.* An insignificant number of the population is Hindu or Sikh who originally came to Afghanistan as traders from India. *Id.* at 5-6.

33. See *id.*

34. See Travis, *supra* note 5, at 52-53.

35. See *id.* at 55.

36. See *id.*

37. See *id.* at 57.

38. See *id.*

General, explaining the lack of a constitution, stated, “The Constitution is the Shari’a so we don’t need a Constitution.”<sup>39</sup> The political sound bite reflected the group’s view that the state serves as a religious organ.

Prior to and during the Taliban regime, religious authorities controlled the courts.<sup>40</sup> Most of the judges were also the religious leaders who led daily prayers and delivered sermons.<sup>41</sup> Training Taliban-regime judges focused on teaching how to apply the Koran as the law, first and foremost.<sup>42</sup>

The Taliban regime governed in that manner without significant protests by western governments. After the September 11, 2001 attacks, however, western apathy towards the country dramatically changed.

The Bush administration provided the international community with evidence of support for the al Qaeda network responsible for the attacks. In an address to the United States Congress, President Bush stated:

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda’s vision for the world.

Afghanistan’s people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan—after all, we are currently its largest source of humanitarian aid—but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.<sup>43</sup>

The administration gave the Taliban the choice of ending its support for the al Qaeda network and turning over Osama bin Laden or facing invasion and regime change.<sup>44</sup> Ultimately, on October 7, 2001, President Bush ordered the United States and coalition forces to begin bombing al

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39. *See id.* at 56.

40. *See* S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 10 (1985).

41. *See id.* at 11.

42. *See id.*

43. *See* President George W. Bush, Presidential Address to a Joint Session of the United States Congress (Sept. 20, 2001).

44. *See* President George W. Bush, Presidential Address to the Nation (Oct. 7, 2001) [hereinafter Bush Address].

Qaeda targets and Taliban infrastructure,<sup>45</sup> because “none of [the] demands were met.”<sup>46</sup>

### *B. The Bonn Agreement and the Interim Government*

Prior to the U.S.-led coalition invasion, Afghanistan was embroiled in its twenty-third year of continuous military conflict.<sup>47</sup> Two months after the initial coalition invasion, a power vacuum emerged in Afghanistan.<sup>48</sup> The United Nations High Commission for Refugees wrote in a report:

The collapse of the Taliban regime was brought by a combination of factors: coalition bombing and ground military action . . . ; military support to Afghan factions . . . ; and the retreat or hand-over of power by the Taliban to local groups. By the end of Nov. 2001, this development had created a power vacuum in many parts of Afghanistan.<sup>49</sup>

The United Nations led a negotiation that provided the framework for an interim government and a process to develop a new constitution.<sup>50</sup> The negotiations involved twenty-three Afghans,<sup>51</sup> including two women.<sup>52</sup> This represented a dramatic change of course because the Taliban had not allowed women to participate in society.<sup>53</sup>

The negotiations resulted in the Bonn Agreement, which was signed by all involved parties.<sup>54</sup> Under the Bonn Agreement,<sup>55</sup> as adopted on December 5, 2001,<sup>56</sup> the interim government operated under the 1964 Constitution,<sup>57</sup> with the exception of having a monarch lead the state (an aspect of the 1964 document).<sup>58</sup> This Constitution included a basic

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45. *See id.*

46. *See id.*

47. *See* HIGH COMMISSIONER, *supra* note 25, at 8.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See* VARTAN GREGORIAN, *ISLAM: A MOSAIC, NOT A MONOLITH* 93 (2003).

52. *See* HIGH COMMISSIONER, *supra* note 25, at 8.

53. *See* GREGORIAN, *supra* note 51, at 93. The Taliban's oppression of women distinguished Afghanistan from some of its Islamic neighbors. Pakistan not only allowed women to participate in society and vote, but also voted a woman into its highest office. In addition to Pakistan (Afghanistan's eastern neighbor), Bangladesh, Turkey, and Indonesia also have elected women to their highest offices. *Id.*

54. *See* HIGH COMMISSIONER, *supra* note 25, at 8. The UN led peace discussions in Bonn. *Id.*

55. *See* The Secretary-General, *Letter Addressed to the President of the Security Council*, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

56. *See* HIGH COMMISSIONER, *supra* note 25, at 8.

57. *See id.*

58. *See id.*



reference to the *hanafi*<sup>59</sup> jurisprudence of the Shari'a<sup>60</sup> of Islam.<sup>61</sup>

Additionally, the agreement adopted existing laws and regulations as laws of the interim government,<sup>62</sup> as long as they did not contradict international agreements, including the United Nations Declaration of Human Rights.<sup>63</sup> Most civil, penal, commercial, and criminal codes were thus incorporated into the agreement.<sup>64</sup> The interim government did have, however, the power to amend any of these existing laws and regulations.<sup>65</sup>

The Bonn Agreement also empowered the interim government to create a judicial system employing Islamic principles.<sup>66</sup>

Afghanistan shall have independent judicial power vested in a Supreme Court and other courts established by the Interim Administration. A Judicial Commission established by the Administration shall rebuild the justice system in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions.<sup>67</sup>

The Bonn Agreement further expressed the importance of Islam in Afghanistan, while also laying the groundwork for incorporating democratic and international principles in the constitution that was to be developed by the Afghans.<sup>68</sup> The Bonn Agreement specifically stated that the constitution needs to “embody the basic principles of Islam, democracy, pluralism, social justice, rule of law, and Afghanistan’s international obligations.”<sup>69</sup> At a time when the negotiators could have

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59. “The *Hanafi School* of Islamic jurisprudence was founded by Abu Hanifa, one of the earliest Muslim scholar interpreters to seek new ways of applying Islamic tenets to everyday life.” *See id.*

60. Islamic law is referred to as the “Shari’a.” *See generally* GREGORIAN, *supra* note 51, at 25. There are various schools of thought on how to interpret the Shari’a (Islamic law). *See id.* Some schools believe that only individual scholars can make interpretations, while others believe there needs to be a consensus among leading scholars. *See id.* The *Hanafi School*, referenced in the 1964 Afghanistan Constitution, interpreted the Shari’a using analogy and reason especially when interpreting conflicts in statements from the Prophet. *See id.*

61. *See* HIGH COMMISSIONER, *supra* note 25, at 8.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* U.S. GEN. ACCOUNTING OFFICE, *AFGHANISTAN RECONSTRUCTION: DETERIORATING SECURITY AND LIMITED RESOURCES HAVE IMPEDED PROGRESS; IMPROVEMENTS IN U.S. STRATEGY NEEDED*, GAO-04-403 (2004), <http://www.gao.gov/htext/d04403.html> (last visited Jan. 4, 2006).

66. *See id.*

67. *See id.*

68. RAND CORP., *DEMOCRACY AND ISLAM IN THE NEW AFGHANISTAN CONSTITUTION*, 2 (Cheryl Benard & Nina Hachigian eds., 2003).

69. *Id.* (quoting Agreement on Provisional Arrangements in Afghanistan Pending the

charted a new course, if that was the direction they truly desired, this was a fatal misstep. By keeping Islam at the center of the judicial system and a future constitution, while attempting to embrace democracy and international norms secondarily, the Bonn Agreement, and ultimately the constitution, will lead to an almost certain demise for the Afghan government.

### C. *Creation of a Constitution*

Obedying the call for a constitutional *loya jirga* within eighteen months of the Bonn Agreement's execution, the assembly drafted a new Constitution.<sup>70</sup> The draft was passed by the assembly in December of 2003,<sup>71</sup> with approval in January of 2004 when interim President Hamid Karzai signed it.<sup>72</sup>

The Afghanistan Constitution's preamble begins by affirming the country's faith in God, but also affirms the drafters' desire to build a democratic nation that respects human rights and international law:<sup>73</sup>

1. With firm faith in God Almighty and relying on His lawful mercy, and Believing in the Sacred religion of Islam. . . .
  
3. While acknowledging the sacrifices and the historic struggles, rightful Jihad and just resistance of all people of Afghanistan, and respecting the high position of the martyrs for the freedom of Afghanistan,
  
4. Understanding the fact that Afghanistan is a single and united country and belongs to all ethnicities residing in this country,
  
5. Observing the United Nations Charter and respecting the Universal Declaration of Human Rights. . . .
  
7. For establishing a government based on people's will and democracy,
  
8. For creation of a civil society free of oppression, atrocity,

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Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement]).

70. The development of the 2004 Constitution has not been characterized positively. Instead, a number of accusations have been made about behind the scene draft changes and manipulation of delegates. See Carlotta Gall, *Chairman Walks Out of Afghan Council*, N.Y. TIMES, Dec. 31, 2003, at A-11.

71. See Chronology, *supra* note 12.

72. See *id.*

73. See AFGHAN CONST. pmb1.

discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people. . . .

11. And finally for regaining Afghanistan's deserving place in the international community. . . .<sup>74</sup>

The Constitution, after declaring Afghanistan a democracy that puts Islam first,<sup>75</sup> created a system that distributed power among a president,<sup>76</sup> cabinet ministries,<sup>77</sup> two legislative houses,<sup>78</sup> and a judicial branch.<sup>79</sup> The principles of this Constitution are discussed in the final section of this comment.

### III. Democratic and Theocratic Constitutional Principles

Before examining the principles of the Afghanistan Constitution that will lead to its failure, it is worth comparing the two very different systems it is based upon: democratic and theocratic systems of government.

#### A. *Western Democracies*

Because the United States strongly influenced the Afghanistan Constitutional process,<sup>80</sup> this section will conduct a brief review of United States and Japanese constitutional principles. Japan's constitution, the Kenpō, provides a useful comparison to the Afghanistan Constitution because at one time Japan had a theocratic system of government,<sup>81</sup> before the United States helped it develop a democratic system.<sup>82</sup>

##### 1. United States Constitution.

The Preamble to the United States Constitution shows the dramatic difference in philosophy behind it and the Iranian (and Afghani) Constitution:

We the People of the United States, in Order to form a more perfect

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74. *Id.*

75. *See id.* ch. I, art. 3.

76. *See generally id.* ch. III.

77. *See generally id.* ch. IV.

78. *See generally* AFGHAN CONST. ch. V.

79. *See generally id.* ch. VII.

80. *See Consensus, supra* note 6.

81. *See* HIROSHI ODA, JAPANESE LAW 123 (1992).

82. *See* Larry Catá Backer, *God Over Constitutions: Religiously Based Foundations and Modern Constitution-Making in the 21<sup>st</sup> Century* (forthcoming 2006).

Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>83</sup>

Unlike the Iranian Constitution,<sup>84</sup> which is discussed in detail later in this section, the United States Constitution endorses the viewpoint that the people, for the purpose of protecting themselves, created the government.<sup>85</sup> During the constitutional ratification debate, founding father James Wilson<sup>86</sup> stated that the power the people used to form the government was the unalienable right about which Thomas Jefferson<sup>87</sup> wrote in the Declaration of Independence:<sup>88</sup>

This opinion approaches near the truth, but does not reach it; for the

83. See U.S. CONST. pmbl.

84. See generally QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN [The Constitution of the Islamic Republic of Iran] *translated in* A. Tschentscher, International Constitutional Law, [http://www.oefre.unibe.ch/law/icl/ir00000\\_.html](http://www.oefre.unibe.ch/law/icl/ir00000_.html) (last visited Jan. 22 2006).

85. See U.S. CONST. pmbl.

86. According to the United States Congress' biographical directory of former members:

James Wilson was a Delegate from Pennsylvania [to the United States Congress] who immigrated to the United States in 1765; resided in New York City until 1766, when he moved to Philadelphia, Pa.; tutor in the College of Philadelphia (now the University of Pennsylvania); studied law; was admitted to the bar in 1767; practiced in Reading and Carlisle, Pa., and for a short time, during Howe's occupation of Philadelphia, in Annapolis, Md.; also engaged in literary pursuits; member of the Provincial Convention of Pennsylvania in 1774; Member of the Continental Congress 1775-1777, 1783, and 1785-1786; chosen colonel of the Fourth Battalion of Associators in 1775; advocate general for France in America and guided that country's legal relations to the Confederation; member of the board of war; brigadier general of the State militia; a signer of the Declaration of Independence; a delegate from Pennsylvania to the Federal Convention in 1787 and a delegate to the State ratification convention; settled in Philadelphia in 1778 and resumed the practice of law; Associate Justice of the United States Supreme Court 1789-1798; first professor of law in the College of Philadelphia in 1790 and in the University of Pennsylvania when they were united in 1791; died in Edenton, N.C., August 21, 1798; interment in the Johnston burial ground on the Hayes plantation near Edenton, N.C.; reinterment in Christ Churchyard, Philadelphia, Pa., in 1906.

See Biographical Directory of the United States Congress: Wilson, James, *available at* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000591> (last visited June 29, 2006).

87. Thomas Jefferson was, among many things, member of the Continental Congress, author of the Declaration of Independence, third president of the United States, and founder of the University of Virginia. See Monticello, Brief Biography of Thomas Jefferson, *available at* <http://www.monticello.org/jefferson/biography.html> (last visited June 29, 2006).

88. See James Wilson, Remarks to the Pennsylvania Ratification Convention (Dec. 4, 1787), <http://press-pubs.uchicago.edu/founders/documents/v1ch2s14.html> (last visited Jan. 11, 2006).

truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people. . . . The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people. . . .<sup>89</sup>

James Madison's words in the Federalist Papers, which advocated for the ratification of the United States Constitution,<sup>90</sup> further strengthened Wilson's argument. Madison argued that one sect, including a religious sect, should never govern the confederacy as a whole.<sup>91</sup> The nation as a whole would be harmed, and therefore, should not allow it.<sup>92</sup> Madison wrote:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.<sup>93</sup>

Madison's argument that various sects in the United States would prevent any one religious sect from dominating the political landscape embodies the Western democratic notion of separation of church and state.

In order to ensure religious independence from the government, the United States adopted the First Amendment to the Constitution.<sup>94</sup> The amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>95</sup>

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89. *See id.*

90. *See* Project Gutenberg, The Federalist Papers, <http://www.law.ou.edu/hist/federalist/> (last visited Jan. 22, 2006). The Federalist Papers was a series of articles written under the pen name of Publius by Alexander Hamilton, James Madison, and John Jay. The Papers attempted to increase support for the then-proposed Constitution. *Id.*

91. *See* THE FEDERALIST NO. 10 (James Madison) [hereinafter Madison].

92. *See id.*

93. *Id.*

94. *See* United States Senate, Constitution of the United States, *available at* [http://www.senate.gov/civics/constitution\\_item/constitution.htm](http://www.senate.gov/civics/constitution_item/constitution.htm) (last visited May 28, 2006).

95. U.S. CONST. amend. I.

Additionally, after the Civil War, the United States amended the Constitution to provide equal protection under the law:<sup>96</sup>

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>97</sup>

The United States Constitution's protection of fundamental rights, such as equal protection of the laws<sup>98</sup> and freedom of religion,<sup>99</sup> are rooted in John Locke's<sup>100</sup> vision of each individual having natural rights that are superior to the rights of the collective civil society.<sup>101</sup> However, individuals in a society such as the United States are willing to agree to a social contract to better protect the enforcement of their rights.<sup>102</sup>

Professor Michael Rosenfeld argued that an individual enters into the social contract because the state's only positive duty is to "insure that others are prevented from harming or destroying already existing rights. Under the vision in question, therefore . . . [the government] is to safeguard its citizens' negative rights through self-restraint and through restraint of would-be rights infringers."<sup>103</sup>

If the United States had not adopted the First or Fourteenth Amendments, the protection of those rights would be at risk. If a religious faction did not have those protections, the faction would lack the incentive to continue to sign on to the social contract (the Constitution). These protections prevent any single religious group from securing complete control of the nation. These protections continue to ensure that the union does not move towards theocracy.

## 2. Japanese Constitution

Prior to the end of World War II, the Japanese political and judicial

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96. *See id.* amend. XIV, § 1.

97. *Id.*

98. *See id.*

99. *See id.* amend. I.

100. John Locke was an English philosopher and political theorist. *See* California Polytechnic State University, John Locke, <http://cla.calpoly.edu/~lcall/locke.html> (last visited June 29, 2006). His most important political work, the *Two Treatises of Government*, argues that the state should protect the natural rights of citizens to prevent poverty. *Id.* Locke believed society was rational, tolerant, and cooperative. *Id.* He also believed there is a "social contract" between everyone in a society to respect a legal authority to ensure the pursuit of happiness. *Id.*

101. Michael Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1333 (2001).

102. *See id.* at 1333.

103. *See id.* at 1333-1334.

systems were embodied in the religious authority of the emperor.<sup>104</sup> As with the Afghanistan Constitution, development of the Japanese Constitution occurred after a conflict won by the United States and its allies with a post-conflict resolution largely directed by those same democracies.<sup>105</sup>

After World War II, and prior to the new Constitution's implementation, the Supreme Commander of Allied Powers, General Douglas MacArthur, signed a policy that separated religion from the state completely.<sup>106</sup> General MacArthur declared that in the new Constitution, the emperor must be "responsive to the basic will of the people as provided [in the Constitution.]"<sup>107</sup>

The Constitution, written by both Japanese and Americans in 1946,<sup>108</sup> came into effect in 1947.<sup>109</sup> The document was based on the principle that sovereign power belongs collectively to the citizens of Japan, and not to any one individual (the Emperor).<sup>110</sup> The Japanese Constitution's empowerment of the people over the Emperor serves as the foundation for the constitutional structure.<sup>111</sup>

The preamble of Japan's Constitution states the people's acceptance of popular sovereignty:<sup>112</sup>

We, the Japanese people . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.<sup>113</sup>

Japan's Constitution also affirmed the belief in basic human rights in Article 11:<sup>114</sup>

(1) The people shall not be prevented from enjoying any of the fundamental human rights.

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104. See ODA, *supra* note 81, at 123.

105. See Backer, *supra* note 82.

106. See ODA, *supra* note 81, at 123.

107. See LAWRENCE BEER, FROM IMPERIAL MYTH TO DEMOCRACY 79 (2002).

108. See *id.* at 77.

109. See *id.*

110. See ODA, *supra* note 81, at 112.

111. See DAN FENNO HENDERSON, THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 11 (1968).

112. See KENPŌ [Constitution] pmbl (Japan) *translated in* A. Tschentscher, International Constitutional Law [http://www.oefre.unibe.ch/law/icl/ja00000\\_.html](http://www.oefre.unibe.ch/law/icl/ja00000_.html) (last visited Jan. 22 2006).

113. *Id.*

114. See *id.* at art. 11.

(2) These fundamental human rights, guaranteed to the people by this Constitution, shall be conferred upon the people of this and future generations as irrevocable and inviolable rights.<sup>115</sup>

Koseki Shoichi, a prominent scholar on the drafting and adoption of the Japanese Constitution, wrote that the affirmation of popular sovereignty and human rights stems from “the views of [Japanese] individuals about the Constitution, and their ideas about human rights. Inherent in the Japanese Constitution are constitutional views and notions of human rights that transcend both state and race.”<sup>116</sup>

The Japanese Constitution, however, certainly shares western democratic ideals. Because of the similarities between the United States and Japanese constitutions, the Supreme Court of Japan and many lawyers in Japan look at the United States Constitution and the U.S. Supreme Court’s interpretations in determining the intent of the drafters of the Japanese Constitution.<sup>117</sup>

Further, instead of identifying religion as its higher calling (which the constitutions of Afghanistan<sup>118</sup> and Iran<sup>119</sup> both do), Japan has made the individual the basic unit of governance.<sup>120</sup> This premise is similar to John Locke’s premise used in founding the United States’ present system.<sup>121</sup> Japanese constitutional scholarship has described the ideal relationship between the individual, nation, and government in Japan:

The government represents the people. It conducts its affairs in accordance with the wishes of the people. . . . [A] government is founded to represent the people, and to perform the service of protecting the people. In compensation for this service, the people have promised to pay all the expenses. . . .

[S]ince the government has become the representative of the people and has acquired the right to act in their behalf, its measures are the people’s measures, and accordingly the people must obey the laws . . . enacted by themselves.<sup>122</sup>

This argument center-pieced the 1947 constitutional debates. Today, scholars view the Japanese Constitution as a document created by the people to function as an instrument for the people. Upon enactment of

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115. *Id.*

116. See BEER, *supra* note 107, at 85.

117. See ODA, *supra* note 81, at 116.

118. See AFGHAN CONST. pmbi.

119. See QANUNI ASSASSI JUMHURI’I ISLA’MAI IRAN pmbi.

120. See YUKICHI FUKUZAWA, AN ENCOURAGEMENT OF LEARNING SECTION 6, at 35ff (Dilworth & U. Hirano trans. 1969).

121. See Rosenfled, *supra* note 101, at 1333.

122. See FUKUZAWA, *supra* note 120.



the Constitution, Japan made the complete shift to popular sovereignty over imperial and religious sovereignty. This stands in sharp contrast to the Iranian and Afghani approaches.

Furthermore, unlike the Iranian and Afghanistan Constitutions, the Japanese Constitution provides without reservation that the "established law of nations" is to be observed.<sup>123</sup> Although the Japanese Constitution is superior to international treaties entered into by the government,<sup>124</sup> it does not require a treaty to survive a religious test.<sup>125</sup>

The 1947 Japanese Constitution, like the United States Constitution, separated religion and state:<sup>126</sup>

- (1) Freedom of religion is guaranteed to all.
- (2) No religious organization shall receive any privileges. . . , nor exercise any political authority.
- (3) No person shall be compelled to take part in any religious act, celebration, rite or practice.
- (4) The State and its organs shall refrain from religious education or any other religious activity.<sup>127</sup>

With the acceptance of a Lockean view of popular sovereignty, and a rejection of religion as a predominant source of law, Japan, like the United States, has adopted a "democratic" system of government.

#### *B. Islamic Constitution: Iranian Constitution*

Legal scholarship has recognized the Iranian Revolutionary Constitution of 1979 as one of the first and leading modern theocratic constitutions.<sup>128</sup> Islamic ideology dominates the Iranian Constitution based upon religious sovereignty.<sup>129</sup>

The Iranian Constitution's preamble states that Islam not only defines the regulations of state, but is the state itself:<sup>130</sup>

The basic characteristic of this revolution, which distinguishes it from other movements that have taken place in Iran during the past hundred years, is its ideological and Islamic nature. . . .

123. See KENPŌ art. 98, ¶ 2.

124. See ODA, *supra* note 81, at 52.

125. See *id.*

126. See KENPŌ art. 20.

127. *Id.*

128. See Backer, *supra* note 82.

129. See AMIN, *supra* note 40, at 109.

130. See QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN pmb1.

The Constitution of the Islamic Republic of Iran, setting forth as it does the political, social, cultural, and economic institutions and their relations that are to exist in society, must now provide for the consolidation of the foundations of Islamic government, and propose the plan of a new system of government to be erected on the ruins of the previous order. In the view of Islam, government does not derive from the interests of a class, nor does it serve the domination of an individual or a group. Rather, it represents the fulfillment of the political ideal of a people who bear a common faith and common outlook, taking an organized form in order to initiate the process of intellectual and ideological evolution towards the final goal, i.e., movement towards Allah.<sup>131</sup>

Under these specifically defined principles, the law of Islam has been superior to all types of Iranian constitutional, local, and international law.<sup>132</sup> The sources of Islamic law in Iran are the Koran and the Sunna.<sup>133</sup> Even if the Koran does not provide guidance, before Iranian laws are enacted, legal scholars in Iran look at the traditions of the prophet, known collectively as the Sunna.<sup>134</sup> After Islam, the Constitution is the next major source of law for the nation.<sup>135</sup>

The preamble continues by describing the role of legislation in Iran<sup>136</sup> and invoking the Koran's role in the law: "Legislation setting forth regulations for the administration of society will revolve around the Koran and the Sunna. Accordingly, the exercise of meticulous and earnest supervision by just, pious, and committed scholars of Islam is an absolute necessity."<sup>137</sup> Unlike in the United States or Japan, Iran empowers religious scholars to determine the absolute meaning of the law, because the law must revolve around the Koran and the Sunna. This represents another example of the inseparability of the Iranian Constitution and religion.

Article 56 of the Constitution proclaims that God rules mankind, even though man can control his own destiny. The article states:

Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual

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131. *Id.*

132. *See* AMIN, *supra* note 40, at 105.

133. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE JUSTICE SYSTEM OF THE ISLAMIC REPUBLIC OF IRAN 8 (1993) [hereinafter LAWYERS COMMITTEE].

134. *See id.* at 9.

135. *See* AMIN, *supra* note 40, at 107.

136. *See* QANUNI ASSASSI JUMHURI'I ISLA'MAI IRAN pmbl.

137. *Id.*

or group. The people are to exercise this divine right in the manner specified in the following articles.<sup>138</sup>

Article 72 makes it a violation of the Constitution for the legislature to “enact laws contrary to the official religion of the country or to the Constitution.”<sup>139</sup> To ensure that Article 72 is not violated, the Constitution creates a “Guardian Council” made up of six religious authorities and six Muslim jurists.<sup>140</sup> Any enacted legislation cannot become enforceable until the Guardian Council approves it.<sup>141</sup> The Guardian Council also has final review over interpretations of the Constitution.<sup>142</sup> The Guardian Council reviews the interpretation of the judicial branch, which under Article 61 reviews the Constitution and laws “in accordance with the criteria of Islam . . . and implement[s] the Divine limits.”<sup>143</sup>

Article 77 of the Constitution states that all “[i]nternational treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly.”<sup>144</sup> Therefore, the Guardian Council (which has ultimate authority over all legislation) also has final authority over all international treaties and agreements.<sup>145</sup>

During a meeting of the United Nations Human Rights Committee in 1982 investigating reports of state-sponsored murder and torture,<sup>146</sup> the leader of the Iranian delegation was questioned about Iran’s view on the United Nations Universal Declaration of Human Rights.<sup>147</sup> Sayed Hadi Khosrow-Shahi, the leader of the delegation, replied that Iran believed in the “supremacy of Islamic laws, which are universal” and when a law, such as the Universal Declaration of Human Rights, comes in conflict with Islamic laws, Iran would “choose the divine laws.”<sup>148</sup>

Ultimately, it is the view that the law of Islam serves as the supreme, universal law that most distinguishes the Iranian Constitution from the United States and Japanese constitutions.

#### IV. Afghanistan: A Theocratic Democracy

The previous sections examined Iran as an example of a theocracy,

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138. *Id.* at 56.

139. *Id.* at 72.

140. *Id.* at 91.

141. *See* QANUNI ASSASSI JUMHURI’I ISLA’MAI IRAN 94.

142. *See id.* at 98.

143. *Id.* at 56.

144. *Id.* at 77.

145. *See* AMIN, *supra* note 40, at 120.

146. *See id.* at 106.

147. *See id.*

148. *See id.*

and the United States and Japan as examples of democracies (to the extent the law originates with the people). This final section draws comparisons from these systems to argue that the Afghanistan Constitution creates a hybrid between democracy and theocracy.

Within the Muslim community, the current debate over democracy is composed of two camps: “modernists” and “traditionalists.”<sup>149</sup> Traditionalists do not believe there should be a difference between state and religion; God is the sovereign authority.<sup>150</sup> On the other hand, modernists believe that western-style democracy can work with Islam; generally advocate for a separation between state and religion.<sup>151</sup>

The Afghanistan Constitution attempted to appease both sides, on one hand establishing a democracy, on the other hand asserting that Islam is the supreme law. One member of the Afghanistan Constitutional Commission has said, “The [Constitution] aims to balance modern needs with those of a Muslim-majority nation.”<sup>152</sup> The document as ratified will likely fail both aims.

A fundamental question in international law is what is the principal source of law?<sup>153</sup> United States and Japanese legal scholars would argue that the people represent the fundamental source of law. Iranian legal scholars, on the other hand, would assert that the religious doctrine underlying the state represents the fundamental source of law. Under the Afghanistan Constitution, Afghan legal scholars would have to conclude their fundamental law includes both the law of Islam and the will of the people.

The Afghanistan Constitution opens by asserting the people’s belief “in the Sacred religion of Islam,”<sup>154</sup> and follows by asserting a respect for the Universal Declaration of Human Rights<sup>155</sup> and a desire to establish “a government based on people’s will and democracy.”<sup>156</sup>

The first chapter of the Afghanistan Constitution continues to show the quandary the drafters faced: embracing the religious principles of almost all of its citizens, while developing a “democracy” that also protects international law.<sup>157</sup> While the Constitution states that “no law

149. See GREGORIAN, *supra* note 51, at 94.

150. See *id.*

151. See generally *id.* at 94-98.

152. See *Hearing, supra* note 23 (statement of Rep. Ros-Lehtinen, Chairwoman).

153. Lecture by William E. Butler, John Edward Fowler Distinguished Professor of Law, Dickinson School of Law of the Pennsylvania State University, in Carlisle, Pa. to Spring 2006 Law of Treaties Class (Jan. 11, 2006).

154. AFGHAN CONST. pmb., cl. 1.

155. See *id.* pmb., cl. 5.

156. *Id.* pmb., cl. 7.

157. See *id.* ch. I, art. 1-8. The State:

Article 1 [Islamic Republic]

Afghanistan is an Islamic Republic, independent, unitary and indivisible

can be contrary to the beliefs and provisions of the sacred religion of Islam,”<sup>158</sup> it also affirms that Afghanistan is “obligated to create a prosperous and progressive society based on social justices . . . protection of human rights, realization of democracy, and to ensure national unity. . . .”<sup>159</sup> Claims from U.S. media outlets, such as the *Washington Post*, which headlined a story “Proposed Afghanistan Constitution Fits U.S. Model,”<sup>160</sup> celebrate the “realization of democracy,” yet ignoring the adoption of an Islamic theocracy. As long as no law can be contrary to Islam, the Afghanistan Constitution will never “fit [the] U.S. model.”

As an Islamic Republic, the Afghanistan state will need to reconcile the seemingly irreconcilable: making no law in contradiction to the laws of Islam,<sup>161</sup> allowing people of other faiths to practice their faith,<sup>162</sup> and abiding by international treaties (including the U.N. Declaration of

state.

Article 2 [Religions]

(1) The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam.

(2) Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law.

Article 3 [Law and Religion]

In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.

....

Article 5 [Territorial Integrity]

Implementation of the provisions of this Constitution and other laws, defending independence, national sovereignty, territorial integrity, and ensuring the security and defense capability of the country, are the basic duties of the state.

Article 6 [Purposes]

The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.

Article 7 [International Law]

(1) The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.

Article 8 [State Policy]

The state regulates the policy of the country on the basis of preserving the independence, national interests, territorial integrity, non-aggression, good neighborliness, mutual respect, and equal rights.

*Id.*

158. *Id.* ch. I, art. 3.

159. AFGHAN CONST. ch. I, art. 6.

160. Pamela Constable, *Proposed Afghanistan Constitution Fits U.S. Model*, WASH. POST., Nov. 4, 2003, at A-19.

161. AFGHAN CONST. ch. I, art. 3.

162. *Id.* ch. I, art. 6.

Human Rights).<sup>163</sup> One effect of the balancing act in the 2004 Afghanistan Constitution is a lack of constitutional certainties.<sup>164</sup> The Afghanistan judiciary has yet to determine the interplay between its Constitution, Islamic law, and international law. The United States, for example, states its Constitution is the supreme law of the land.<sup>165</sup>

Scholars at a RAND Corporation conference advising the constitutional drafters in Afghanistan warned that the Afghanistan Constitution could “erode the position of the elected legislature and the executive, and it may allow for a parallel power structure of politically ambitious clerics, as happened in Iran.”<sup>166</sup>

An important characteristic of democratic governments is an independent judicial branch with the ability to review acts by the legislative and executive branches.<sup>167</sup> Pakistan, Afghanistan’s eastern neighbor, shows the impact of an “independent” judicial branch that reviews laws from a constitutional and religious perspective. Pakistani courts created economic and social problems by striking down “vast portions of the statutory laws” because they did not conform to the judges’ view of Islam.<sup>168</sup> Afghanistan’s court system will be faced with similar decisions—and the fate of the state’s democracy could rest on the determination of what is the supreme law of the Afghanistan.

The United States Department of State recognized some of the uncertainties in the Afghanistan Constitution that the judiciary will face. United States Ambassador John Hanford, in a statement to Congress, said he was alarmed at the conflict between Islam and democracy at the judicial level,<sup>169</sup> and because of it, “the potential exists for extremist judges or officials to enforce their own policies or interpretations that would violate religious freedom.”<sup>170</sup>

Hanford’s concerns are well founded. The Afghanistan Constitution’s judicial system will be composed of both secular, legal

163. *Id.* ch. I, art. 7.

164. *See* Backer, *supra* note 82.

165. U.S. CONST. art. VI, § 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

166. RAND CORP., *supra* note 68, at 2.

167. *Id.* at 5.

168. *Id.*

169. *See* *Hearing*, *supra* note 23 (statement of John V. Hanford III, Ambassador-at-large, U.S. Department of State, Office of Int’l Religious Freedom).

170. *See id.*

trained judges, as well as Islamic judges.<sup>171</sup> Noah Feldman, the United States Department of State's advisor on religious liberty issues during the drafting of the Afghanistan Constitution, admits the judicial system's approach is an "experiment":

[The judicial system is] an experiment. It has the possibility of working, but there are certainly no guarantees. It's an experiment with a body that will be able to mediate between those two different sets of values, and do it in a way that is perceived as legitimate by the rest of the Afghan people.<sup>172</sup>

Further, the judiciary will need to address how to balance the interests of religion and international law. Iran has determined that when a law, such as the Universal Declaration of Human Rights, comes in conflict with Islamic laws, Iran would "choose the divine laws."<sup>173</sup> If the Afghanistan judiciary relies on the principles articulated in the Preamble that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam,"<sup>174</sup> Afghanistan's answer will sound very similar to Iran's.

Afghanistan's Constitution pledges to support human rights, equality, and liberty, characteristics of the United States and Japanese constitutions:

Article 22 [Equality]

- (1) Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited.
- (2) The citizens of Afghanistan—whether man or woman—have equal rights and duties before the law.

Article 23 [Life]

Life is a gift of God and a natural right of human beings. No one shall be deprived of this right except by the provision of law.

Article 24 [Liberty, Human Dignity]

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171. See Noah Feldman, *A New Democracy, Enshrined in Faith*, N.Y. TIMES, Nov. 13, 2003, at A-31.

172. See Office of Int'l Info. Programs, U.S. Dep't of State, *Constitutionalism in the Muslim World: A Conversation with Noah Feldman*, <http://usinfo.state.gov/journals/itdhr/0304/ijde/feldman.htm> (last visited July 4, 2006).

173. See AMIN, *supra* note 40, at 106.

174. AFGHAN CONST. ch. I, art. 3.

(1) Liberty is the natural right of human beings. This right has no limits unless affecting the rights of others or public interests, which are regulated by law.

(2) Liberty and dignity of human beings are inviolable.

(3) The state has the duty to respect and protect the liberty and dignity of human beings.<sup>175</sup>

To protect these and other human rights, the Afghanistan Constitution creates a human rights commission for “the purpose of monitoring the observation of human rights in Afghanistan, to promote their advancement and protection.”<sup>176</sup> The Afghanistan judiciary will certainly interpret those provisions; the question is whether the courts will protect democracy or Islam.

The Afghanistan Constitution rejects any separation between religion and state. When the drafters wrote: “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam,”<sup>177</sup> they rejected the central tenet of the protections in the United States that Madison described:

A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.<sup>178</sup>

Instead of protecting the system from any single religious sect, the drafters of the Afghanistan Constitution embrace Islam as the only true protector of the people. Professor Larry Catá Backer described Article 3 of the Afghanistan Constitution by writing that the article “is a national reflection of an ancient universal system of governance developed within a global community of believers, whose moral and ethical norms, it is argued, should limit the power of states over their subjects, whether or not members of the community of believers.”<sup>179</sup>

The impact on non-Muslims living in Afghanistan could be significant. When considering the rights of non-Muslims in an Islamic state, Islamic legal scholar S. Abdul A’la Maududi concluded: “While discussing the rights of non-Muslims in an Islamic state, it should be clearly borne in mind that an Islamic state is essentially an ideological

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175. *Id.* ch. II, art. 22-24.

176. *Id.* ch. II, art. 58.

177. *Id.* ch. I, art. 3.

178. *See* Madison, *supra* note 91.

179. *See* Backer, *supra* note 82.



state, and is thus radically different from a national state.”<sup>180</sup> This stands in stark contrast with Madison’s view that western democracy naturally protecting the people from “any danger” from controlling religious sects.<sup>181</sup>

The problems with the Afghanistan Constitution have moved to the front page of the *New York Times* recently with the story of the Afghan Muslim who converted to Christianity:

Preachers used Friday Prayer services to call for the execution of an Afghan Muslim who converted to Christianity, despite growing protests in the West. The conversion of the man, Abdul Rahman, 15 years ago was brought to the attention of the authorities as part of a child custody dispute.

The Bush administration and European governments have strongly protested the case as a violation of religious freedom. But Mr. Rahman has drawn a strong reaction in Afghanistan, too, and for many hardline clerics, there is no greater offense than apostasy. . . .

The dispute has exposed the contradictions in Afghanistan’s Constitution, which promises freedom of religion on the one hand, and on the other declares Islam supreme.

Sheik Asif Muhsini, a Shiite cleric, emphasized that the Constitution says, “No law can contradict Islam and the values of the Constitution.”

The case has fueled feelings here of an assault against Islam, coming after reports of the possible desecration of the Koran in Guantanamo Bay, Cuba, in 2004 by American soldiers and, more recently, cartoons published in Europe that mocked the Prophet Muhammad. . . .<sup>182</sup>

The rejection of Madison’s ideal is further seen in the oath for the Afghan President,<sup>183</sup> cabinet ministers,<sup>184</sup> and judges.<sup>185</sup> All of these officials need to swear to “obey and safeguard the provisions of the sacred religion of Islam,”<sup>186</sup> as well as the laws of the nation.<sup>187</sup>

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180. See S. ABUL A’LA MAUDUDI, RIGHTS OF NON MUSLIMS IN ISLAMIC STATE 1 (Islamic Publ’ns Ltd. 1982).

181. See Madison, *supra* note 91.

182. Abdul Waheed Wafa, *Preachers in Kabul Urge Execution of Convert to Christianity*, N.Y. TIMES, Mar. 25, 2006, at A-07.

183. See AFGHAN CONST. ch. III, art. 63.

184. See *id.* ch. IV, art. 74.

185. See *id.* ch. VII, art. 119.

186. See *generally id.* ch. III, art. 63; ch. IV, art. 74; ch. VII, art. 119.

One additional example from the Afghanistan Constitution shows the balancing of democratic and theocratic principles, and its shortcomings. The Constitution's power to amend is a very broad power, similar to the United States'<sup>188</sup> and Japan's.<sup>189</sup> The exception to the broad amendment power, however, is an important one. The Constitution significantly limits any changes to the provisions involving fundamental rights of the people and the religion of Islam.<sup>190</sup> The sections involving the fundamental rights can be amended only "in order to make them more effective."<sup>191</sup> The amendment provision also rules out any changes involving any section of the Constitution that refer to adherence to Islam.<sup>192</sup>

United States Ambassador John Hanford told the United States Congress that the Department of State has serious reservations about the amendment provision.<sup>193</sup> Ambassador Hanford felt that future improvements to the Constitution needed to include an expanded guarantee of religious freedoms, not just of the right to practice a religion.<sup>194</sup> Additionally, the Constitution should eliminate the tension between international law, Islamic law, and the new constitutional law.<sup>195</sup> With the amendment clause as written, it would be very difficult to address these concerns.<sup>196</sup>

Ultimately, all of these micro-level issues lead to a macro-level conclusion: under the Afghanistan Constitution religion supplants individual and communal human rights as the most important aspect to be protected. This fundamental principle binds the document to the Iranian document, and distinguishes it from the United States or Japanese constitutions.

## V. Conclusion

America is respectful of the great traditions of Islam and is serious about its commitment to help establish a peaceful, just, and tolerant society in which the Afghan people are free to shape their destiny. . . . It's important for people to know we never seek to impose our culture or our form of government. We just want to live under those

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187. *See generally id.*

188. *See* U.S. CONST. art. V.

189. *See* KENPO, ch. IX.

190. *See* AFGHAN CONST. ch. X, art. 149.

191. *Id.*

192. *See id.*

193. *See Hearing, supra* note 23 (statement of John V. Hanford III, Ambassador-at-large, U.S. Dep't of State, Office of Int'l Religious Freedom).

194. *See id.*

195. *See id.*

196. *See id.*

universal values, God-given values. We believe in the demands of human dignity that apply in every culture, in every nation. . . . All people deserve equal justice, religious tolerance. This is true in America. This is true in Afghanistan. These rights are true everywhere. . . . We've seen in Afghanistan that the road to freedom is the only one worth traveling.<sup>197</sup>

President George W. Bush delivered these words in a televised address one year after the initial attack on the Taliban in Afghanistan. Only a few months after he spoke those words did the constitutional convention deliver a constitution for ratification.

Despite the rhetoric of President Bush and other world leaders, the Afghanistan Constitution has made the nation an ideological state. Under the United States and Japanese constitutions, the rights of the people are superior to the rights of any religion. Afghanistan's government is bound to conduct the affairs of the state according to the Laws of Islam before all other considerations, including the will of the people. This single feature distinguishes the Afghanistan Constitution the documents that govern western democracies. This single feature inseparably ties the government of Afghanistan to governments of traditional Islamic states, such as Iran.

Scholars believe the twenty-first century could lead to a potential new wave of constitution making in which Muslim states attempt to create democracies.<sup>198</sup> It is hoped that the Afghanistan Constitution will not be a model for those constitutions.

The United States Constitution has stood successfully for almost 220 years. The Japanese Constitution has been successful for almost 60 years. In both cases, the constitutions do not attempt to appease many masters. Both documents rejected the premise of imperial sovereignty and instead are premised on the principle of popular sovereignty.

The Afghanistan Constitution attempts to empower all of the people, but severely restricts the power of all of the people except religious leaders. As long as the Constitution is subservient to the Law of Islam, it cannot also be subservient to the people of Afghanistan.

John Jay, one of the founding fathers of the United States, defined the perfect union as one that "will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms."<sup>199</sup> So long as Afghanistan has two kingdoms it looks toward: Islamic theocracy, like Iran, and western democracy, like the United States and Japan, the nation will

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197. See President George W. Bush, Televised Address (Oct. 11, 2002).

198. See Backer, *supra* note 82.

199. See Jay, *supra* note 1.

never meet the ideal of the perfect union that the world community dreams it can become.

