



## Applied Study of the Place of Religion in the Constitution of Afghanistan

*Afganistan Anayasasında Dinin Yerinin Uygulamalı Çalışması*

### ABSTRACT

One of the necessary issues of any society is to have a government and political system, which has a special place in Islamic political jurisprudence. In today's societies, the constitution of each country follows the legal system of that country. The important issue at this time, especially in religious societies, is the content of the Constitution and the position and role of religion in that society. After years of war, the country of Afghanistan approved its constitution in 2003. Considering that the new constitution of Afghanistan introduces the type of government as an Islamic republic and has ethnic, cultural and linguistic similarities with Iran, the study of the place of religion in the constitution Afghanistan will not be free of benefits for our own country either. The main question of this article is what is the place of religion in the constitution of Afghanistan and the Islamic Republic. What measures has Afghanistan planned to make the constitution compatible with Islam? It is natural that in order to answer this question, first of all, we have to understand the jurisprudence, this religion and the Shari'ah, and then we will refer to the experiences of other countries,

**Keywords:** The Constitution, Religion, Islam, Reconciliation of Religion and the Principles of the Constitution, Islamic Republic of Afghanistan

### ÖZET

Herhangi bir toplumun gerekli konularından biri, İslami siyasi hukukta özel bir yeri olan bir hükümet ve siyasi sisteme sahip olmaktır. Günümüz toplumlarında, her ülkenin anayasası o ülkenin hukuk sistemini takip eder. Özellikle dini toplumlarda, bu dönemde önemli olan konu, Anayasanın içeriği ve dinin o toplumdaki konumu ve rolüdür. Yıllarca süren savaştan sonra, Afganistan ülkesi 2003 yılında anayasasını onayladı.

Afganistan'ın yeni anayasasının hükümet türünü İslami cumhuriyet olarak tanıttığı ve İran ile etnik, kültürel ve dilsel benzerliklere sahip olduğu düşünüldüğünde, Afganistan anayasasında dinin yerinin incelenmesi kendi ülkemiz için de faydalardan mahrum olmayacaktır. Bu makalenin temel sorusu, Afganistan anayasasında ve İslam Cumhuriyeti'nde dinin yerinin ne olduğudur. Afganistan, anayasayı İslam ile uyumlu hale getirmek için hangi önlemleri planlamıştır? Bu soruyu cevaplamak için öncelikle fikhî, bu dini ve şeriatî anlamak, ardından İslam Cumhuriyeti dâhil diğer ülkelerin tecrübelerine başvurmak ve daha sonra bu bölümün bulgularını dikkate almaya çalışmak doğaldır. Asıl soruyu cevaplayalım.

**Anahtar Kelimeler:** Anayasa, Din, İslam, Din ve Anayasa İlkelerinin Uzlaştırılması, Afganistan İslam Cumhuriyeti

### INTRODUCTION

One of the necessary issues of every society is having a government and a political system, which also has a special place in Islamic political jurisprudence. In today's society, the constitution of every country is the most important law, and it predicts the legal system in that country.

One of the most important issues, especially in religious societies, is the new and important discussions about the content of the constitution and especially the viewpoint of the constitution regarding the place of religion in that society. The country of Afghanistan, as a Muslim society, approved its new constitution in 2012 after many wars.

Considering the cultural, religious and linguistic commonalities between the two countries of Iran and Afghanistan. The religion (Islam) in the constitution of Afghanistan will not be useless for our own legal system because the constitution of Afghanistan defines the government in Afghanistan as an Islamic republic like Iran. Therefore, the main question of this article is what is the place of Islam in the constitution of Afghanistan and how far does the Islamic Republic of Afghanistan correspond with the Islamic principles that it preaches and how can it be done for Taz Mine has used this match.

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To answer this question, it is natural that we need explanations. First of all, we should get familiar with the concept of religion, jurisprudence and sharia, and then we should study the different views of the fundamental rights of Islamic countries regarding Islam, and we should see what the basic laws of Islamic countries are in today's society.

In the next stage, we will mention examples of the basic laws of Islamic countries, including the Islamic Republic of Iran, and after studying these cases, and considering the knowledge we gain in these studies, the topic of the new basic law We will consider Afghanistan as a case of Islam.

On the one hand, it should be noted that the evaluation of the real role of religion in the fundamental rights can be significantly dependent on the practical implementation of the fundamental law. The new constitution of Afghanistan consists of a short preamble and 162 articles, which are divided into 12 chapters. The first and important point in the introduction is the emphasis on the Afghan people's faith in God and their belief in the holy religion of Islam.

Some of the cases in the constitution clearly show the dominant position of Islam in all aspects of Afghan people's lives. The first principle of this constitution states that Afghanistan is an Islamic republic. Therefore, we will pay attention to the role of Islam in the entire constitution of Afghanistan and examine the ways to ensure the Islamic system of Afghanistan.

### Definitions

In this section, while explaining the whole political system in Islam, we will briefly examine the different meanings of religion, jurisprudence, and Sharia, and examine their differences and similarities.<sup>3</sup> And to clarify the issue, we will have short references to various religions and writers of Islam.

### Meaning and Concept of Religion

Undoubtedly, the word religion is among the concepts that are always in the field of opinions and opinions of various experts, but it is very difficult to reach a common agreement about it Which is almost impossible. For this reason, even some researchers do not consider it definable.<sup>4</sup> Robert Hume has a beautiful and accurate interpretation in the book Living Religions of the World. He says: "Religion is so simple that every intelligent child or adult can have a real religious experience, and it is so comprehensive and complex that it needs analysis and analysis for complete understanding and use."<sup>5</sup>

Therefore, it should be noted that the subject of religion is of great importance, breadth and scope, and naturally one should pay attention to all its dimensions. Therefore, considering the relationship between religion and the constitution, we will provide a brief definition of religion: "The word religion in the dictionary has various meanings, including punishment, knowledge, oppression, habit, Obedience, obedience, obedience There are examples of these.

There are also verses in the Holy Quran, from which the meaning of punishment, law, obedience and servitude can be deduced.<sup>6</sup> According to these explanations, the meaning of the term religion can be defined as follows: "Religion is a set of beliefs, ethics, laws and regulations that are for the management of human society and human development."<sup>7</sup> There is another common and similar definition: "Religion is equal to belief in a creator for the world and human beings and practical instructions corresponding to these beliefs."<sup>8</sup>

### Political System in Islam

Before examining the political system in Islamic thought, it should be noted that power in Islamic thought is different from the western point of view. In the Islamic thinkers' view, power does not belong to the owners of power or the ruler, but every power belongs to the Lord, and there is no power other than absolute and original power. For this reason, they believe that any power that takes care of its origin will not be corrupted, because the corruption of power comes from that which considers itself as the source of power.<sup>9</sup> Therefore, with regard to this discussion and with regard to Western thoughts about the political system and its effect on Muslim thinkers, you should see how this relationship is established, in other words, in the constitution of a country. Islam, which determines the four pillars of power and powers in a political system, how much is the role of religion, in other words, how much is Islam? Islamic thoughts and teachings have been used.

<sup>3</sup> Yazdi,1986:26.

<sup>4</sup> Motaharrit,1984:117.

<sup>5</sup> Hume,1984:18.

<sup>6</sup> Ibid.

<sup>7</sup> Amoli,1993:93-95.

<sup>8</sup> Yazdi,1986:28.

<sup>9</sup> Javid,2013:40-41.

In the analysis of the opinions of Muslim thinkers about the political system and the rule of law, many ups and downs can be seen. And especially in the opinion of Ahl as-Sunt, a distinction should be made between the jurists of Ahl-as-Sunt and contemporary thinkers (last 2 centuries), because the latter group is to a large extent negatively or positively influenced by the currents of Western thought. Here, in order to avoid lengthy words, we have limited ourselves to this point about the political system in Islam, and in the next parts of this section, we will examine the linguistic and conceptual meaning of Sharia, religion and jurisprudence.<sup>10</sup>

### **The Meaning and Concept of Sharia and Jurisprudence and Their Relationship**

Sharia in the dictionary means a path that must be followed and refers to divine guidance. Shariah generally refers to divine laws, which have two parts: one is the words of God, that is, the set of revealed regulations that are included in the Qur'an, and the other part is tradition, that is, the traditions of the Holy Prophet (PBUH), which includes Of course, there are differences between the Sunnis and the Shiites regarding the extent of the tradition, which cannot be discussed here. In this sense, Sharia refers to the primary sources of rights that are eternal and cannot be changed.

Fiqh has multiple lexical and terminological meanings. The literal meaning of jurisprudence is to know or understand. As we read in the dictionary: jurisprudence refers to the understanding of something and knowledge about it, and in the literal sense, jurisprudence means knowledge and knowledge about the sciences of religion, in other words, jurisprudence is Islamic law. It is indicated that it is: conclusions from the application of Sharia to regulate people's daily activities. These inferences are the product of human thought, so they can change depending on factors such as time, circumstances, and the understanding of the inference of a specialist, that is, a jurist.

In the study of jurisprudence, as we mentioned earlier, there are various religions and schools. There is a general understanding of Shariah in the special sense of the word, and there is a consensus about the place of Shariah as supreme rights in the basic laws of some countries, but the relationship between jurisprudence and rights is the subject and role. Meanwhile, religion is different in different countries.<sup>11</sup>

### **Different Viewpoints of Basic Laws (Political Systems) Regarding Religion**

Regarding the relationship between religion and the state, there are various patterns and the position of the systems and the state in relation to religion and the place of religion and religion in the basic laws of the countries is different, which is generally and briefly discussed in this section.

#### **Anti-religion Pattern (Hostility Pattern)**

In this model, the government not only refrains from interfering in religious affairs, but acts as if there is no such thing as religion in the society. Some believe that this kind of differences can sometimes turn into hostility. For example, in former communist and socialist countries, there was an effort to make this position the dominant one. For example, although Article 52 of the former Soviet Constitution approved in 1977 states: "Freedom of conscience, the right to follow any religion or reject it, and to carry out religious worship or propaganda.

Al-Hadamiz is guaranteed for the citizens of the Soviet Union, but in the Soviet Union, China, Albania and other communist countries sometimes dealt with religion and religious followers in a very violent way, examples of which are in history. Therefore, although in these governments there is a belief in the separation of religion from the state, but considering the anti-religious spirit in the communist systems, it is almost impossible to believe in the issue of neutrality of the state in relation to religions.<sup>12</sup> Therefore, the separation of religion from the state in such systems is completely different from the neutral position, which we will explain in the next section.

#### **Non-religious Pattern (Spending)**

In this model, none of the provisions of the religion and the government have the right to interfere in a matter related to the other. The duty of the government is to guarantee religious freedom and prevent interference in religious matters. In this system, which is sometimes known as the neutral system, different situations can be observed. Among them, the state of tolerance, in which the government officially recognizes religious realities and their existence, and deals with them according to the social weight of each religion. In this case, the government is absolutely wary of interfering in the affairs of religions.

<sup>10</sup> Mohammadreza,2011:105-110.

<sup>11</sup> Ashahniaz,(2005) "The constitution of Afghanistan and women", Femenism legal studies2005p12

<sup>12</sup> Ibid.

In the secular and secular systems, especially in the West, the government is separate from the religion, and at the same time, there is complete freedom for any type of religious activity, and this model is the ruling one, of course, as mentioned in this model as well There are different situations.

For example, in the first article of the US Constitution, "Congress shall not pass any law establishing a religion or prohibiting the free performance of religious duties." In the fourth article of the German constitution, it is stated that freedom of conscience beliefs and freedom of religious and ideological worship is protected from interference. Non-violence is guaranteed during the religious ceremony. Therefore, it can be seen that several principles about religion and religion are usually mentioned in this pattern.

1. First, that no religion or sect, the official religion or religion of the state is recognized and the state is completely separate from the religion.
2. Second, that any type of religious activity and following any religion is free for everyone and has no prohibitions.
3. Any type of anti-religious or non-religious activity and movement is also free and has no prohibitions.<sup>13</sup>

### **The Issue of Systems Based on Religion (Unification and Integration)**

In this model, the government and the political system are not neutral and alien to religion, but what is seen is the unity of the government and religion. In this case, there is no distinction between religion and government, and there is a kind of production and reproduction relationship between religion and government. In most of the Islamic countries, this method has been adopted and it has been stated that the official religion of the country is Islam, and in general, the system of these countries can be called a system based on religion.

But on the other hand, there is no single reading in this relationship, and from the practical point of view, a single procedure has been adopted in these countries, and different readings have been read from Islam, and since Afghanistan is an Islamic country. In this part, there are references to different patterns.

### **Full Compliance with Sharia**

In this model, the political system, laws, regulations and all the principles of the system should be based on Islamic standards. This type of interpretation of the law and the government's formula and the adoption of the system based on religion and religion is the highest level of religious authority, because in this formula, any type of legislation and decision-making must be in accordance with the principles and standards of the Sharia And it has not accepted any kind of non-religious laws and regulations. And the only source of law is Sharia.

Of course, there are other principles and criteria, i.e. inference and ijthad in the framework of the Qur'an and Sunnah, and several other secondary sources It should be done accurately and completely. This pattern should be found in some Islamic recitations of the state and province of the jurist.<sup>14</sup>

### **Sharia as Main Source for Legislation**

In this model of religion and its principles, the main source is legislation, but the use of sources other than the Sharia is not prohibited, at least as secondary sources, and in the form that does not conflict with the rulings of jurisprudence.

In this model, the official religion and the main motto of the Islamic country in the ceremonies, motto and general culture of the country, and Sharia is the main source of legislation, but the use of sources other than Sharia is not prohibited and can be They used it. Also, there is no requirement that all the rulings of Sharia must be implemented in various personal, social, civil, economic, cultural, etc. fields.<sup>15</sup>

### **Prohibition of Laws that Contradict Islam**

In this model, two points are emphasized: firstly, the holy religion of Islam is the official religion of the country, and secondly, no law that contradicts the principles of Islam can be established. The difference between this model and the previous one is that in the previous model, a positive formula has been presented, that is, Sharia is the main source of legislation, but in this model, a negative formula is taken, that is, a law that contradicts the principles Salam cannot be established, that is, in the law, the law is contrary to the principles. It is sufficient if it is not Islam, and it is not necessary for it to be completely compatible as it is derived directly from the sources of Sharia.

<sup>13</sup> Ibid.

<sup>14</sup> danish,2016;2.

<sup>15</sup> ibid

## The Perspective of Some Basic Laws of Islamic Countries Regarding the Position of Religion

As we know, there are different schools in the study of jurisprudence and based on these schools, the basic laws of Islamic countries have also chosen different models, five of which are more important than the rest. Four of them are known as Sunni Islam. These four cases are: Maliki, which is common in North Africa, West Africa and Kuwait. Shafi'i, which is prevalent in Malaysia, Indonesia, southern Egypt, southern Arabia and East Africa. Hanafi, which is seen in Eastern Europe, India, Pakistan, Turkey and other countries. And Hanbali, which is observed in Saudi Arabia and Qatar. Another important school is Jafari, which is common in Iran and the most important school of Shiite Islamic law.

There is a general understanding of Shariah in the special sense of the word, and there is a consensus about the place of Shariah as a supreme right in the basic laws of some Islamic countries. However, the relationship between jurisprudence and the subject rights of a state can be significantly different in different Islamic countries.<sup>16</sup> Based on this, in this section, we will make brief references to some of the most important of these patterns.

### Saudi Arabia

As we said, there are different models in Islamic countries regarding the relationship between jurisprudence and subject rights, and one of these models is Arabia. Based on this, the country of Arabia has developed a school of jurisprudence and called it a legal system.

In this country, the rules of Hanbali jurisprudence constitute the rights of the state, in the sense that there are no legal principles in Arabia, but the rulings of the Sultanate that are issued and create rules in different areas, it is the Hanbali jurisprudence that exists in different fields. In addition, this means that judges are not required to find explicit rules: they can and should issue their opinions based on the Qur'an and Sunnah, even when there are no explicit rules. Another example was the example of Arabia in Afghanistan, which officially recognized Hanafi jurisprudence as the sovereign rights of this country.<sup>17</sup>

### Egypt

Although Egypt has gone through many changes after the Arab revolution and a new legal system is being formed, here we can briefly refer to the model of Egypt before the revolution and the new Egypt. be the subject of another independent investigation. In the constitution of the ruler before the recent revolution in Egypt, there were two principles, and according to this principle, Islam has multiple roles in the Egyptian society: Islam was declared the official religion of the country and also It was stated that the Islamic law is one of the main sources of legislation in Egypt.<sup>18</sup>

As we mentioned earlier, the model accepted by Egypt was a model that, although it introduces Islam as a source of legislation, it did not negate other sources for legislation, and there is no discussion about it. Laws are not compatible with Islam, and at first glance, principle 2 was seen as a descriptive principle rather than a mandatory order of the constitution at that time, despite Egypt's long history as an Islamic country. The revision of Egyptian laws in order to comply with Sharia law was not considered as a legislative task.

After a decade of Islamic movements calling for the actual implementation of principle 2 and Islamization, laws were made and in 1980, principle 2 of the constitution was changed and it was stated that Sharia is the main source of legislation in Egypt. Of course, it should be clarified what is meant by Sharia and what is meant by original source?

Therefore, the common theory was that although the Sharia is the main source of legislation and the legislative power must consider the Sharia in legislation, it is not required to follow a specific reading of the Sharia, the legislature is free. It is to choose any law of Sharia that is with the requirements of time and place. The Supreme Court also worked very carefully in the interpretation and monitoring of principle 2 and tried to introduce Islam as one of the sources of legislation.<sup>19</sup>

### Iran

In the Islamic Republic of Iran, there is a special model, because in Iran, Jafari's legal rules are dominant, and basically all private and criminal laws are based on Jafari's jurisprudence. Even if a law is approved (that is, the

<sup>16</sup> Said,2004.

<sup>17</sup> Ibid.

<sup>18</sup> Lombardi,2002:274.

<sup>19</sup> Ibid.

Council of the Islamic Shura establishes a law), it will be implemented only when it is approved by the respected Guardian Council in terms of compliance with the Sharia.

In other words, in the Islamic Republic of Iran, there is a pattern of non-contradiction with the rule of law. In the 4th principle of the Islamic Republic of Iran, it is also stated that all civil, criminal and other laws and regulations must be based on Islamic standards, and this principle applies to all the basic laws and regulations. Another ruling is the ruler and diagnosis. This is the responsibility of the respected jurists of the Guardian Council.

In the political structure of the Islamic Republic of Iran, the main position of leader and guide (jurisprudence) has been assigned to a just and knowledgeable jurist who guides the Islamic system and applies the laws according to Sharia. Holy is also placed in charge of the principle of religion.<sup>20</sup>

This type of interpretation of Sharia law and the adoption of the system based on religion is the highest level of religious authority in the modern world, because in this formula, any type of legislation and decision-making must be in accordance with the law. 1. Shari'a standards and no contrary laws and regulations. It is not accepted by religion and the main source of legislation is the Holy Sharia.

Of course, the system of the Islamic Republic is a special and successful system, because besides Islam and its complete respect, democracy and the adoption of the system based on the acceptance of the people and elections have also been given special attention.<sup>21</sup>

### **The Place of Religion in the Constitution of Afghanistan**

The basic laws of many Islamic countries include statements in the preamble that refer to the role of Islam. A democratic constitution is expected to include all the principles that the country will follow, the constitution of Afghanistan is also one of these laws.

In the preamble of the Constitution of Afghanistan, the faith of the Afghan people in God and their belief in the holy religion of Islam has been emphasized. Some of the principles in the constitution clearly show the dominant position of Islam in all aspects of people's lives. Therefore, in this section, we will discuss the role of the Islamic religion in the new constitution of Afghanistan.

### **The Role of Religion in the Principles of the New Constitution of Afghanistan**

The role of religion is evident from the brief introduction of the Afghan constitution, because the first principle of the Afghan constitution states that Afghanistan is an Islamic republic.<sup>22</sup>

The second principle of the constitution of Afghanistan states in summary that Islam is the official religion of Afghanistan, but the followers of other religions are free to practice their beliefs and religious ceremonies within the limits of the approved laws. It is worth mentioning that no distinction has been made between different Islamic minorities in Afghanistan and their law schools.

This could be due to the fact that none of the religious minorities received privileges compared to other religions, and of course, it was probably due to the fact that this principle is in line with the universal human rights.

In principle 7, which has been paid with the government's commitment to promote education at all levels, the development of religious education and the improvement of the conditions of mosques, religious centers and schools have been specially emphasized.

This matter has been emphasized in principle 45, that is, where the government is committed to implement a single educational program, based on the principles of Islam, and the flow of religious issues based on different schools of thought. Islam is developing in Afghanistan. Along with these actions, the government is obliged to remove customs that are against the principles of Islam according to principle 54.

Article 35 of the constitution recognizes the right to form political parties according to legal regulations and on the condition that the program and charter of the party are not against the principles of the holy religion of Islam for Afghan citizens. According to principle 19, the national emblem of Afghanistan is a place of worship on which this phrase is written: There is no God but Allah, and Muhammad is His Messenger, and God is greater.

Principle 2 also states that in the national anthem that will be in Pashto language, it is necessary to mention the phrase "God is greater". In the tenth section of the constitution, where the possibility of amending the constitution

<sup>20</sup> danish,2016:2.

<sup>21</sup> Refer to the principles of the Constitution of the Islamic Republic of Iran. <https://tinyurl.com/bdz9ueke>

<sup>22</sup> The first principle of the Constitution of Afghanistan: Afghanistan is an independent, united and indivisible state of the Islamic Republic. <https://tinyurl.com/mpzkymv>

is foreseen, that is, in principle 149 of the constitution, it is established that the principles of faith in the foundations of the Holy Islamic Sharia and the regime of the Islamic Republic cannot be accepted.

According to these principles, it shows the concern of the writers of the constitution to confirm the Islamic nature of the state and guarantee the dominance of Islamic rights, they are in all the texts of the constitution.<sup>23</sup>

From the point of view of the relationship between religion and the constitution, principle 3 is probably the most important principle that states: "In Afghanistan, no law can be against the beliefs and rulings of the holy religion of Islam."

This principle seems ambiguous to some extent because the concept of this principle can refer to Sharia, jurisprudence and even Islamic law doctrine from a legal point of view.<sup>24</sup>

It is considered that it can be strengthened in relation to jurisprudence in principle 10 which stipulates that when there are no provisions in the constitution or other laws regarding the decision of the issue, the decision of the judge must be the framework of the constitution should be according to Hanafi jurisprudence, and this is understandable considering that 84 percent of Afghanistan's population is followers of the Hanafi religion.<sup>25</sup>

He has not forgotten the constitution of the Shia community, which constitutes about 15 percent of the population. Principle 131 stipulates: Courts must respect the provisions of Shia jurisprudence in cases where the subject is personal status and is related to followers of Shia jurisprudence, and in other cases, if a special provision in the constitution or there are no other laws and they are both Shia, the courts in these the cases will be decided based on Shia jurisprudence.

The regulations of principle 130 and 131 fill the possible gaps. Both of these principles consider Sharia as a complement to the constitution. This particular encounter with two major religious groups naturally raises questions about the place of other religious groups and their rights in the constitution.

### **The Relationship between Religion and the Rights Guaranteed in the Constitution of Afghanistan.**

As it was pointed out in the previous section, the new constitution of Afghanistan has established a complementary role for Hanafi jurisprudence in Article 130 and 131, and in some cases for Shia jurisprudence.

The compatibility or conflict of the provisions of the constitution with religion can be examined from different angles and different points of view. The most important areas of challenge at this time are areas such as the construction of norms and government structures, family law, criminal law and human rights, and the study and comparison of these areas between Islamic law and human rights are discussed.

Considering the major violations of human rights during the Mojahedin and Taliban regime and the special attention of the authors of the new constitution of Afghanistan to human rights, we make this area the subject of a brief study.

This is with reference to the preamble of the Constitution and the 7 principles of the Declaration of Human Rights and the commitment to comply with them.

Such references in the constitution with this style and context are rare and it is certainly exclusive to the individual in the Islamic constitution.<sup>26</sup> The guarantee of individual rights and human rights is evident in the principles of the constitution of Afghanistan, and it is clear that human rights were one of the most important concerns of the authors of this constitution,<sup>27</sup> and for the effective supervision of it in the principle of 85 constitutions Afghanistan's independent human rights watchdog has been established. And he has a supervisory officer.

This type of organization is not seen or is rarely seen in other Islamic countries, because the previous government (Taliban) emphasized that human rights should be respected and guaranteed by the government. It is stated in the preamble of the constitution: "With respect to the Universal Declaration of Human Rights and in order to create a civil society free from oppression, tyranny, discrimination and violence and based on legality, social justice, and the preservation of dignity and rights." Humanity and ensuring people's freedoms and basic rights . We approved this basic law. "From the point of view of the drafters of the constitution, human rights have been so important that only the above words in the introduction are not enough and in addition to the previous cases that were mentioned in the 6th principle of the state to protect the right human life is burdened. In another place, it has been stated that

<sup>23</sup> Alame,2004"110.

<sup>24</sup> Thier,2006:106.

<sup>25</sup> . Islam in Afghanistan available at [www.aalsorg](http://www.aalsorg)

<sup>26</sup> Thier,2006:557.

<sup>27</sup> Danesh,2003:215-216.

the government respects the international human rights and international covenants to which Afghanistan has joined.<sup>28</sup>

But the important point in this regard is that due to the provision of the constitution to respect human rights and the existence of the third principle of the constitution which stipulates that the approved laws must be in accordance with Islamic regulations, they are fully enforceable at the same time or not. In other words, is there a conflict between them or not? An explicit answer to this question is not given in the text of the constitution, and basically an explicit answer cannot be given to this question.

An explicit reference to the necessity of compliance of all approved laws with Sharia is also seen in other basic Islamic laws such as Egypt, Iran and Saudi Arabia. However, none of these laws explicitly refer to the Universal Declaration of Human Rights.

Therefore, the case of Afghanistan is limited to an individual. The Islamic Republic of Afghanistan is self-evident.

It considers RA as the protector of human rights documents, and on the other hand, he considers all his laws to be compatible with Sharia. The point is that from the point of view of the drafters of the Constitution of Afghanistan, there is an inconsistency between the requirements of Article 3 and the human rights commitments contained in it. There is no universal declaration of human rights and other human rights documents. It is necessary to mention that the unconditional recognition of the Constitution of the Universal Declaration as a law. It is possible to show the positive attitude of the editors towards these rights.

Although giving a higher place to Sharia and making all the laws of the country in accordance with Sharia has also come in the basic laws of countries like Iran, Egypt and Arabia, but in these countries, the guarantee of these rights is subject to compliance. The rules of Sharia have been established, but in the constitution of Afghanistan, as when referring to the Sharia, the world declaration is also mentioned, and at first glance, the inclusion of the world declaration and the Sharia in a single document seems to be contradictory.

According to some, the supremacy of the Sharia in the Afghan Constitution over other applicable legal norms may create an obstacle to the implementation of the rights declared in a global declaration and the reference of the Constitution to this declaration. Make ineffective or meaningless.<sup>29</sup> For example, principle 22 of the Constitution of Afghanistan stipulates: "Any kind of discrimination and privilege among the citizens of Afghanistan is prohibited."

Citizens of Afghanistan (both men and women) have equal rights and duties before the law. This combination can be compared with the 20th principle of the<sup>30</sup>th Constitution of Iran, which stipulates that all citizens of the country, whether male or female, are equally protected by the law and have all cultural, social and equal rights. Islamic people will benefit.

In principle, there have been 2 global declarations that every person deserves all the rights and freedoms stipulated in this declaration, without any discrimination. Therefore, as we can see in the constitution of Afghanistan, the condition of basic rights and freedoms has come without observing Islamic standards, and the main point is that the challenges of the difference in human rights and observance of Sharia are there. Areas such as the equality of men and women, Islamic punishments and how it can be solved.

### **Examples of the Challenges Associated with the Universal Declaration of Human Rights and**

**Compliance with Sharia Laws** According to Principle 2 of the Universal Declaration, every person is entitled to all the rights and freedoms stipulated in this declaration, without discrimination of any kind, such as race, color, gender, language, religion, political opinions and other opinions. The principle of equality of all people before the law is stated in the 7 principles of the global declaration, which stipulates that all people are equal before the law and receive legal protection without discrimination. The question is to what extent these regulations are in harmony with Islamic legal rulings.

The distinction between women and men in Islam and between Muslims and non-Muslims has often been presented by human rights experts as possible times of incompatibility between the Sharia and the world. Some believe that Islam has officially recognized the equality of men and women, but it does not support the absolute equality of the role of their supporters. They explain their topic by referring to the principle of equal but not equivalent.

<sup>28</sup> Ibid.

<sup>29</sup> A-shahniaz,2005:12.

<sup>30</sup> Dolat Abadi,2011:82.



Others point to the behavior of those Islamic countries that have given Islamic rights in their constitutions and conclude that there is no conflict. In Sharia, the difference between men and women can be recognized in family rights, economic issues (inheritance, commitment to alimony) and judicial rights (the value of testimony in court).

Due to the mentioned differences, Islamic countries have tried to publish their Islamic declarations in the field of human rights. These efforts show themselves well in the approval of the Cairo Declaration on Human Rights in Islam.

The Cairo Declaration declares that women are equal to men in human dignity and have similar rights and duties. Women have their own citizenship identity and financial independence. They have the right to use their own name and fame. Critics consider this combination to be evasive, which introduces equality in human dignity to equality in rights.

But they accept that the difference in gender roles in Islamic law can be equivalent to discrimination on the threshold of international human rights. The reality is that the Cairo Declaration first of all officially recognizes the equality of men and women, and then addresses some special rights of women according to Islamic law, and then addresses the differences.<sup>31</sup>

The unconditional reference in Article 22 of the Constitution of Afghanistan to the equal rights of all citizens of Afghanistan leaves no room for any doubts about the reconciliation with the composition of the World Declaration. At the same time, it is not known how women can exercise all their rights, which are included in the global declaration, in such a way that such actions are subject to an examination of compatibility with Sharia.

Another area that has an apparent conflict between Sharia and international human rights is the discussion of crime and punishment. Principle 5 of the Universal Declaration declares that no one can be tortured or subjected to brutal, inhuman and degrading punishments, and according to some, any type of physical punishment is rejected.

Some Islamic punishments are physical, such as the law of stoning adulterers, or for example, according to the rule of an eye for an eye, and whipping are placed in this category. These punishments or some of them are carried out in many Islamic countries such as Iran, Pakistan, Saudi Arabia and Iran.<sup>32</sup> Islamic punishments are generally classified into several groups.

The first group includes the limits, i.e. the punishments for which special punishments have been determined in the Holy Sharia, and the other group is tazeer, which is the punishments that have been handed over to the government or the judge.

Although all these things can be physical, but the main issue about the category is the limit, that is, the limit that their assigned punishments have come in the divine rights and therefore they cannot change or they will indulge. This issue is true in the case of Islamic countries that have the condition of compliance of the provisions of the subject with the Shariah in their constitution have identified, but the new constitution of Afghanistan has not solved these challenges and has not provided any solution.

Article 29 of the new constitution of Afghanistan explicitly and unconditionally prohibits not only torture in general, but also specifically prohibits any punishment against human dignity. This matter can be considered as an obvious conflict with the Sharia as it is found in the Qur'an and Sunnah.

However, there are Islamic commentators who refuse the strict implementation of these regulations and argue that although these are the rules of God's book, they depend on the time and they should be considered as examples. Dunst and therefore used newer measures against crimes.

In addition, it is pointed out that while the punishments are almost unchangeable, they can be avoided by applying the judicial rules and establishing strict evidentiary conditions without violating the divine orders. He performed them correctly.<sup>33</sup>

Two other Islamic countries with basic laws that have the condition of conforming laws to Sharia, i.e. Islamic Republic of Iran and Saudi Arabia, usually apply Hudud punishments. Article 38 of the Iranian Constitution stipulates that all types of torture to obtain confessions or information are prohibited. This phrase, of course, closes the place for un-Islamic and inhumane punishments that are classified as torture and declares that the implementation of inhumane punishments is not limited. Egypt is another Islamic country that has a clear

<sup>31</sup> Said,2004:871.

<sup>32</sup> Ibid .

<sup>33</sup> Ibid.

requirement that the approved laws comply with Sharia, but usually, it does not apply the punishments of the border.

It is necessary to see how Afghanistan faces the challenge of Islamic punishments with regard to its commitments in the Sharia and the Universal Declaration of Human Rights. Another of the times of inconsistency between Sharia law and international declaration is principle 16 of the declaration, which states that men and women of any age, without racial, national or religious restrictions, have the right They get married and start a family. The Cairo Declaration has changed this phrase and states that the family is the foundation of society and marriage is the foundation of this foundation.

Men and women have the right to marry, and no race, color, or nationality restrictions can prevent them from enjoying this right. The reference to religion is not seen in this part of the statement because the marriage of Muslim women with non-Muslim men is prohibited in Islamic law. The constitution of Afghanistan is silent on this issue.

It is difficult to imagine how the legislator can respect the global declaration at this time without violating the old faith and sensitivity of Islamic countries. This law is generally respected in Islamic countries, even those that have solar legislation, such as Tunisia and Turkey.<sup>34</sup>

Finally, it is worth mentioning that the freedom of every person to change his religion is included in the principle of 18 universal declarations. The opinion of Islamic scholars on freedom of religion and the issue of changing religion is different. Traditional Islamic theory forbids adultery and prescribes the death penalty (for men).

Despite this, the majority of Islamic scholars reject the theory of Mazzat for Arnad and declares this opinion that there should not be compulsion in religion. They argue that it is not the change of religion that is prohibited according to Islamic law, but its manifestation in action in a way that endangers the public safety, morals and freedom of others, or even the existence of the Islamic government itself.

The constitution of Afghanistan, like other constitutions of Islamic countries, is silent on this issue, and the fate of the Universal Declaration depends on how the courts interpret the freedom to change religion. Whether or not the current constitution with its unprecedented guarantees of human rights will conflict with the law depends on how all these issues that do not have a clear answer in the text of the constitution are approved by the parliament. National and Supreme Court procedures will be investigated.

If this council and the Supreme Court want to apply the correct interpretation of Islamic law and mention the supremacy of Islam. It will be difficult to reconcile that kind of interpretation with many of the requirements of the current text. There are many signs and points in the current text of the constitution that show that this is not the intention of its writers.<sup>35</sup>

### **Solutions for the Compatibility of Laws with Islam in the Constitution of Afghanistan**

As we mentioned earlier, the most important principle in relation to the observance of Sharia law in Afghanistan is the third principle, which states: In Afghanistan, no law is against the beliefs and regulations of the Holy Islamic Sharia It should be approved. A complete evaluation of the implementation of the 3 principles of the Constitution of Afghanistan, in the first instance, is deferred to the evaluation.

The types of structures foreseen in the constitution are for monitoring its implementation.

In the Constitution of Afghanistan, 3 strategies for monitoring Sharia compliance are foreseen, which we will refer to briefly and examine the future challenges of this system:

The role of the President of the Republic in safeguarding the Sharia is one of the methods of guaranteeing the Sharia. Principle 63.<sup>36</sup> According to the most important principle related to this duty of the President, the President of the Republic must take an oath before the National Assembly to observe and guarantee the provisions of the holy religion of Islam To observe Sasi and other laws of Afghanistan and supervise their implementation.

<sup>34</sup> Saboory, mohamad hamid,(2006) "The Progres of constitutionalism in Afghanistan, Private law, 2006p16

<sup>35</sup> Stari,2010:206.

<sup>36</sup> . Article 35 stipulates: Before taking office, the President shall take the following oath according to the specific procedure regulated by the law :In the name of Allah, the Merciful, in the name of the great God (J), I swear that I obey the holy religion of Islam.And to protect it, respect the constitution and other laws and take care of its application, protect the independence, national sovereignty and territorial integrity of Afghanistan and protect the rights and interests of the people of Afghanistan with the help of the Barga Almighty God and the support of the nation, his efforts I will use it for the happiness and development of the people of Afghanistan.

Considering the broad powers of the President, it can be concluded that he is the guardian of the Constitution and the responsibility of supervising its implementation.<sup>37</sup> But the guarantee of Islam, the final commitment of the president is more than anything else, even more than the observance of the constitution, and this shows the place of religion in the constitution of Afghanistan.

In addition, this issue shows that the president will have a basic role in the implementation of Islam based on his understanding of the priorities of Islamic principles, of course, which includes a detailed list of the president's powers and duties. It is known that there is no guarantee about Islam.

Of course, if the president does not consider a law to be in accordance with Sharia, he can also use his right of veto<sup>38</sup> and return it to the parliament, even though after  $\frac{2}{3}$  of the law has been vetoed by another parliament, the president c Mahor is obliged to implement this law. It has been and should use other methods to guarantee Sharia. The principle of 157<sup>39</sup> has foreseen the solution of this issue through a separate legal means, that is, an independent commission to supervise the implementation of the constitution.

On the other hand, the members of this commission are also elected by the president of course with the approval of the parliament, but you can wait for the full powers of this commission. Zar said that one of its duties is to control the coordination of the approved laws with Sharia. was

But the important point of this commission is that what is the goal of the legislator here? Are the duties of the mentioned institution and the president of the republic parallel to each other and the basic law is not aware of this?<sup>40</sup>

With this situation, it is possible that inconsistencies may arise between the opinion of the President of the Republic and the aforementioned commission after monitoring the implementation of the Constitution and the Shari'ah, which will be a major challenge. What should be done in this case, there is no way to solve this problem in the constitution, unless the common law eliminates any kind of conflict in practice.<sup>41</sup>

In addition to the President and the aforementioned commission, there is another way to guarantee Sharia law in Article 121<sup>42</sup> of the Constitution of Afghanistan. According to this principle, at the request of the government or the courts, the Supreme Court can examine the conformity of laws, regulations, international agreements, and international conventions with the Shari'ah and their interpretation according to the laws.

This regulation turns the Diwanali of Afghanistan into a constitutional court that can have the authority to examine the compatibility of Islamic laws and regulations. A constitutional court plays an important role in developing countries as an arbiter in legal matters and is considered an important guarantor of individual rights.

The concern that exists at this time is that the independent constitutional court has attracted most of the existing judges and it will lead to a shortage of rare talents in the rest of the judicial system, especially when the country is struggling. It is a vote to rebuild the entire judicial system. In addition to this, the dual supervision of the independent commission and the judicial supervision of conformity with Islam will have challenges.<sup>43</sup>

## CONCLUSION

In some Islamic countries, God's absolute authority has been accepted in Taqeen; in such cases, it is God's will that rules over affairs, and the will of the people will flow in harmony with God's will. For example, principle 4 of the 1998 Constitution of Iran says that God, the creator of all people, is superior to the government and gives power to the people of Iran.

The second principle of the constitution of the Islamic Republic of Iran also states that the military Islamic Republic is based on belief in one God. Belief in the authority of God brings the high position of Sharia in these systems based on the religion of Islam, and religious commentators as experts should determine the limits and limitations of God's will.

<sup>37</sup> Constitution of the Islamic Republic of Afghanistan, Article 64 and Clause 1 of Article 63

<sup>38</sup> Article 94 of the Basic Law of the Islamic Republic of Afghanistan: The law is the approval of both houses of the National Council that has reached the term of the President of the Republic, unless otherwise specified in this Basic Law. If the President of the Republic does not agree with the resolution of the National Council, he can return it to the Wolsey Jirga within 15 days from the date of submission with the reasons. During this period, or in the event that the Wolsi Jirga approves it again with two-thirds of the votes of all the members, the revised resolution will be considered invalid.

<sup>39</sup> Refer to Article 157 of the Constitution of Afghanistan

<sup>40</sup> Stari, 2010:104.

<sup>41</sup> Ahmadi et al, 2018:318.

<sup>42</sup> 41 Asl: 121, examining the conformity of laws, technical orders, agreements between countries and international covenants with the constitution and their interpretation based on the request of the government or the courts, in accordance with the provisions of the law. The jurisdiction of the Supreme Court is

<sup>43</sup> Qorbati, 2018:366.

Of course, in the basic Islamic laws, the rule of the people has been officially recognized in most cases. The 4 principles of Afghanistan's constitution are very clear at this time. National sovereignty in Afghanistan belongs to the people who exercise it directly or through their representatives.

In these countries, in general, the respect of the constitution for Islam is not an obstacle for the establishment of laws that are not against the correct understanding of Islam. Regarding the constitution of Afghanistan, there are many signs that its authors were in search of creating the most modern constitution in the Islamic world.

The pressure of time and the very special political situation at the time of drafting the constitution is inconsistency. This has led to some irregularities in the text. Despite this, it can be considered as a basis for the implementation of the progressive hopes of the writers. The declaration in principle 22 is the most important sign of the equality of men and women in terms of their rights and duties.

According to the principle of 60, the president can be a woman or a man. Although there is no explicit prohibition for women in Islamic law, the general view of Islamic rights regarding women is at least one of the progressive and unprecedented cases in the law. A new basis appears.

A traditional interpretation of Sharia between Muslims and non-Muslims in terms of political and civil rights and their position in the history of the law is different. This is the fact that the constitution of Afghanistan includes religion as a condition for membership in the National Assembly or Diwan. It shows that there is no discrimination between different religions at this time. The current constitution is based on the 1964 constitution to some extent.

The issue of the reconciliation of national laws with Islamic regulations in the constitution did not create a problem. Therefore, it is possible for the legislator to design an effective approach in the framework of the new constitution, considering the requirements of principle/

The issue of the reconciliation of national laws with Islamic regulations in the constitution did not create a problem. Therefore, it is possible for the legislator to design an effective approach in the framework of the new constitution, considering the requirements of principle 3.

The person of the President and the composition of the National Assembly have a fateful role in the formation of the relationship between the approved laws and the Sharia law. In addition to various powers in relation to the National Assembly and the Judiciary, the President of the Republic is the person who finalizes the laws (Article 94) and appoints the members of the Supreme Court and appoints the members of the Supreme Court.

The Commission for Monitoring the Implementation of the Constitution (Article 157). Therefore, it seems that the personality and the opinion of the President of the Republic have an effect on the reconciliation of laws with the Holy Sharia and the practical formation of the Islamic Republic of Afghanistan. Ann is a great role player. In summary, in the answer to the main question raised in this article, it should be stated that Sharia is undoubtedly considered as a complement to the Constitution of Afghanistan.

Although there are possible contradictions between the Sharia and some of the principles of the constitution, what makes the constitution of Afghanistan one of the unique cases among Islamic countries is that it is strict in accordance with the Universal Declaration of Human Rights and at the same time maintaining harmony between all the laws of Afghanistan and the principles of Islam has been emphasized.

This combination does not officially create a conflict, but there is a possible inconsistency that may arise in the actual implementation of the Constitution. This inconsistency may be small and can be tolerated with new and moderate treatments.

Therefore, although the name of the government of Afghanistan is Islamic Republic, it is mentioned that the system is Islamic and the role of religion is mentioned in the constitution, but it should be noted that in practice you have to wait and see how Islamic the government of Afghanistan is. He believes that he is committed to the implementation of the religion of Islam in government affairs, and in other words, how determined the new Afghanistan will be in the correct implementation of the religion in the affairs of the government.

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