

Bismi Allah al-Rahman al-Rahim

Constitutional Dialogue: Opinions Among Afghan Sharia and Law Experts

Afghanistan has seen more than forty years of political conflict. The conflict has also meant that every new government has introduced a different way of how the country should be governed. In the last 50 years Afghanistan has seen many different forms of government – monarchies, emirates and republics among them. Bearing in mind this historical context, this group has come together to discuss contemporary constitutional issues in Afghanistan.

As we have gathered, we do not represent any institution but our own conscious, at the same time we come from different backgrounds concerning age, gender, region, ethnicity, profession, and are of different or no political affiliation. The dialogues were held only among Afghans and without any foreign presence.

We, the participants and scholars on Sharia and constitutional law in Afghanistan have met four times between 21 Saunbola and 24 Qows of 1399 to discuss topics related to constitutionalism and Islam. After thorough and inclusive dialogues, we have come to the following points.

1. Sharia recognizes more than one way to govern; it does not provide one conclusive model of political governance. The Holy Quran and the Sunnah do not require any specific form of government. It is the decision of any society how it wants to be governed, but every people need a stable political order to live peacefully. Here, Islam is flexible, and Afghans should be pragmatic. We appreciate the formulation of a written constitution as a foundation of that order. The Charter of Medinah serves as an important historical example of the Prophet Muhammad (peace be upon him) creating order through a written document. It is important that any type of government pursues the goal of public welfare (*maslaha*) and seeks to establish justice across the land.
2. We compared different forms of government: monarchy, emirate, and republic. Islamic jurisprudence allows for all three systems as the structure of the state is for the *umma* to decide according to its circumstances.
 - We discussed who is eligible to lead and concluded that it is for the *umma* to choose its political leaders and design the structure of the state.

- Leaders must be Muslim, pious, experienced, just and of good reputation.
 - We were unable to find a common point of view on the issue of permissibility of the political leadership of women and the legislative role of non-Muslim minorities. Hence the issue remains unresolved.
 - We believe in the principle of consultation (*shura*) and have observed various similarities between the ideas of parliament and a *Shura of Ahl al-Hal wa'al Aqd*. The institutions and their functions are similar. Consultation regarding political governance should be public and transparent. And the rulers should be accountable to the public for their actions in accordance with the law.
3. We have discussed the precedents of the election of righteous Caliphs in early Islamic history. We conclude that modern elections are permissible and legitimate in Islamic perspective. Most of us agree that political parties are permissible and represent the diversity and tolerance inherent in Islam. However, political parties should not be designed to be divisive but they must serve the public good. We could not agree whether leadership should be time-bound or not but are confident that it should be conditional on the leader upholding justice and consultation. Hence, we could not agree whether leaders should stand regularly for election, but we agreed that Islam does not prescribe an absolutist or authoritarian system.
 4. The Quran and several *ahadith* refer to consultation (*Shura*). Several principles such as the rule of law, separation of powers, checks and balances, transparency and accountability can all be derived from Islamic sources. Some of us have stressed that the *Jamhur* (republic) is not a Western invention, but a genuine term of Islamic jurisprudence. The Prophet (peace be upon him) appointed judges who adjudicated with considerable independence from executive governors. This sets a good example to separate the powers in government, especially when it comes to the independence of the judiciary and the rule of law. An Islamic system must be based on *Sharia*— but it leaves discretion to the people and the ruler in political and administrative spheres. Leaders must uphold the divine law and consult the public in the discretionary political matters. The values of accountability and transparency are thus important from an Islamic governance point of view. The rule of law should be upheld in governance, whether with regard to divine law or to the laws where humans have been granted discretionary power.
 5. With regard to fundamental rights, we agree that better human rights protection leads to stable political governance and that human rights are universal because all human beings are endowed with dignity by their creator. Both Islam and international human rights law impose

limitations on the state authority to protect the rights of citizens, and Islam guarantees equality based on dignity of human beings and prohibits all forms of discrimination. Both men and women are equal in dignity. The Islamic approach to rights is based on considerations of equality as well as equity.

6. Despite many similarities between Islam and international human rights law, which is evident from the endorsement of the Universal Declaration of Human Rights by Muslim-majority states, we do observe that they differ with regard to their sources and philosophical orientations. Such differences however should not be a hindrance for reforming the current constitutional framework to allow for a robust judicial review of laws based on human rights norms derived from Islam and international human rights law.

We reiterate that Sharia does not require a certain form of government. The principles of justice, rule of law, transparency and accountability should guide any form of governance among Muslims. It is up to every Afghan to build a just, Islamic system in which they hold their leaders accountable. It is up to the leaders of Afghanistan to consult with the people and uphold justice. The differences with regards to human rights are smaller than assumed given the politicized discourse. We must strive for justice and to uphold the ideal of public welfare (*maslaha*) to serve all Afghans.

Participants

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