

# The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution

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Glossary

## I. Introduction

The constitutions of most Islamic countries – including that of the Islamic Republic of Afghanistan – contain clauses establishing Islam as the official state religion and requiring that all laws adopted by the state comply with Islamic beliefs and religious doctrine.<sup>1</sup> At the same time,

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these constitutions guarantee civil rights for all citizens. The Afghan Constitution<sup>2</sup> even refers to the Universal Declaration of Human Rights and the Charter of the United Nations and compels the Afghan state to respect these rights and abide by the international conventions it has ratified.<sup>3</sup>

The question of whether these two obligations are contradictory or complementary will be examined and methods of resolving such a potential conflict will be evaluated. I would like to shed some light on the Afghan legal system, in particular the Afghan Constitution, and describe how religious doctrine and the conflicts, which arise from the co-existence of these two obligations in the Afghan legal framework, can be said to influence due process.

The case of Abdul Rahman, an Afghan-born Muslim who converted to Christianity while he was working abroad and was later on accused of apostasy, was heavily reported worldwide and drew much public interest. The case clearly illustrates the conflict of different legal systems coexisting in legal pluralistic societies such as Afghanistan. A legal evaluation of the case will provide the necessary insight and elaborate the relationship between religious and judicial norms in the Afghan Constitution and their compliance with human rights standards.

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Law on 15 June 2006, where I presented my dissertation. This article can only give insight into some constitutional issues regarding Islamic countries such as the Islamic Republic of Afghanistan, which will be studied in-depth in future publications.

<sup>1</sup> Countries with a majority Muslim population giving Islamic law a preferred position are *inter alia* Islamic Republic of Afghanistan, article 3 of the Afghan Constitution; Arab Republic of Egypt, article 2 of the Egyptian Constitution; Islamic Republic of Iran, arts 2-4 of the Iranian Constitution; Republic of Iraq, article 2 of the Iraqi Constitution; Islamic Republic of Pakistan, article 227 of the Pakistani Constitution; State of Qatar, article 1 of the Qatari Constitution; Kingdom of Saudi-Arabia, *inter alia* arts 1, 23 and 48 of the Saudi-Arabian Constitution; Republic of Yemen, article 3 of the Yemeni Constitution.

<sup>2</sup> Decree 103 published in the Official Gazette No. 818; for English translation see under <[http://www.idli.org/AfghanLaws/Laws%201921\\_todate.htm](http://www.idli.org/AfghanLaws/Laws%201921_todate.htm)>.

<sup>3</sup> Article 7 of the Constitution.

## II. Factual Background of the Case of Abdul Rahman

Abdul Rahman was accused of rejecting Islam and converting to Christianity 16 years ago when he was working for a Christian relief organisation in neighbouring Pakistan as a medical aid officer caring for Afghan refugees. When he returned to Afghanistan to settle a custody battle for his daughters, he was arrested after his family denounced him to the police, accusing him of becoming a Christian. In an interview with the Associated Press, the competent judge stated:

“We are not against any particular religion in the world. But in Afghanistan, this sort of thing is against the law. It is an attack on Islam ... The prosecutor is asking for the death penalty”.<sup>4</sup>

Nevertheless, Abdul Rahman avowed himself a Christian when questioned by the competent judge. High-ranking state officials and dignitaries called for his release, reminding Afghanistan of its duty under international human rights law to respect the freedom of religion. Afghanistan’s judiciary was vexed by the external intervention, recalling that it was a sovereign and independent nation. Finally, the indictment was rejected on procedural grounds and Abdul Rahman was released. The questions raised by his prosecution, however, remain crucial. Is the Afghan legal and judicial system’s ability to provide rule of law and protect human rights merely hindered by a lack of capacities, or is the source of all evil the Constitution and legal system itself?

First, the legal basis of the offence of apostasy in the Afghan legal system will be examined, and then the constitutionality of recourse to Islamic jurisprudence will be challenged.

## III. Legal Basis of the Crime of Apostasy in the Afghan Context

There is much doubt as to the legal foundation of the prosecutor’s demand for the death penalty. This interpretation is borne out by an analysis of the applicable legal sources.

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<sup>4</sup> Cf. under <[http://www.religioustolerance.org/isl\\_apos1.htm](http://www.religioustolerance.org/isl_apos1.htm)>.

## 1. The Afghan Penal Code

The Afghan Penal Code of 1976,<sup>5</sup> in force today, does not deal with apostasy and therefore fails to set out an applicable penalty. Article 1 of the Afghan Penal Code, however, specifies that the Penal Code only deals with *ta'zir* crimes and sanctions, while crimes and sanctions of the *qisas* and *hudud* category shall be punished in accordance with the provisions of Islamic religious law, namely, *Hanafi* religious jurisprudence.

Islamic offences are divided into three categories and classified pursuant to punishment.<sup>6</sup> *Ta'zir* crimes and sanctions are those crimes that are not qualified as *hudud* or *qisas* offences, or prescribed by Islamic law, but may be decided by a judge or codified by the state if deemed necessary,<sup>7</sup> so long as Islamic principles and rules of procedure are respected.<sup>8</sup> *Ta'zir* crimes and sanctions form part of the secular statutory laws of Afghanistan and are left to the discretion of the respective authorities.<sup>9</sup> *Qisas* and *hudud* crimes and sanctions are determined by Islamic law, also referred to as the *shari'a*.<sup>10</sup>

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<sup>5</sup> Decree 910 published in the Official Gazette No. 347; for English translation see under <[http://www.idli.org/AfghanLaws/Laws%201921\\_todate.htm](http://www.idli.org/AfghanLaws/Laws%201921_todate.htm)>.

<sup>6</sup> M. Lippman/ S. McConville/ M. Yerushalmi, *Islamic Criminal Law and Procedure*, 1988, 38.

<sup>7</sup> In Islamic jurisprudence, the principle of separation of powers is not followed. The Head of State as well as his appointed judges have the authority to administer justice. They have the power to set forth new crimes and sanctions at their own discretion; A. Baradie, *Gottes-Recht und Menschen-Recht*, 1983, 156.

<sup>8</sup> Cf. G. Benmelha, "Ta'zir Crimes", in: M.C. Bassiouni (ed.), *The Islamic Criminal Justice System*, 1982, 211 et seq. (212 et seq.); M. Baderin, *International Human Rights and Islamic Law*, 2003, 69 et seq.; S. Tellenbach, "Fair Trial Guarantees Under Islamic, Afghan Constitutional and International Law", *ZaöRV* 64 (2004), 929 et seq. (931); Baradie, see note 7, 146 et seq.

<sup>9</sup> Cf. article 1 of the Afghan Penal Code.

<sup>10</sup> A. Abd al-Aziz al-Alfi, "Punishment in Islamic Criminal Law", in: Bassiouni, see note 8, 227 et seq. (227).

## 2. Islamic Law

The question of whether apostasy is a crime under Islamic religious law punishable by the death penalty must therefore be answered before any examination of how such an interpretation may be implemented under the Afghan Constitution can take place.

The term ‘Islamic Law’ generally refers to the entire system of law (*shari’a*) and jurisprudence (*fiqh*). It is important however to distinguish between *shari’a* and *fiqh*, and the terms should not be used interchangeably.<sup>11</sup> While the *shari’a* is both infallible and irrevocable, the concepts of *fiqh* may change according to the circumstances.<sup>12</sup>

Literally, *shari’a* means “the path to be followed,” and is understood as guidance revealed. Its sources are the word of God as laid down in the *Qur’an* and the normative praxis of the Prophet Muhammad – the *sunna*.<sup>13</sup> The interpretation of the *shari’a* is determined by Islamic legal scholars (*faqih*). This jurisprudence of the *shari’a* established by inferring from and applying *shari’a* is called *fiqh*, literally “understanding” or “intelligence”. Islamic legal scholars belong to different legal schools or jurisprudences (*madhhab*) predominant in different parts of the Islamic World. These legal schools are equally orthodox.<sup>14</sup>

The *Hanafi* jurisprudence referred to in article 1 of the Afghan Penal Code is one of the Sunni legal schools predominant in Afghanistan. According to article 1 of the Afghan Penal Code, the crimes and sanc-

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<sup>11</sup> Cf. I. Abdal-Haqq, “Islamic Law, an Overview of its Origin and Elements”, *Journal of Islamic Law* 1 (1996), 1 et seq. (5).

<sup>12</sup> Abdal-Haqq, *ibid.*, 10.

<sup>13</sup> Baradie, see note 7, 23 et seq.; C.B. Lombardi/ N.J. Brown, “Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court reconciles Islamic Law with the Liberal Rule of Law”, *Am. U. Int’l L. Rev.* 21 (2006), 379 et seq. (395).

<sup>14</sup> B. Johansen, “The Relationship between the Constitution, the Shari’a and the Fiqh: The Jurisprudence of Egypt’s Supreme Constitutional Court”, *ZaöRV* 64 (2004), 881 et seq.; S. Mahmoudi, “The Shari’a in the New Afghan Constitution: Contradiction or Compliment”, *ZaöRV* 64 (2004), 867 et seq.; for a short introduction to Islamic jurisprudence see D. Jordan, “The Dark Ages of Islam: Ijtihad, Apostates, and Human Rights in Contemporary Islamic Jurisprudence”, *Washington & Lee Race & Ethnic Ancestry Law Journal* 9 (2003); 55 et seq. (57); Lombardi/ Brown, see note 13, 395 – 402; for a detailed overview on Islamic Law see J. Schacht, *An Introduction to Islamic Law*, 1964; Baradie, see note 7.

tions of *qisas* and *hudud* must be interpreted and implemented in compliance with the *Hanafi* jurisprudence.

*Qisas* comprise manslaughter and bodily harm. These crimes constitute a violation of the rights of men and require retaliation pursuant to the talion (Native) principle.<sup>15</sup> Although God explicitly provides for *qisas* crimes,<sup>16</sup> the victim or his/her family may renounce their right to retributive punishment and negotiate compensation (*diyat*),<sup>17</sup> which is encouraged in the *Qur'an*.<sup>18</sup> This category of crimes is however not relevant to the case at hand.

The final category are the *hudud* crimes, which are considered to be crimes against God. They are prescribed and defined by Him and may not be modified by men.<sup>19</sup> *Hadd*, the singular for *hudud*, literally means 'limit' or 'restriction'. *Hudud* form the bounds of acceptable behaviour.<sup>20</sup> Crimes classified under *hudud* are the most severe and carry harsh punishments.<sup>21</sup> The procedural rules concerning the violation of *hudud* are characterized by their rigidity and stringent requirements of proof, which makes it sometimes almost impossible to prove a crime.<sup>22</sup> Neither the evaluation of evidence nor the punishments leave room for discretion.<sup>23</sup>

According to the prevailing opinion of all Islamic legal schools, adultery,<sup>24</sup> false accusations of adultery directed at a chaste individual,<sup>25</sup> theft,<sup>26</sup> and armed robbery<sup>27</sup> are without controversy *hudud* crimes.<sup>28</sup>

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<sup>15</sup> Cf. M.C. Bassiouni, "Qisas Crimes", in: id., see note 8, 203 et seq.; Lippman/ McConville/ Yerushalmi, see note 6, 49-52.

<sup>16</sup> *Qur'an*, Sura 2:178.

<sup>17</sup> Tellenbach, see note 8, 931; Lippman/ McConville/ Yerushalmi, see note 6, 38 and 41.

<sup>18</sup> *Qur'an*, Sura 3:159 as translated by Abdullah Yusufali; Cf. Bassiouni, see note 15, 203 et seq. (205).

<sup>19</sup> Benmelha, see note 8, 212.

<sup>20</sup> Lippman/ McConville/ Yerushalmi, see note 6, 38; Benmelha, see note 8, 212.

<sup>21</sup> A. Aly Mansour, "Hudud Crimes", in: Bassiouni, see note 8, 195 et seq. (196).

<sup>22</sup> Baradie, see note 7, 99; Tellenbach, see note 8, 933.

<sup>23</sup> Baradie, see note 7, 99.

<sup>24</sup> *Qur'an*, Sura 2:208.

<sup>25</sup> *Qur'an*, Sura 24:2.

<sup>26</sup> *Qur'an*, Sura 5:38.

<sup>27</sup> *Qur'an*, Sura 5:33.

Apostasy, the formal renunciation of one's religion, is not defined as a crime in the *Qur'an*.<sup>29</sup> The *Qur'an* only states:

"[...] And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein."<sup>30</sup>

While there are consequences, they are not legal in nature. Moreover, this citation must be compared with another *sura* constituting that "there be no compulsion in religion."<sup>31</sup> This could be interpreted as a statement clearly in favour of religious freedom and the right to freely renounce Islam and convert to any other religion.<sup>32</sup> Nevertheless, the predominant understanding is different. According to the prevailing opinion of Islamic scholars, this *sura* only refers to Non-Muslims who shall not be converted to Islam by compulsion but shall be enabled to freely worship. Born Muslims or a convert to Islam must submit entirely to Islam.<sup>33</sup> The meaning of the word "Islam" is "submission or surrender to Allah's will".<sup>34</sup> Matters, which have been decided by God and his Messenger, are excluded from the free disposal of the believer.<sup>35</sup> Hence, it is concluded that a Muslim cannot freely choose to renounce Islam. Pursuant to this traditional understanding, apostasy is considered as one of the *hudud* crimes giving rise to the death penalty. It is the greatest sin a Muslim can commit against God and the Muslim community. It is high treason.<sup>36</sup>

Scholars see the legal basis of their interpretation in a *hadith*,<sup>37</sup> which are the reported words and deeds of the Prophet Mohammad. They are an important tool for the determination of the *Sunna* referred to by all traditional legal schools. They are binding for the Muslim community under the prerequisite that they derive from a reliable

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<sup>28</sup> Baderin, see note 8, 79; Abd al-Aziz al-Alfi, see note 10.

<sup>29</sup> Jordan, see note 14, 61.

<sup>30</sup> *Qur'an*, Sura 2:217 as translated by Abdullah Yusufali.

<sup>31</sup> *Qur'an*, Sura 2:256 as translated by Abdullah Yusufali.

<sup>32</sup> Cf. Baderin, see note 8, 120.

<sup>33</sup> *Qur'an*, Sura 2:208.

<sup>34</sup> Lippman/ McConville/ Yerushalmi, see note 6, 24

<sup>35</sup> *Qur'an*, Sura 33:36.

<sup>36</sup> T. Kamali, "The Principle of Legality and its Application in Islamic Criminal Justice," in: Bassiouni see note 8, 165 et seq.; Aly Mansour, see note 21, 197; Baradie, see note 7, 125.

<sup>37</sup> "Whoever changes his religion, kill him"; see Kamali, see note 36, 166.

source.<sup>38</sup> The Prophet Muhammad is said to have described the three cases in which Muslim blood may be legitimately shed: it is justified to kill an adulterer, a murderer, or an apostate abandoning his community.<sup>39</sup> This *hadith* may of course be and is interpreted in various other ways. The predominant opinion is confronted with more moderate interpretations of the *shari'a*. Some legal scholars do not consider apostasy as a *hadd* crime. Others have a very restrictive interpretation of the elements of crime justifying a punishment so severe as the death penalty.<sup>40</sup>

Grand Ayatollah Montazeri e.g., one of the highest-ranking authorities in *Shi'a* Islam today, has issued a *fatwa*<sup>41</sup> on the question of apostasy, stating that an apostate, in terms of Islamic criminal law, is a born Muslim who has rejected the religion of Islam with the intent to harm Muslims and to fight against Islam. A hostile intent is thus required. A believer who renounces Islam after searching his soul without expressing any ill-will shall not fear prosecution. One of Montazeri's students goes even further in claiming that the crime of apostasy, which goes back to the time of ancient religious wars, cannot be applicable today.<sup>42</sup>

According to *Hanafi* jurisprudence, which is authoritative in Afghanistan and decisive for the case at hand, apostasy of a Muslim-born sane adult constitutes a *hadd* crime for which the prescribed sanction is the death penalty.<sup>43</sup> It can be therefore concluded that the act of apostasy is a *hadd* crime under the prevailing *Hanafi* jurisprudence's interpretation of Islamic criminal law. If the constituting elements of the crime can be proven, its sanction is the death penalty.

The next question to examine is whether this interpretation of Islamic law has to be considered in the legal system of Afghanistan and, if so, whether its consideration would be consistent with the Afghan Constitution.

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<sup>38</sup> Baradie, see note 7, 26.

<sup>39</sup> Kamali, see note 36, 153.

<sup>40</sup> For an overview on the arguments see Baderin, see note 8, 124-125.

<sup>41</sup> A *fatwa* is a legal pronouncement in Islam, issued by a religious law specialist (*mujtabed*) on a specific issue. See Glossary at the end of the article.

<sup>42</sup> BBC PERSIAN.com, 2 February 2005 see under <[http://www.bbc.co.uk/persian/iran/story/2005/02/050202\\_mj-montzari-renegade.shtml](http://www.bbc.co.uk/persian/iran/story/2005/02/050202_mj-montzari-renegade.shtml)>.

<sup>43</sup> Baradie, see note 7, 123 et seq.

## IV. Constitutionality of Recourse to Hanafi Jurisprudence

### 1. Article 130 para. 2 of the Afghan Constitution

This interpretation of the *Hanafi* jurisprudence could be asserted before a court according to article 130 para. 2, which states:

“When there is no provision in the Constitution or other laws regarding the ruling of a pending case, the courts shall decide in accordance with the Hanafi jurisprudence and within the limits of this Constitution in a way to serve justice in the best possible manner.”<sup>44</sup>

The scope of application and the interpretation of this article was discussed at length amongst the judges, prosecutors, police officers, defence counsel and law students at the Fair Trial Training of the Max Planck Institute for Comparative Public Law and International Law and the Institut International de Paris la Défense in Kabul.<sup>45</sup> The participants had differing views on the possibilities of recourse to *Hanafi* jurisprudence and the limits determined by the Constitution. The different opinions will be presented and discussed below.

### 2. Constitutional Limits

According to the wording of article 130 para. 2 of the Constitution, a recourse to *Hanafi* jurisprudence is limited to ruling on cases which have been already taken to court. In criminal cases, an indictment for an offence constituting a crime under statute law is presupposed.

Under the Constitution or other statutory laws, apostasy is not recognized as a crime. Apostasy is a *hadd* crime under *Hanafi* jurisprudence (*shari'a*). Pursuant to article 130 para. 2 of the Constitution, recourse to *Hanafi* jurisprudence must be within the limits of the Constitution.

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<sup>44</sup> Unofficial translation of the author in compliance with the Dari version of the text.

<sup>45</sup> See under <[http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/afghanistan\\_project/training.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project/training.cfm)>.

### a. Principle of Legality

One of the constitutional principles limiting state action is the principle of legality. State infringement of civil rights and freedoms always requires a legal basis. This principle is inferred from the principle of rule of law. It serves as a protection against abuses of power and arbitrariness of judges and ensures legal predictability and certainty.<sup>46</sup> In the field of criminal law, where state sanctions constitute the deepest intrusions in respect of the fundamental rights of the citizens, the principle of legality must be observed throughout.

#### *aa. Recourse to Hanafi Jurisprudence Excluded in Criminal Cases*

The principle of *nullum crimen, nulla poena sine lege* is set out in article 27 of the Afghan Constitution.<sup>47</sup> One could argue that the doctrines of *Hanafi* jurisprudence are not laws in terms of the Constitution. If the Islamic jurisprudence were to be understood as other laws in terms of article 130 para. 2 of the Constitution, it would be superfluous to point out their applicability for adjudicating cases.

The traditions of the Prophet Mohammad were not transformed in Afghan statutory law according to the constitutional law making process.<sup>48</sup> Apostasy is not stipulated as a crime in any Afghan statute law. Recourse to the *shari'a* according to a *Hanafi* jurisprudential interpretation would violate the principle of legality of crime and sanction. According to this perception, convicting Abdul Rahman and handing down the death sentence for apostasy would be inconsistent with the principle of the rule of law. Such a sentence would have violated article 27 of the Constitution. Consequently, the subsidiary use of *Hanafi* jurisprudence in terms of article 130 para. 2 of the Constitution would be

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<sup>46</sup> Kamali, see note 36, 149; Tellenbach, see note 8, 930; cf. Baderin, see note 8, 112.

<sup>47</sup> Article 27 of the Constitution reads: "No act is considered a crime, unless determined by a law adopted prior to the date the offence was committed. No person can be pursued, arrested or detained but in accordance with provisions of law. No person can be punished but in accordance with the decisions of an authorised court and in conformity with the laws adopted before the date of the offence."

<sup>48</sup> See arts 94-96 of the Constitution on the lawmaking process.

excluded in criminal cases. It is argued therefore that the scope of application of article 130 para. 2 of the Constitution is limited to civil cases.<sup>49</sup>

*bb. Recourse to Hanafi Jurisprudence not limited per se*

This perception is confronted with the wording of article 130 para. 2 of the Constitution mentioning the adjudication of cases. A restriction to civil cases is not obvious. Furthermore, this interpretation does not take into account the Afghan legal conception and the predominating legal pluralism in Afghanistan. Among believers, Islamic law and jurisprudence are, without any act of state legislation, considered binding laws.<sup>50</sup> Hence, it is asserted that recourse to *Hanafi* jurisprudence does not violate the constitutional principle of legality. Moreover, it is stressed that the Constitution forbids any contradictions between laws and the belief and provisions of the sacred Islam.<sup>51</sup> This constitutional conception would justify recourse to *Hanafi* jurisprudence regarding the punishment of behaviour contrary to the provisions of Islam. This view can be based on article 1 of the Afghan Penal Code, which refers to the applicability of Islamic criminal law in addition to the Penal Code.

## **b. Obligation to Observe International Law**

As regards the recourse to Islamic jurisprudence, article 7 of the Constitution must also be considered. Article 7 stipulates that Afghanistan has an obligation to abide by the Charter of the United Nations, the treaties and conventions it has ratified, and the Universal Declaration of Human Rights. One of these international treaties is the International Covenant on Civil and Political Rights of 1966 (ICCPR).<sup>52</sup> Afghanistan acceded to the ICCPR on 24 January 1983 without reservation.

Article 18 para. 2 of the ICCPR states:

“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

The threat and execution of the death sentence for apostasy amounts to a coercion, which would significantly impair the freedom of indi-

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<sup>49</sup> Tellenbach, see note 8, 932.

<sup>50</sup> Kamali, see note 36, 151.

<sup>51</sup> Article 3 of the Constitution.

<sup>52</sup> A/RES/2200A (XXI) of 16 December 1966 entered into force 23 March 1976.

viduals to have or to adopt a religion or belief of their choice under international law.

Article 2 of the Afghan Constitution guarantees the freedom for followers of religions other than Islam to exercise their faith and to perform their religion within the limits of the provisions of law. However, the freedom to freely adopt a religion of one's choice is not protected under the Constitution.

Pursuant to article 18 para. 3 of the ICCPR:

“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Any justification of such limitations of the freedom to adopt a religion of one's choice therefore requires a prescription by law, which is the point at issue.

The constitutional obligation to abide by international law could lead to a restrictive interpretation and implementation of article 130 para. 2 of the Constitution, which would ensure compliance with Afghanistan's commitment under international law to guarantee entirely the freedom of religion under article 18 of the ICCPR.<sup>53</sup> In line with this perception, any interpretation and implementation of Islamic jurisprudence allowing a sentence for apostasy would be prohibited under article 7 of the Constitution. The conviction and execution of Abdul Rahman on the basis of Islamic jurisprudence would violate the limits of the Constitution and thus be inconsistent with article 130 para. 2 of the Constitution.

### **c. Obligation to Observe the Beliefs and Provisions of Islam**

Restricting the scope of application of article 130 para. 2 of the Constitution through the principles of legality, and the obligation to respect universal human rights standards could conflict with the requirement of article 3 of the Constitution.

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<sup>53</sup> See also article 18 of the Universal Declaration of Human Rights of 10 December 1948, A/RES/217A (III) of 10 December 1948: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

Article 3 states that:

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

As a legal concept, this article is vague.<sup>54</sup> It is unclear to which provisions of Islam article 3 refers. Does it refer to the indisputable principles of Islam as the Iraqi Constitution does,<sup>55</sup> or does it require compliance with all provisions of the *shari'a*?

Examining Afghanistan's constitutional history, we find provisions such as the cited arts 3 and 130 para. 2 in every Afghan Constitution since the very first Constitution of 1923.<sup>56</sup> The self-commitment to observe the United Nations Charter and respect international (human rights) treaties is a novelty in Afghan constitutional history, promulgated for the first time in this new Constitution of 2004. Moreover, this Constitution binds the Afghan state to protect human rights and human dignity so as to achieve democracy.<sup>57</sup> These provisions render the Afghan Constitution as one of the most modern and unique among Islamic states.<sup>58</sup> This can be considered as proof of the desire of the fathers and mothers of this Constitution to more effectively promote the protection of human rights after the fall of the Taliban regime.<sup>59</sup>

Taking that desire into account, the constitutionality of a criminal conviction of Abdul Rahman becomes dubious at best.

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<sup>54</sup> Mahmoudi, see note 14, 870.

<sup>55</sup> Article 2 (b) Iraqi Constitution states that “no law can be passed that contradicts the undisputed rules of Islam”, cf. <[http://en.wikipedia.org/wiki/Proposed\\_Iraqi\\_constitution](http://en.wikipedia.org/wiki/Proposed_Iraqi_constitution)>.

<sup>56</sup> On the constitutional history of Afghanistan see e.g. S. Arjomand, “Constitutional Developments in Afghanistan: A comparative and historical perspective”, *Drake Law Review* 53 (2004/2005), 943 et seq.

<sup>57</sup> Article 6 of the Afghan Constitution reads: “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.”

<sup>58</sup> Mahmoudi, see note 14, 873.

<sup>59</sup> Mahmoudi, see note 14; H.J. Vergau, “Manifest der Hoffnung. Über die neue Verfassung Afghanistans”, *VRÜ* 37 (2004), 465 et seq. (488) who states that, radical-conservative interpretations of the Constitution would violate its spirit.

## V. Conclusion

To conclude, I would like to point out that I consider bringing charges for an offence not based on Afghan statute law unconstitutional. Such indictments betray the principle of legality of crime and sanction set forth by article 27 of the Constitution, and therefore equally violate the principle of the rule of law as well as the fundamental rights of the accused. The accused finds his rights to a fair trial infringed. The infringement is not covered by article 130 para. 2 of the Constitution. In my view, the scope of application of article 130 para. 2 is limited to pending civil cases. Afghanistan could bypass this problem by adopting the *shari'a* as statute law and following the example of the Islamic Republic of Iran. This would ensure compliance with article 27 of the Constitution. However, the violation of Afghanistan's obligations under international law would linger.

Afghanistan can only do justice to its constitutional self-commitments by promoting a more moderate interpretation of Islamic law and jurisprudence. The Iranian Grandayatollah Montazeri is one advocate of such moderate Islamic interpretations. According to his understanding, the crime of apostasy is only committed when acting with hostile intent and contentious deeds against Islam and the society of Muslims and was restricted by Prophet Mohammad to these conditions<sup>60</sup>.

Afghanistan is struggling to enter into modernity as it remains bound to conservative and sometimes conflicting interpretations of religious and traditional laws and values. During the constitutional process, compromises had to be made on both sides, conservatives and reformers.<sup>61</sup> The Afghan Constitution thus leaves the door open for both possibilities. One can only hope that Afghanistan chooses the path of the rule of law, democracy and the protection of human rights without losing its religious identity.

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<sup>60</sup> Cf. Jordan, see note 14.

<sup>61</sup> On the struggles and compromises regarding the preference of Islamic Law on the one side and human right obligations under international law on the other see Vergau, see note 59, 471 et seq.

## Glossary

Diyat	Blood money, compensation for murder or injuries under Islamic law
Faqih	Islamic jurist
Fatwa	Legal or religious opinion by a qualified Islamic law specialist (mujtahid)
Fiqh	Understanding; Islamic jurisprudence and methodology for the interpretation of shari'a
Hadd (sg.)/ Hudud (pl.)	Limit(s); fixed punishment for certain crimes under Islamic law
Hadith	Saying; traditions of the Prophet Muhammad
Madhhab	School of Islamic jurisprudence
Mujtahid	Islamic legal specialist competent to infer independent expert legal rulings from the sources and methods of Islamic law
Qisas	Equal, balanced; law of retaliation under Islamic law, <i>lex talionis</i>
Qur'an	Holy book; principle source of Islam
Shari'a	The right path; Qur'an and Sunna; the divine sources of Islamic law
Shi'a	Second largest denomination of the religion of Islam; Arabic for 'group' or 'faction'
Sunna	Practice, tradition; the practices of the Prophet Mohammad
Sura	Chapter of the Qur'an
Ta'zir	Discretionary punishment under Islamic law

