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## A Few Comments on Selected Articles of the 1964 Constitution of Afghanistan

**Abstract** The article gathers comments on selected articles to be found in the 1964 Constitution of Afghanistan—the third in Afghanistan’s history but at the same time the first in many respects, not only because of its modern, by the standards of the time, nature, as it was supposed to change the nature of the monarchy from an absolute into a constitutional/parliamentary one. The text is divided into four parts: (0) Introduction, where the aims of the analysis and reasons for writing the text have been presented; (1) Historical perspective of the Afghanistan’s constitutional movement; (2) In-depth comments on: (i) Royal Promulgation, (ii) The Preamble, and (iii) nineteen articles; as well as (3) Conclusions.

**Keywords** article, constitution, democracy, monarchy, power, reform

L’«occidentalisation» de ce texte constitue son caractère essentiel. Contrairement à la Constitution de 1931, qui était un amalgame de principes islamiques et de coutumes afghanes, avec quelques emprunts à des constitutions étrangères, la Constitution de 1964 est fondée sur le principe de la séparation des pouvoirs, et sa référence la plus constante est la Déclaration des droits de l’homme et du citoyen. Elle comprend 128 articles : c’est dire qu’elle entre dans le détail du fonctionnement institutionnel. Par rapport au texte de 1931, sa clarté, son ordre, la progression des différents chapitres et articles, sont remarquables. (Centlivres et al. 1984: 138)



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The ability of a constitution to effect political change has limits. The 1964 Constitution of Afghanistan, for example, is and was widely regarded as a well drafted and progressive document, but it did not produce a democracy. A constitution, however, has several important functions. It will be looked to as a clear symbol of the country's direction, both by its citizens and the international community. It can also provide important safeguards against the government going off track, while laying the groundwork for increased democracy, rule of law, and good governance at a later time when the country stabilizes and those developments become increasingly possible. (Benard and Hachigian 2003: 1)

## 1 Introduction

In this paper I have gathered comments on a few selected articles that make up the 1964 Constitution of Afghanistan (Dari *qānun-e asāsi-ye afgānestān*/Pashto *də afgānistān asāsi qānun*).<sup>1</sup> The aim I am setting myself here is to discuss in depth those more crucial articles of the 1964 Constitution that redefined (or, better, tried to redefine) the Afghan political reality (and stage) between 1964 and 1973, marked as a decade of parliamentary democracy (Dari *demokrāsi-ye nau*/Pashto *nəway dimukrāsi*). For practical reasons my selection of articles is partly arbitrary.

The 1964 Constitution, the third basic act after the 1923 and the 1931 ones (Amanollāh Xān's *Nezāmnāme-ye asāsi-ye daulat-e aliye-ye Afgānestān* and Mohammad-Nāder Šāh's *Osul-e asāsi-ye daulat-e aliye-ye Afgānestān* respectively), was an outcome of local processes taking place on various levels of the cultural-political as well as socio-economic life after World War II. As Arjomand (2006: 952) highlights in his *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, the internal evolution melded liberal constitutionalism and Islamic modernism to succeed in finding the finest (in his opinion) formula for the reconciliation of both socio-political approaches.<sup>2</sup> His conclusions should be complemented with Olesen's (1995: 206) comments to be found in her *Islam and Politics in Afghanistan* as she emphasises that the authors of the 1964

<sup>1</sup> The text is partially based on a paper 'Komentarze do Konstytucji Królestwa Afganistanu z 1964 roku' ('Comments on the 1964 Constitution of the Kingdom of Afghanistan') delivered during the Cracow-Warsaw seminar *The Iranian Constitutional Revolution 1905–1911: Contexts, Narratives, Implications* (2–3 December 2021).

<sup>2</sup> For intellectual movements in Afghanistan see e.g.: Dupree (1980: 417–558); Poullada (1973); Qobār (1390 [2011/2012]: II, 557–573, 667–669); Rištyā (1355 [1976/1977]).

Constitution tried to conform the state and its legal basis to the changing socio-economic structure of the Afghan society. The reason for that was, *inter alia*, the appearance of a new urban middle class educated in the public, state-sponsored school that started demanding complicity in governing.<sup>3</sup> Meanwhile, Pasarlay (2016: 32) emphasises that the hitherto traditional *élites*, following the 1931 Constitution based on the ideological paradigm according to which the state power is based on both tribal and classic Islamic pillars, found it difficult to develop such legal solutions that would allow for the inclusion of emergent self-aware leftist, conservative, or nationalist groups into the mainstream of all-Afghan politics. In anticipation of the conclusions presented at the end of this article, I have to explain that a number of reforms planned within the framework of the 1964 Constitution never came to fruition.<sup>4</sup>

The 1964 Constitution, representing the basic legal act, has been hitherto analysed through the prism of history and its political significance, e.g.: Chishti (1998), Kaškaki (1365 [1986/1987]), Mobārez (1375 [1996/1997]). Simultaneously, functioning as a legal text, it is also of a performative nature. Besides, each constitution not only describes the existing reality, but, by changing the basic legal provisions, it also changes (or, at least, can/may/tries (to) change<sup>5</sup>) the socio-political dimension of the reality within which it operates. This is why while reading the 1964 Constitution, it is worth following Austin's *How to Do Things with Words* (1962) and his deliberations regarding performative utterances. Such a dual, legal-and-linguistic perspective allows for a better assessment of the content and functionality of individual articles. Especially since the language used to craft a constitution, like the language of any legal act, should be marked by clarity and comprehensibility. It indicates not only the clarity of the argument, but also the avoidance of any ideological declarations that would undermine the meaning of its provisions. As Ginsburg and Huq (2014: 122) rightly observe: '[p]oorly drafted, ambiguous, or merely incomplete constitutional texts may perversely generate new sources of conflict'.

Why is it worth taking a look at the 1964 Constitution again almost sixty years after its adoption? There are at least four reasons.

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<sup>3</sup> For a new middle class in Afghanistan see e.g.: Vogelsang (2008: 288–290).

<sup>4</sup> For some conclusions see: Chapter 3.

<sup>5</sup> I deliberately write 'can/may/tries (to)' because, as Ginsburg and Huq (2014: 120) note: '[e]ven though constitutions are inextricably embedded in their distinctive economic and geopolitical contexts and some basic design questions have an implacably normative cast, the drafters of new constitutions still need some realistically attainable goals'.

Firstly, in the 1980s, i.e. during the Soviet invasion of Afghanistan to support the communist regimes of, originally, Babrak Kārmal (1979–1986) and, later, Mohammad Nağibollāh (1986–1992), one of the opposition leaders, Ahmad Gaylāni, the head of the Mahāz-e Melli-ye Eslāmi-ye Afğānestān (NIFA National Islamic Front of Afghanistan), canvassed for returning to the principles of the parliamentary democracy embodied in the 1964 Constitution as a way to reconstruct the socio-political life in the state (Olsen 1995: 286).<sup>6</sup>

Secondly, in December 2001 Afghan leaders participating in the International Conference on Afghanistan hosted by Hotel Petersburg in Bonn, Germany, agreed to base the post-Taliban system of government on this particular basic law (Larson 2011: 9; Their 2003: 1). As one can find in Part II. *Legal framework and judicial system* of the *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions* (so-called: Bonn Agreement) produced at that time, in the interim, i.e. before a new constitution will be enacted, the 1964 one subsists: ‘[t]o the extent that its provisions are not inconsistent with those contained in this agreement [Bonn Agreement—MMPK], and [...] with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution [the 1964 Constitution—MMPK]; and [...] existing laws and regulations, to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations’ (*Agreement* 2001).

Thirdly, in September 2021, some news agencies reported that the Taliban authorities announced shortly after regaining power, following twenty years of armed struggle, their intention to temporarily reinstate its provisions as long as they do not contradict Shariah principles (Gul 2021; Kamil 2021; Patel 2021). So far, the initial announcements have probably not been covered by the actual actions of the Taliban authorities. The perfunctory statement made by the Taliban authorities remains rather as an empty gesture towards the international community for when the Taliban ruled Afghanistan in the second half of the 1990s, they did not bother with the idea of writing a new (their own) constitution. Moreover, the 1964 Constitution, already at the time of its enactment, was perceived by a number of conservative and religious leaders as contrary to the principles of Islam (Olesen 1995: 242).

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<sup>6</sup> For a detailed description of Ahmad Gaylāni and the NIFA see e.g.: Adamec (1991: 84, 152, 175–176).

Fourthly, the 1964 Constitution, one of seven (*plus* one temporary) in force in Afghanistan over the last one hundred years, opens an intertextual discourse with the rest.<sup>7</sup> It maintains previous legal arrangements or provides them with future documents. It redefines previous legal arrangements or forces subsequent documents to reshape them. It covers issues previously overlooked or marks them as of a redundant nature. This intertextual discourse also concerns the very conditions in which several constitutions were crafted. For, as Haress (2019) observes: '[w]ith the exception of the constitution of 1964, all previous Afghan constitutions [i.e., the pre-2004 ones—MMPK] were drafted as a result of regime change, and were used to consolidate the power of the new ruler'. However, the purpose of this article is not to discuss this intertextual discourse in detail, therefore only individual threads have been marked.

To complete the introduction, I need to add that my comments should be viewed as a personal voice partially supplementing the conclusions made during the Democracy and Islam in the New Constitution of Afghanistan meeting organized on in January 2003 by RAND, i.e. at the time when work on a new document (adopted one year later, in 2004) regulating the nature of the Afghan state after the fall of the Taliban regime (1996–2001) was underway. On the other hand, some comments have been prepared as sidenotes to Pasarlay's inspiring PhD dissertation *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* (2016). As far as the RAND panellists tried to: '[...] to identify ways in which the constitution of Afghanistan could help put the country on the path to a strong, stable democracy characterized by good governance and rule of law, in which Islam, human rights, and Afghanistan's international obligations were respected' (Bernard, Hachigian 2003: iii). Pasarlay (2016: 11–12) accurately notes that all those who have so far undertaken research on the constitutional history of Afghanistan: '[t]hey have not framed Afghan constitutions as devices designed to coordinate politics in the unruly lands that fall within the borders of Afghanistan, nor have they systematically explored the ways in which Afghanistan's constitutions have (or have not) employed constitutional deferral to increase the odds of long-term coordination'. His research, as well as that made by other scholars, show that the constitutional history of Afghanistan is a history of mostly unsuccessful coordination devices and failures caused by the reluctance of authors writing respective

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<sup>7</sup> The constitutions were enacted in: (i) 1923 by Amanollāh Šāh, (ii) 1931 by Mohammad-Nāder Šāh, (iii) 1964 by Mohammad-Zāher Šāh, (iv) 1977 by Mohammad-Da'ud Xān, (v) 1987 and (vi) 1990 by Mohammad Nağibollāh, and (vii) 2004 by Hāmed Karzay, while the temporary one in 1980 by Babrak Kārmal.

texts to cope sometime with some issues of fundamental importance to the further development of the state.

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All quotations, except for the *Promulgation*, have been taken from the text of the 1964 Constitution published in *Rasmi Ğarida* №12 with the date the 11th of Mizān, 1343 (3rd of October, 1964). The *Promulgation* is not featured in the *Rasmi Ğarida* but in a booklet *Də Afġānistān asāsi qānun: Qānun-e asāsi-ye Afġānestān (The Constitution of Afghanistan)* with the date the 9th of Mizān, 1343 (1st of October, 1964). With the exception of the *Promulgation* and the *Preamble*, all articles can also be found in the monograph entitled *Qavānin-e asāsi-ye Afġānestān (The Constitutions of Afghanistan)* published in 1386 (2007/2008) by the Ministry of Justice, where all seven *plus* one temporal Afghan basic laws have been gathered.

## 2 Historical perspective

The constitutional history of Afghanistan has become a subject of numerous studies, e.g.: Ahramovič (1967); Centlivres et al. (1984: 131–140); Kakar (1992); Modrzejewska-Leśniewska (2010: 245–276); Olesen (1995); Pasarlay (2016); Vogelsang (2008: 278–280, 284–286, 294–295); Sierakowska-Dyndo (1987; 1989; 2002: 93–114).<sup>8</sup> For that reason, I limit myself to a very brief introduction here.

It is crucial to remember that the 1964 Constitution did not emerge of inexistence creating a new Afghan order (and political stage) out of anything. It was the fruit (rather than the by-product) of long lasting efforts aimed at consolidating and modernising the country and made by some intellectuals as well as politicians who in one way or another appealed to postulates put forward by, *inter alia*, Mahmud Tarzi (1865–1933).<sup>9</sup>

As Wilber (1965: 216), the first one who made some brief comments on the 1964 Constitution, notices, the document was more: ‘liberal, enlightened, forward-looking, comprehensive and definitive than its predecessor’. In fact, the first, 1923 Constitution was of a basic nature as it did not cover a number of issues that are usually discussed in this type of documents.<sup>10</sup> The second one, passed in 1931, bore clear traces of inspiration from the Iranian constitution, with visible emphasis on Islam and on

<sup>8</sup> For a detailed list of publication printed prior 2002 see: Pasarlay (2016: 9–12).

<sup>9</sup> For a detailed treatment of Tarzi’s life and work see e.g.: Schinasi (1971).

<sup>10</sup> For the text of the 1923 Constitution see: *Qavānin-e asāsi-ye Afġānestān* (1386 [2007/2008]: 3–33). For its English translation see: Yunas (2001: 1–15).

the priority of sharia (Wilber 1965: 215).<sup>11</sup> The ideological *ergo* legal base of both previous constitutions was an absolute monarchy that remained beyond any social or governmental control even if it was supported by advisory bodies. The difference between the 1964 Constitution and its two predecessors was thus quantitative (it was definitely longer) and, above all, qualitative (it was definitely much better compiled). It was supposed to reshape the nature of the Afghan, Bārakzāy monarchy, replacing its absolute origin with a constitutional/parliamentary version.

There were many reasons for such a shift. The post-World War II period was a time when a number of economic, political as well as social and cultural changes were occurring worldwide, also in Afghanistan. Particularly crucial was the decade of the Mohammad-Dāʿud Xān’s premiership (1953–1963), marked by such episodes as, *inter alia*, economic development,<sup>12</sup> growth of Pashtun nationalism,<sup>13</sup> expansion of the national armed forces,<sup>14</sup> or *raf<sup>c</sup>-e heḡāb*, i.e. abolition of the obligation for women to cover their faces in a public place.<sup>15</sup> As Sierakowska-Dyndo (2002: 87) notices, Mohammad-Dāʿud Xān’s aim was to create an economically and militarily strong nation state with a stable central power represented by the Kabul-based government.<sup>16</sup> The decade of his premiership became hence the time when centralisation of power took place—the state, on the one hand, strengthened its position in those spheres of public life over which it had already exercised its oversight, and, on the other one, took control of those spheres that were traditionally beyond its reach (Olesen 1995: 199).<sup>17</sup> Additionally, the slow but constant expansion of the secular education system or the laborious implementation of infrastructural and industrial projects financed by the Americans as well as the Soviets,

<sup>11</sup> For the text of the 1931 Constitution see: *Qavānin-e asāsi-ye Afḡānestān* (1386 [2007/2008]: 34–78). For its English translation see: Yunas (2001: 17–32). As far as I know, no text on such inspirations/similarities has been published yet.

<sup>12</sup> For a detailed treatment of economic development see e.g.: Dupree (1980: 499–558); Kāzem (1389 [2019/2020]: I, 243–276)

<sup>13</sup> For a detailed treatment of Pashtun nationalism see e.g.: Human (2002). For a detailed treatment of the Pashtunistan Issue as well as the Afghanistan-Pakistan relations during Mohammad-Dāʿud Xān’s premiership see e.g.: Kāzem (1389 [2019/2020]: I, 121–150).

<sup>14</sup> For a detailed treatment of expansion of the armed forces see e.g.: Kāzem (1398 [2019/2020]: I, 201–216).

<sup>15</sup> For a detailed treatment of *raf<sup>c</sup>-e heḡāb* see e.g.: Kāzem (1398 [2019/2020]: I, 317–336). First-hand report see e.g.: Szrednicki (1963: 341–343).

<sup>16</sup> For a detailed treatment of Mohammad-Dāʿud Xān’s premiership see e.g.: Dupree (1980: 499–558); Kāzem (1398 [2019/2020]: I, 111–400); Sierakowska-Dyndo (2002: 79–114).

<sup>17</sup> For an understanding of the term ‘centralisation’ see: Chapter 2.3.8.

both processes controlled by the Kabul-based administrative apparatus, eventuated in, *inter alia*, the creation of a new social stratum—the urban educated middle class represented mostly by a broad category of civil servants.<sup>18</sup> This new social stratum obviously strove for active participation in governing and claimed the right to have a real influence on crucial matters related to the state. In this way, next to the traditional *élites*—the ruling house as well as tribal and religious leaders, who constituted the pillars of the contemporary political system symbolised by the 1931 Constitution, another one appeared (Olesen 1995: 199).

Mohammad-Dāʿud Xān became aware of such changes and noticed the mismatch between the current political system and the on-going transformation of social and economic reality. In his letter sent on the 9th of Saratān, 1341 (30th of June, 1962), to Mohammad-Zāher Šāh he explicitly underlined the need to make the contemporary political system to be of a more inclusive nature (Kāzem 1398 [2019/2020]: I, 359). He even proposed to the monarch holding a referendum on the future system of government, but due to the low level of public awareness he considered it unlikely to be organised at that time. In his next letter dated on the 24th of Ğaddi, 1341 (11th of January, 1963), he once again wrote about the (urgent) need to remodel the political system and proposed to adopt a new constitution that would replace the absolute monarchy with its more inclusive constitutional/parliamentary version (Kāzem 1398 [2019/2020]: I, 362). He argued that since emergent *élites* demanded in-depth modifications, the current political system had no chance of surviving in the long run. When Mohammad-Dāʿud Xān addressed Mohammad-Zāher Šāh with a proposition of structural modification, the monarch faced a dilemma—should he support his cousin’s programme, or, should he rather undertake the task of carrying out the expected reforms himself. Fearing that leaving this issue in Mohammad-Dāʿud Xān’s hands would weaken his position, he decided to deal with it himself.

It is ironic that a statesman who initiated reforms leading to the modernisation of Afghan politics was legally excluded from official life for nine years pursuant to Article №24 of the 1964 Constitution.<sup>19</sup> The rea-

<sup>18</sup> Article №22 of the 1931 Constitution clearly stated that the institution responsible for organising the education system in the state was the government: ‘*omum-e makāteb-e afġānestān dar zir-e nezārat-o taftiš-e hokumat mibāšand [...] (schools in Afghanistan are under the supervision and inspection of the government [...])*’ (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 44; Yunas 2001: 20), specifying that the curricula in force must not contradict the principles of Islam. Free and compulsory education, in turn, was referred to in Article №34 of the 1964 Constitution (*Rasmi Ğarida* 1343 [1964]: 8–9; Wilber 1965: 221).

<sup>19</sup> For Article №24 see: Chapter 2.3.5.



sons for the later failures of the democratic/parliamentary experiment symbolised by the 1964 Constitution should be looked for here—the document, theoretically, created a broad spectrum of possibilities providing a wider public discussion that should channel eventual tensions and political conflicts through institutions rather than through violence, but, *de facto*, the conditions modelled (and controlled) by Mohammad-Zāher Šāh himself significantly limited free exchange of views, ultimately leading to the abolition of the monarchy in 1973. It is so because imposition of restrictions on Mohammad-Dāʿud Xān remained one of the main targets of the authors of the new regulations. By providing Mohammad-Zāher Šāh with semi-presidential power, the authors elevated the position of the monarch who could be no longer considered as a passive spectator of the political stage directed previously by the former prime ministers—his two uncles: Mohammad-Hāšem Xān (1929–1946)<sup>20</sup> and Šāh-Mahmud Xān (1946–1953),<sup>21</sup> as well as by his cousin (and brother-in-law)—Mohammad-Dāʿud Xān (1953–1963).

The democratic/parliamentary reforms had two major symbols. The former one was a new constitution itself which tried to westernise the Afghan political system, taking as its basic paradigm the truistic statement that power came from the people. I refer to it as truistic on purpose, but it is worth remembering that, in accordance with the provisions of the earlier, 1931 Constitution, the clergy and tribal structures remain the source of royal power (Olesen 1995: 65). The latter one were the first parliamentary elections carried out between the 26th of August and the 17th Sombole, 1343 (8th of September, 1965).<sup>22</sup>

To start reforms, on the Mohammad-Zāher Šāh's order between March 1963 and March 1964 the Constitution Committee in cooperation with some European experts such as the French constitutionalist Louis Fougère prepared some propositions of new regulations.<sup>23</sup> When completed, it was sent to the Constitutional Advisory Commission for discussion and presented as a draft—*Mosavvade-ye qānun-e asāsi-ye ġadid-e Afġānestān*

<sup>20</sup> For a detailed description of Mohammad-Hāšem Xān see e.g.: Adamec (1991: 164).

<sup>21</sup> For a detailed description of Šāh-Mahmud Xān see e.g.: Adamec (1991: 92).

<sup>22</sup> For a detailed treatment of the 1965 parliamentary elections see e.g.: Dupree (1980: 588–590). Next to the new constitution and the parliamentary elections one can also mention outburst of both, press as well as students' political activity (Dupree 1980: 590–597, 600–619, 619–623).

<sup>23</sup> The French model was not chosen by accident. French experts had already collaborated on writing of the Egyptian (1953), Iraqi (1958) and Kuwaiti (1962) constitutions. Louis Fougère (1915–1992) was a lecturer at the Université de Montpellier that closely cooperated with the Kabul University in the field of law and had previously advised the committee preparing the constitution of the Kingdom of Morocco.

(1343 [1964])—to the Loya Ğerga (Loya Jirga) that gathered on the 9th of September, 1964, in Kabul (Dupree 1980: 565–569). The date was not chosen accidentally, as that day was the anniversary of the proclamation of the 1931 Constitution. Thus, a semantic link emerged between the two gatherings of the Loya Ğerga as well as between the two, old and new, documents. The former gave way to the latter, closing thus a certain epoch and opening a new one, the symbol of which was a new legal act. Interestingly, the 1964 Loya Ğerga, the first one to record its proceedings in writing, debated for eleven days, changing some of the articles (Dupree 1980: 568, 573–574). The final version of the new constitution was officially signed by Mohammad-Zāher Šāh on the 1st of October, 1964 (Dupree 1980: 586).

The 1964 Constitution, drafted on the 1958 French model (Olesen 1995: 207), introduced a number of modern legal regulations, initiating the reconstruction of local political stage and ways of thinking about its practice, clearly separating the three spheres of power: a legislature, an executive, and a judiciary one. Furthermore, its Article №43 guaranteed, for the first time in the history of Afghanistan, women's suffrage rights; Articles №78–84 gave legal force to the traditional Loya Ğerga, the General Assembly, previously convened sporadically, and since then functioning as an integral part of state structures; Article №103 introduced the office of the attorney general to investigate crimes (Dari/Pashto *modda'i-yo-l-omum*); Article №105 created the Supreme Court (Dari/Pashto *stōra mohakima*). The 1964 Constitution, considered by many scholars as one of the best in the Islamic world, laid the foundations for, *inter alia*, social justice, personal freedom, protection of private property, freedom of speech and religion, the right to education and healthcare (Sierakowska-Dyndo 2002: 98). Above all, however, it ushered a decade of parliamentary democracy, when students frequently organised demonstrations, the masses became politically mobilised and the press flourished (Dupree 1980: 587–623). Not all tasks envisaged by the reforms were successfully completed, e.g. Mohammad-Zāher Šāh refused to sign a law that would allow to establish political parties, but several were formed, *inter alia*, communist and Islamic ones (Vogelsang 2008: 295–299).

Historically, the decade of constitutional monarchy and parliamentary democracy came to an abrupt end when, in the summer of 1973, Mohammad-Dā'ud Xān overthrew Mohammad-Zāher Šāh, who at that time sojourned in Italy, in a military *coup d'état* and suspended the 1964 Constitution (Vogelsang 2008: 299–300). Practically, the monarch's lack of determination to continue reforms effectively prevented the post-1964 reality from becoming more democratic and more open to everyone interested in active participation in the political life of the state. The fate

of the 1964 Constitution was thus determined by Mohammad-Zāher Šāh and sealed by Mohammad-Dāʿud Xān's own constitution signed in 1977 that promoted, in its Article №40, a one-party regime under the banner of presidential Hezb-e Enqelāb-e Melli (NRP National Revolutionary Party): *'barā-ye en'ekās-e xāstehā-ye eġtemā'i va tarbiyat-e siyāsi-ye mardom-e afgānestān tā zamān-i ke in ārezu bar āvarde gardad va be rošd-e tabi'i-ye xod beresad sistem-e yekhezbi dar kešvar be rahbari-ye hezb-e enqelāb-e melli ke bāni va pišāhang-e enqelāb-e mardomi va moteraqqi-ye 26-e saratān-e sāl-e 1352 mardom-e afgānestān ast bar qarār xāhad bud* (For the reflection of social demands and for the political education of the people of Afghanistan, until such time as this aspiration is realised and attains its natural maturity, the one party system led by the Hezb-e Enqelāb-e Melli [NRP National Revolution Party—MMPK], which is the founder and vanguard of the popular and progressive revolution of the 26th of Saratān, of the year 1352 [17th of July, 1973—MMPK], of the people of Afghanistan, will prevail in the country)' (*Qavānin-e asāsi-ye Afgānestān* 1386 [2007/2008]: 176–177; *The Constitution of the Republican State of Afghanistan: English Translation Part III* 1977: 1).<sup>24</sup> Accordingly, as proved by Ginsburg and Huq (2014: 118), the fate of each Afghan constitution is entwined with that of its author(s).

One thing needs to be clarified here, as the prime minister Mohammad-Dāʿud Xān complained that the monarch exercised too much power under the 1931 Constitution. He highly insisted on moving Afghanistan to a constitutional monarchy/parliamentary democracy, but, as the president he literally crafted a constitution that vested him unrestrained powers (Pasarlay 2022)—an absolute monarchy was hence replaced by an authoritarian republic.

### 3 Comments

The 1964 Constitution, approved by the Loya Ğërġa in September 1964 and signed by Mohammad-Zāher Šāh in October of the same year, comprised: (i) the Royal Promulgation; (ii) the Preamble; (iii) eleven chapters on the state, the monarch, the fundamental rights and obligations of

<sup>24</sup> For the text of the 1977 Constitution see: *Qavānin-e asāsi-ye Afgānestān* (1386 [2007/2008]: 157–228). For its English translation see: *The Constitution of the Republican State of Afghanistan: English Translation Part I–XII* printed in *The Kabul Times* (15: 282–293) between the 14th and 25th of Hut, 1355 (5th–16th of March, 1977), reprinted in *The Constitution of the Republic of Afghanistan: The English Language Version of the Constitution as it Appeared in the Kabul Times from March 5, 1977 to March 16, 1977* (in *Afghanistan Council of the Asia Society Occasional Paper* 7: 2–11, 1977), or in Yunas (2001: 67–95). For the detailed description of the NRP see: Adamec (1991: 176).

citizens, the parliament, the Loya Ğerga, the government, the judiciary, administration, the state of emergency, amendments as well as transitional provisions; and (iv) one hundred twenty eight articles. For comparison, the 1923 Constitution consisted of nine chapters *plus* two sets of amendments and seventy three articles, while the 1931 one had sixteen chapters and one hundred ten articles.

### 3.1 Royal Promulgation

The main body of the 1964 Constitution was precluded by a concise royal promulgation dated the 9th of Mizān, 1343 (1st of October, 1964), and written in both official languages of the Kingdom of Afghanistan, i.e. Dari and Pashto. Apparently, there was no such declaration in neither the 1923 Constitution nor the 1931 one, so the enactment of the law can be interpreted as a new beginning of communication between the state and citizens. The content of the promulgation reads as follows:

*mā almotevakkol ala-allāh mohammad-zāher-šāh pādešāh-e afgānestān mosavvade-ye qānun-e ġadid-e afgānestān-rā ke az taraf-e loya ġerga-i ke az heždahom tā bist-o-haštom-e mäh-e sombole-ye sāl-e 1343 h.š. dar šahr-e kābol en'eqād yāft, tasvib gardide be nām-e xodāvand-e bozorg touših mikonam va sar az emruz ān-rā be heys-e qānun-e asāsi-ye afgānestān dar tamām-e neqāt-e doulat nāfez e'lām mikonam. sar az emruz qānun-e asāsi-rā ke az taraf-e loya ġerga-ye sāl-e 1309 h.š. tasvib gardide va tā konun dar kešvar nāfez bud bā tamām-e zamāyem-e ān molqā e'lām mikonam/mohammad-zāher-šāh/dā afgānistān pādšāh. (Də Afgānistān asāsi qānun: Qānun-e asāsi-ye Afgānestān 1343 [1964]: 2)*

We, Mohammad Zahir Shah, the King of Afghanistan, in the name of Almighty God, do herewith sign the new Constitution of Afghanistan approved by the Loya Jirgah [Loya Ğerga—MMPK] in its session in Kabul beginning on the eighteenth and ending on the twenty-eighth of Sumbullah [samble—MMPK], 1343 [09th–19th September, 1964—MMPK]. We promulgate this new Constitution today throughout the entire State. From today we declare the Abrogation of the Constitution approved by the Loya Jirgah of 1309 [1931—MMPK] prior to this day in force in the country and all amendments thereto/Mohammad-Zāher Šāh/The King of Afghanistan. (Wilber 1965: 217)

As can be seen, Mohammad-Zāher Šāh, following the principle of using *pluralis maiestatis* in form of the *mā* 'we' personal pronoun, typical for the Persian court tradition, announced the enactment of a new set of basic

legal regulations.<sup>25</sup> The addressees of his words put in the Promulgation, however, was not a random crowd, but those who had been referred to in the body of the 1964 Constitution as: ‘nation (*mellat*)’, ‘people (*mardom*)’, or, alternatively, ‘Afghans (*afgānān*)’, i.e. all the citizens of the Kingdom of Afghanistan. In doing so, the king defined himself as the executor of the will of the subjects embodied by the Loya Ğarĝa, i.e. all-Afghan General Assembly that during a series of meetings had adopted the final version of the 1964 Constitution to which he penned the analysed Promulgation. He seemingly described his political role as purely administrative but, *de facto*, it was him who was the depositary of the prerogatives which made it possible for him to do so—the privilege guaranteed by Article №9: ‘[...] *pādšāh dārā-ye hoquq-o vazāʿef-e āti mibāšad*: [...] *touših-e qavānin va eʿlām-e enfāz-e ān* (The King has the following rights and duties: (...) signs laws and proclaims their enforcement)’ (*Rasmi Ğarida* 1343 [1964]: 2–3; Wilber 1965: 218).

Such a power was visually represented by his signature—in line with Austin’s *How to Do Things with Words* (1962), writing: *touših mikonam* ‘I sign’, as well as: *eʿlām mikonam* ‘I declare’, Mohammad-Zāher Šāh not only stated that from this point forward the 1931 Constitution of Mohammad-Nāder Šāh (1929–1933), i.e. of his father, officially ceased to be important but a new one would take its place throughout the country.

Mohammad-Zāher Šāh’s right to enactment of the law also resulted from (or, rather, was entrenched by) Article №6 on the king representing the sovereignty: ‘*dar afgānestān pādšāh hākemiyat-e malli-rā tamsil mikonad* (In Afghanistan the King personifies the sovereignty)’ (*Rasmi Ğarida* 1343 [1964]: 2; Wilber 1965: 217) as well as from (entrenched by) Article №7 on the king upholding, *inter alia*, the constitution and its legal solutions: ‘*pādšāh hāmi-ye asāsāt-e dīn-e moqaddas-e eslām, hāfez-e esteqlāl va tamāmiyat-e sāhe, negahbān-e qānun-e asāsi va markaz-e vahdat-e melli-ye afgānestān mibāšad* (The King is the protector of the basic principles of the sacred religion of Islam, the guardian of Afghanistan’s independence and territorial integrity, the custodian of its Constitution and the centre of its national unity)’ (*Rasmi Ğarida* 1343 [1964]: 2; Wilber 1965: 217). The king remained thus the source of law, although, as characterised in Article №1 (more below), his prerogatives, placed within the confines of a constitutional monarchy, were limited by those of the representatives elected by the citizens in parliamentary elections.

At the same time, Mohammad-Zāher Šāh sanctioned his signature as consistent with Islam, and the 1964 Constitution itself as consistent with

<sup>25</sup> This is not surprising, as any law of crucial importance can be announced by a head of state in this way.

its basic principles, by using the expression: *be nām-e xodāvand-e bozorg* (in the name of Almighty God), when speaking about singing the new law, as well as such terms as: *almotevakkol* (trusting in God) and *alā-al-lah* (putting confidence in God), when speaking about himself. Such utterances involuntarily direct our thoughts towards Abdorrahmān Xān's title *ziyā-l-mellat-wa-ddin* (the light of community and religion), his son, Habibollāh Xān's, *seraġo-l-mellat-wa-ddin* (the lantern of the nation and religion) as well as the Iranian Safavids' one *zellollāh* (the shadow of God) but, it cannot be argued that the king claimed the right to also exercise the function of the leader of a religious community (*Dari ommat*) even if, according to Article №8, the king must be a Muslim: '*pādšāh bāyad az taba'e-ye afgānestān, mosalmān va peyrou-e mazhab-e hanafi bāšad* (The king shall be an Afghan national, a Muslim and a follower of the Hanafi do)' (*Rasmi Ğarida* 1343 [1964]: 2; Wilber 1965: 217), and, according to Article №11, his name must be called during the Friday prayer: '*dar xotbehā nām-e pādšāh zekr migardad* (The name of the king is mentioned in khutbas)' (*Rasmi Ğarida* 1343 [1964]: 3; Wilber 1965: 217). The 1964 Constitution remained in line with the pillars of Islam, which was defined in Article №2 as Afghan and sacred: '*din-e afgānestān din-e moqaddas-e eslām ast [...]* (Islam is the sacred religion of Afghanistan [...])' (*Rasmi Ğarida* 1343 [1964]: 2; Wilber 1965: 217) but the religion itself, contrary to the 1931 Constitution, was not the main core of the law. I return to this problem later in the text, but it is worth adding here that the recognition of Islam as a model and moral standard did not mean recognising it as the right in itself, as clearly stated in Article №64 (more below).

One point needs clarification. The 1964 Constitution was co-inspired by Mohammad-Zāher Šāh and with his consent, although he did not participate directly in the work of the seven-member Constitution Committee, which prepared an extensive draft over the course of several months. The draft, accepted by Mohammad-Zāher Šāh and his cabinet, was then handed over to a thirty-two-member Constitutional Advisory Commission which assessed it and, if necessary, corrected it. Only after the completion of their work, the relevant project was sent to the chosen Loya Ğerga representatives, who focused on each of the articles, introducing final changes to the presented document.<sup>26</sup> As can be seen, the indirect source of the new constitution is the king himself, as no article that would be inconsistent or contrary to his will would be included in the version presented to the Loya Ğerga, which was composed on Mohammad-Zāher Šāh's order and to which he appointed thirty four members.

<sup>26</sup> For a detailed treatment of work and discussion taken by the Loya Ğerga see e.g.: Dupree (1980: 567–587).

### 3.2 The Preamble

The preamble, an optional introductory statement, reveals the legal document's purposes. It is no different in the case of the 1964 Constitution as in its Preamble various motives for writing the new basic law, i.e. general references to humanity and to God, as well as to sources of the constitutional authority could be easily traced. All these references placed the document within both a local, i.e. Afghan, and an international legal-and-cultural context.<sup>27</sup> The content of the Preamble reads as follows:

*besmellāho-r-rahmano-r-rahīm/be nām-e xodāvand-e tavānā va dādgar/ be manzur-e tanzim-e hayāt-e melli-ye afġānestān motābeq be moqtaziyāt-e zamān-e asr va bar asās-e vāqe'iyāt-e tārixi va farhang-e melli; be manzur-e ta'min-e edālat va mosāvāt; be manzur-e tatbiq-e demokrāsi-ye siyāsi-eqtesādi va eġtemā'i; be manzur-e tanzim-e šo'un va arkān-e doulat barā-ye ta'min-e āzādi va refāh-e afrād va hefz-e nazm-e omumi; be manzur-e enkešāf-e motevāzen-e tamām-e omur-e hayāti-ye afġānestān. va dar nahāyat: be manzur-e taškil-e yek ġāme'e-ye moraffah va moteraqqi bar asās-e ta'avon-e eġtemā'i va hefz-e kerāmat-e ensāni; mā mardom-e afġānestān bā dark-e tahavvolāt-e tārixi ke dar zendegāni-ye mā be heys-e yek mellat va yek ġoz' e ġāme'e-ye bašari be voqu' peyvaste, dar hāl-i ke arzešhā-ye fouq-rā haqq-e hame-ye ġavāme'e-ye bašari midānim, be qiyādat-e a'lāhazrat-e mohammad-zāher-šāh pādešāh va pišvā-ye zendegāni-ye melli-ye afġānestān in qanun-e asāsi-rā barā-ye xod va nashā-ye āyande vaz' kardim. (Rasmi Ġarida 1343 [1964]: 1)*

In the name of God, the almighty and the just/To reorganize the national life of Afghanistan according to the requirements of the time and on the basis of the realities of national history and culture; to achieve justice and equality; to establish political, economic and social democracy; to organize the functions of the State and its branches to ensure liberty and welfare of the individual and the maintenance of the general order; to achieve a balanced development of all phases of life in Afghanistan; and to form, ultimately, a prosperous and progressive society based on social co-operation and preservation of human dignity; we, the People of Afghanistan, conscious of the historical changes which have occurred in our life as a nation and as a part of human society, while considering the above-mentioned values to be the right of all human societies, have, under the leadership of His Majesty Mohammed Zahir Shah [Mohammad-Zāher Šāh—MMPK], the

<sup>27</sup> Modrzejewska-Leśniewska (2010: 247) cites the Preamble in her monograph *Afganistan*, noticing its importance, but, unfortunately, does not analyse its content.

King of Afghanistan and the leader of its national life, framed this Constitution for ourselves and the generations to come. (Wilber 1965: 217)

As one can see, the 1964 Constitution stated that it was enacted to introduce (or, better, strengthen) democracy at different levels of the economic or social life. I have written above: ‘the 1964 Constitution stated that it [...]’, on purpose because its text, as most of other legal documents, used present indicative, or possibly present subjunctive, not so much to describe reality as to model it—by naming various phenomena, the document tries to change their ontological status, firstly, on the legal level, and, secondly, on the level of everyday administrative practice.

Furthermore, the 1964 Constitution was supposed to improve the functioning of the state by strengthening its freedom (including, freedom of press) and by ensuring sustainable development that supported creation of a society based on collective cooperation. Various references dedicated to these, and other, crucial issues can be found throughout the whole one-hundred-twenty-eight-article document. Some of them appeared in both earlier constitutions, of 1923 and 1931, which additionally created a network of intertextual relationships between these three legal documents. Moreover, it made the 1964 Constitution their indirect continuator, even if a number of the current legal solutions were in contradiction with the existing ones.

It is worth explaining that some basic ideas for the preparation of the new constitution appeared as early as the late 1950s, during Mohammad-Dāʿud Xān’s premiership. It was him who in a series of letters penned in the early 1960s and addressed to Mohammad-Zāher Šāh clearly postulated the re-construction of the Afghan political system by introduction of the real (and effective) separation of three powers: legislative, executive and judiciary, existing so far more in the realm of wishful thinking than administrative practice (Kāzem 1398 [2019/2020]: I, 376–378). In fact, both previous constitutions, of 1923 and 1931, were prepared without any public participation and entrusted the monarch with almost all of the power, stipulating a little room for popular participation. The new one was supposed to be a completely new opening, and an expression of this new opening was represented not only by its content, but also by the way it was prepared—hence, *inter alia*, the presence of a few French constitutionalists, or the actual discussions concerning various legal arrangements carried out by the Loya Ğarġa.

Some plans for systemic politic reforms had been raised by Mohammad-Dāʿud Xān at the beginning on 1960s for a long time and discussed with cabinet members, but they revealed a deep discrepancy between the ideas of the prime minister and the intentions of the king as well as the educated urban middle class (Sierakowska-Dyndo 2002: 91). While Mo-



hammad-Dā'ud Xān opted, apparently, for a strong constitutional monarchy and parliamentary democracy as well as the legalisation of one party (eventually, two), by referring to the United Arab Republic (1958–1961) under Gamal Abdel Naser, the king and the middle class feared that such a one-party model would only strengthen his position, making him *de facto* the most important persona in the country. For Mohammad-Zāher Šāh this would mean depriving him as well as the royal family of its active participation in making the most crucial decisions in the country, and in the longer term weakening the role of the monarch to such a degree that it would eventually cause the change of the system from monarchist to republican. For the intellectual *élite*, Mohammad-Dā'ud Xān was an ambivalent figure. On the one hand, he boldly introduced a number of cultural, economic or social reforms. On the other one, they believed that in the case of Afghanistan, the desired political model should use tools developed within the framework of local jirgas. In other words, they sought to incorporate traditional councils into the political system of a constitutional monarchy at the local and supra-local levels (Magnus 1974: 54–55). If the king and the educated urban middle class were looking for any pattern to follow, it was primarily India, not the United Arab Republic (Magnus 1974: 55).

Returning to the topic, the source of power, according to the Preamble, is the Afghan society, self-defining itself as a nation led by a king, in this case Mohammad-Zāher Šāh. Contrary to the Promulgation, where the *mā* 'we' personal pronoun represented the king, here: '*mā mardom-e afgānestān [...] in qanun-e asāsi-rā barā-ye xod va naslhā-ye āyande vaz' kardim* (We, the People of Afghanistan [...] framed this Constitution for ourselves and the generations to come)' (*Rasmi Ğarida* 1343 [1964]: 1; Wilber 1965: 217), it did not define the person of the king but the community represented in the form of the Afghan society. It is therefore a retreat from the divine sources of royal power, not a return to the earlier ideas about the jirga rooted in it.

### 3.3 Articles

Below, nineteen of selected articles from the 1964 Constitution have been collected and discussed.

#### 3.3.1 Article №1

The content of Article №1 reads as follows:

*afgānestān doulat-e pādšāhi-ye mašrute, mostaqel, vāhed va ġeyr-e taġziye ast. hākemiyat-e melli dar afgānestān be mellat ta'alloq dārad. mellat-e afgānestān ebārat ast az tamām-e afrād-i ke tābe'iyat-e doulat-e afgānestān-rā motābeq be*

*ahkām-e qānun dārā bāšand. bar har fard az afrād-e mazkur kalame-ye afḡān etlāq mišavad. (Rasmi Ġarida 1343 [1964]: 2)*

Afghanistan is a Constitutional Monarchy; an independent, unitary and indivisible state. Sovereignty in Afghanistan belongs to the nation. The Afghan nation is composed of all those individuals who possess the citizenship of the State of Afghanistan in accordance with the provisions of the law. The word Afghan shall apply to each such individual. (Wilber 1965: 217)

This article, opening the 1964 Constitution as well as its Chapter I: *Daulat/ Daulat (The State)*, explicitly defined the nature of the Afghan state as independent (Dari *mostaqel*/Pashto *xpəlwāk*), unitary (Dari *vāhed*/Pashto *yawmuṭay*) and indivisible (Dari *qeyr-e taḡziya*/Pashto *nabeledunkay*). It repeated thus the previous legal assumptions to be found in the 1923 and 1931 documents. According to Article №1 of the 1923 Constitution, the Afghan state was an internally and internationally independent entity where the royal authority extended over its whole territory: ‘*doulat-e afḡānestān edāre-ye omur-e dāxele va xāreḡe-ye xod-rā be esteqlāl-nāme hā’ez bude. hame-ye mahallāt va qat’āt-e mamlekat be zir-e amr-o edāre-ye saniye-ye molukāne be surat-e yek voḡud-e vāhed taškil miyābad [...] (Afghanistan is completely free and independent in the administration of its domestic and foreign affairs. All parts and areas of the country are under authority of His Majesty, the King and are to be treated as a single unit [...])’ (Qavānin-e asāsi-ye Afḡānestān 1386 [2007/2008]: 3; Yunas 2001: 1). The analogous utterances were repeated in the 1931 Constitution as Article №2 (*Qavānin-e asāsi-ye Afḡānestān 1386 [2007/2008]: 35–36; Yunas 2001: 17).**

The reference to independence was of a twofold dimension. Obviously, it was a simple statement of a political fact but, simultaneously, it referred to the not so remote history when the international independence of the Afghan state had got partially restricted and transferred to the British Government of India (Raj) under the Treaty of Gandamak (1879) by Mohammad-Ya’qub Xān, Emir of Afghanistan (1879), and Sir Louis Cavagnari, a representative of the Government, ratified by Lord Edward Robert Bulwer Lytton, Viceroy of India, and finally lifted by the Treaty of Rawalpindi (1919) which brought the Third Anglo-Afghan War (1919) to an end.<sup>28</sup> The very first sentence to be found in the 1964 Constitution was therefore an intertextual reverse of two passages of the 1879 agreement: ‘His Highness the Amir of Afghanistan and its dependencies agrees to conduct his relations with Foreign States in accordance with the advice and

<sup>28</sup> For a detailed treatment of the Second Anglo-Afghan War as well as the Treaty of Gandamak see e.g.: Gregorian (1969: 114–117).

wishes of the British Government. His Highness the Amir will enter into no engagements with Foreign States, and will not take up arms against any Foreign State, except with the concurrence of the British Government' (*The Treaty of Gandamak* 1879: 2).

What distinguished the 1964 Constitution from the two previous ones was the unequivocal definition of the character of the Afghan monarchy in Article №1 as a constitutional one (Dari *doulat-e pādšāhi-ye mašrute*/Pashto *mašruta bāčā'i daulat*), i.e. based on a codified set of legal norms, applicable to all, including the monarch, whose legislative power was limited by cooperation with the representation of the people; such a legal basis also explained the second sentence of the same article, referring to sovereignty and its holders—the nation (Dari *mellat*/Pashto *millat*). The appearance of the phrase defining the character of the monarchy should be interpreted in terms of the reconstruction of the political system or at least in terms of attempts to reform it in great depth. It also might be read as a visible signal of the willingness of the Afghan officials and politicians to abandon the current model of the absolute monarchy with the decision-making centre located within the royal family and originating from Abdorrahmān Xān's unification efforts between 1880 and 1901.<sup>29</sup>

Article №1 unambiguously defined the meaning of the term 'Afghan nation (Dari *mellat-e afgānestān/dā afgānistān millat*)' as a group of people sharing the same citizenship (Dari/Pashto *tābe'iyat*) of Afghanistan. The lexeme *mellat/millat* appeared in its modern meaning 'nation', not in the traditional sense of 'a group of people who are united by a common religion'—this remained an expression of the transformations in the way of thinking about relations between the state and the citizen that had been taking place in Afghanistan since the end of the 19th century.<sup>30</sup> A modern-like definition of the nation was also found in the first two constitutions, according to the provisions of which the only criterion of belonging was the place of residence. Ethical issues, especially religious ones, played no role here as in Article №8 of the 1923 Constitution one can read: '*hame-ye afrād-i ke dar mamlekat-e afgānestān mibāšand belātafriq-e dini va mazhabī taba'e-ye afgānestān gofte mišavand [...] (All persons residing in the Kingdom of Afghanistan, without respect to religious or sectarian differences, are considered to be subjects of Afghanistan [...])*'

<sup>29</sup> For a detailed treatment of Abdorrahmān Xān's unification efforts see e.g.: Kakar (1979: 3–72).

<sup>30</sup> Tarzi played a significant role in creating a local intellectual horizon that would allow for the development of his own set of concepts describing modern intellectual currents. It is to him that we owe the transplantation of a number of ideological solutions to Afghanistan, which were the beginning of later systemic changes.

(*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 7; Yunas 2001: 2); the same statement figured in Article №9 of the 1931 one (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 40; Yunas 2001: 19).

Finally, Article №1 implemented the ethnonym ‘Afghan (*afġān*)’ as a term denoting every citizen of the country who had full political rights. Theoretically, the term should not have taken into account the citizen’s ethnic, cultural, linguistic, religious or professional affiliation, nevertheless during the Loya Ğerga’s assembly it aroused great resistance on the part of non-Pashtun delegates.<sup>31</sup> Despite the work of a separate committee, no alternative solution was presented (Dupree 1980: 578). As a side note, it is worth mentioning an anecdote quoted by Janata (1990: 60): ‘Once, during a fieldwork in Afghanistan [...] I was instructed by a nationalist *mamur* (bureaucrat) when I used the term “Afgan” referring to the user of the Pashto language. “I heard” all the citizens of this country are Afghans’. What is the significance of the bureaucrat’s words? Not only a universalising statement that every inhabitant of Afghanistan is ‘Afghan’, but also the emphasis that every inhabitant of Afghanistan is ‘Afghan’—in the original version appears the exoethnonym ‘Afghan (Dari *afġān*)’, used by the people outside of Pashtun as a synonym for the endoethnonym ‘Pashtun (Pashto *paštun*)’. This innocent, seemingly linguistic trick carries a considerable ideological charge, as it clearly proves that one of the pillars of Afghan national unity is precisely the Pashtun element. This can and has generated considerable resistance from the non-Pashtun people, revealing the heterogeneity and internal incoherence of the Afghan society. The term appeared in a few other places of the 1964 Constitution, *inter alia*, in Article №27: ‘*hiĉ afġān be ellat-e ettehām be yek ġorm be doulat-e xāreġi seporde nemišavad* (No Afghan accused of a crime can be extradited to a foreign state)’ (*Rasmi Ğarida* 1343 [1964]: 7; Wilber 1965: 220), affirming the equality of all before the law, regardless of ethnic or linguistic differences.<sup>32</sup>

### 3.3.2 Article №2

Article №2 concerned the place and role of Islam within the newly re-considered Afghan political system. Additionally, it confirmed the right of religious minorities to practice their faith, present in earlier documents.

<sup>31</sup> For a detailed treatment of the term ‘Afghan’ see e.g.: Green (2017a: 5–7); Green, Arbabzadah (2013: 4).

<sup>32</sup> It is interesting that the issue of ethnonym, and therefore ethnicity, returned, like a boomerang, during the preparation of the 2004 Constitution: ‘Afghanistan began as a Pushtun empire ruled by tribal dynasts from Kandahar, and even today the ethnic question in its plainest form asks whether the state is to be the instrument of a mostly Pushtun elite, or a mechanism through which all citizens may equally take part in self-government’ (Rubin 2004: 10–11).

Afghanistan was (and still is) a relatively homogeneous country in terms of religion. In the 1960s, when the 1964 Constitution was written, a small percentage of the population were the Hindus and Jews. They were guaranteed religious freedom, although possible restrictions resulting from the need to maintain public order were clearly indicated. The content of Article №2 reads as follows:

*din-e afġānestn din-e moqaddas-e eslām ast. ša'āyer-e dini az taraf-e doulat motābeq be ahkām-e mazhab-e hanafi eġrā' migardad. ān afrād-e mellat ke peyrou-e din-e eslām nistand dar eġrā'-ye marāsem-e mazhabi-ye xod dar dāxel-e hodud-i ke qavānin-e marbut be ādāb-o āsāyeš-e āmme ta'yin mikonad, āzād mibāšand. (Rasmi Ğarida 1343 [1964]: 2)*

Islam is the sacred religion of Afghanistan. Religious rites performed by the State shall be according to the provisions of the Hanafi doctrine. Non-Muslim citizens shall be free to perform their rituals within the him determined by laws for public decency and public peace. (Wilber 1965: 217)

This article partially duplicated the legal arrangements to be found especially in the 1931 Constitution on relations between the secular and religious foundations of the state law. For, as one can conclude reading Article №5 of the 1931 Constitution, the monarch's exercise of power takes place in accordance with the provisions of religious law: '[...] *zāt-e homāyuni dar heyn-e ġolus bar taxt-e soltanat-e mostaqele-ye afġāniye belmovāġehi-ye omum va kalā va ašrāf-e ahāli-ye afġānestān ta'ahhod namude-and ke motābeq-e avāmer-e mofti-ye bahā-ye šar'-e šarif-e nabavi (s) va mazhab-e hanafi (rh) va osul-e asāsi-ye mamlekat eġrā'-ye u amr-e hokumat-e šāhāne-ye xod-rā farmude [...]* ([...] His Majesty had expressed resolve, in presence of the people, representatives and noble citizens of Afghanistan, that he would rule the country according to tenets of the Shariat of the Holy Prophet (P.B.U.H), the sacred Hanafite creed and the constitution of the State [...])' (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 37; Yunas 2001: 18). Furthermore, references to the religious and secular law appearing in the 1931 Constitution clearly grade their value because religious regulations were mentioned first, and only then secular ones followed, e.g.: Article №19: '*šekanġe va digar onvā'-e zaġr tamāman mouquf ast va xāreġ-e ahkām-e šar'-e šarif va osulnāmeḡā-ye doulat barā-ye hiġkas moġāzāt dāde nemišavad* (Persecution and torture of any kind is prohibited. No body may be punished without trial under the Shariat and State laws)' (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 43; Yunas 2001: 20), or Article №65: '*mavād-i ke dar maġles-e šurā-ye melli tasvib mišavad bāyad bā ahkām-e din-e mobin-e eslāmi va siyāsat-e mamlekat moxālefat nadāšte bāšad*

(The matters approved by the National Assembly should not clash with the holy religion of Islam and the policy of the state)' (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 61; Yunas 2001: 26).

The 1964 Constitution should be thus considered as a new step on the way to the separation of the state from the religion. This can be clearly seen in the example of two articles—Article №69: '*be estesnā-ye hālāt-i ke barā-ye ān tarzo-l-amal-e xāssi dar in qānun-e asāsi tasrih gardide, qānun ebārat ast az mosavvabe-ye movāfeq-e har do ġerge ke be touših-e pādšāh reside bāšad. dar sāhe-i ke čenin mosavvabe voġud nabāšad ebārat ast az ah-kām-e feqh-e hanafi-ye šari'at-e eslām* (Excepting the conditions for which specific provisions have been made in this Constitution, a law is a resolution passed by both houses [of the parliament—MMPK], and signed by the king. In the area where no such law exists, the provisions of the Hanafi jurisprudence of the shariaat of Islam shall be considered as law)' (*Rasmi Ģarida* 1343 [1964]: 14; Wilber 1965: 223), and Article №102:

*mohākem dar qazāyā-ye moured-e residegi-ye xod ahkām-e in qānun-e asāsi va qavānin-e doulat-rā tatbiq mikonand. har gāh barā-ye qaziye-i az qazāyā-ye moured-e residegi dar qānun-e asāsi va qavānin-e doulat hokm-i mouġud nabāšad mohākem be peyrou-i az asāsāt-e kolli-ye feqh-e hanafi-ye šari'at-e eslām dar dāxel-e hodud-i ke in qānun-e asāsi vaz' namude dar čenin ahvāl hokm-i sāder mikonand ke dar nazar-ešān edālat-rā be behtarin surat-e momken ta'min namāyad.* (*Rasmi Ģarida* 1343 [1964]: 19)

The courts in the cases under their consideration shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the Hanafi jurisprudence of the Shariaat of Islam and within the limitations set forth in this Constitution, render a decision that in their opinion secures justice in the best possible way. (Wilber 1965: 226)

As can be deduced from both provisions, the religious law only supplemented the legal arrangements to be found in the new constitution and was not their sole basis.

Even if a number of legal arrangements to be found in the 1964 Constitution were consistent with legal ones developed on the basis of the religious law, the fact that they were treated as an element of secular law shows clear tendencies to separate the two legal spheres. Such an approach should be perceived as a retreat from Abdorrahmān Xān's intentions to centralise the Afghan stare around religion subject to strict control by

the central authorities, represented by the emir himself.<sup>33</sup> In his case this meant, *inter alia*, the Islamization of Kafirstan (1895–1896), the pacification of the Shi'a Hazaras (1892–1893), the fullest possible subordination of the top-down control of the traditional decentralised education system based on Koranic schools by establishing a network of training centres for the clergymen, and finally monopolising the judiciary system under the sharia law through the appropriation of the right to nominate judges.<sup>34</sup> These and other moves led to the strengthening of the position of Islam and, at the same time, closer integration of it with the state administrative apparatus (and, therefore, better control). As Olesen (1995: 65) notes, Abdorrahmān Xān developed Islam to legitimise his own absolute monarchy. Such an ideological solution later helped Mahmud Tarzi to use religion to link the absolute monarchy with the emerging concept of a nation-state. While Abdorrahmān Xān dealt primarily with the juristic aspects of Islam, Mahmud Tarzi referred mainly to its pillars and ethical considerations. Since it was by the grace and will of God, the Afghans converted to Islam. Afghanistan was a country that they received from God, and therefore love for the homeland was directly ordained. Although all Muslims belong to the community of believers, it is made up of many political collectives, from homelands whose citizens are nations. Thus, pan-Islamism and nationalism did not contradict each other. If the homeland is identified with Being, then the nation is its body and bones, and the king is its soul. Therefore, it was the religious duty of every Muslim to serve not only his homeland and nation, but also his government and monarch.<sup>35</sup>

Reports made during the successive sessions of the Loya Ğarĝa show the surprise of some delegates, mainly the clergy, who demanded explanations as to why the Hanafi jurisprudence, and therefore religious *per se*, occupies a secondary position in relation to the secular law (Dupree 1980: 578–583). It should be clarified here that the provision of Article №64 was a nod towards conservative, traditionalist and clerical circles: '[...] *hiĉ qānun nemitavānad monāqez-e asāsāt-e dīn-e moqaddas-e eslām va digar arzešhā-ye mondareĝ-e in qānun-e asāsi bāšad [...]* (There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this constitution [...])' (*Rasmi Ğarida* 1343 [1964]: 13; Wilber 1965: 223). Nevertheless, it does not change the fact that the authors of the 1964 Constitution treated various references to Islam quite instrumentally. The atmosphere in which the deliberations of

<sup>33</sup> See Chapter №2.3.8.

<sup>34</sup> For a detailed treatment of Abdorrahmān Xān's reign see e.g.: Kakar (1979).

<sup>35</sup> For a detailed treatment of Mahmud Tarzi's set of beliefs see e.g.: Gregorian (1967); Sims-Williams (1980).

the Loya Ğarĝa were held was also not without significance, as the clergy still remembered the unfavourable attitude of former Prime Minister Mohammad-Dā'ud Xān, hence they often made long, intricate statements, sometimes surprisingly objective. However, the most heated discussions concerned issues related to the judiciary, which faced the serious problem of determining its nature—religious or secular. This process began much earlier, because even during the reign of Mohammad-Nāder Šāh, the decision-making centre was shifted—previously, *qāzi* (religious judge) issued a verdict, guided by the principles of the Hanafi school. In the 1930s, government officials began to play an increasingly important role. A peculiar situation then occurred in which the *qāzi* issued a specific verdict, but it was subject to possible changes by the state administration, including the governor or his subordinates, in accordance with the provisions of the secular law.

### 3.3.3 Articles №3 and 35

It remains a well-known fact that Afghan society has been a mosaic of different ethnic, linguistic and cultural groups. No wonder that one of the most crucial challenges faced by the 20th century Afghan intellectuals was the sincere acceptance of its complex nature and the resulting difficulties in building a common Afghan identity. The 1964 Constitution *via* its Article №3 recognised such issues as evidenced by the plural form of the noun 'language, tongue (Dari *zabān*/Pashto *žəba*)', i.e. 'languages, tongues (Dari *zabānhā*/Pashto *žəbi*)'. Even if only two languages were ensured a special status as the official languages of the Kingdom of Afghanistan—Dari and Pashto—the mere fact that attention was drawn to the multilingualism of the citizens is commendable. The content of Article №3 reads as follows: '*az ĝomle-ye zabānhā-ye afgānestān pašto va dari zabānhā-ye rasmi mibāšad* (From amongst the languages of Afghanistan, Pushtu [Pashto—MMPK] and Dari shall be the official languages)' (*Rasmi Ğarida* 1343 [1964]: 9; Wilber 1965: 217).

Article №35 introduced, meanwhile, a new semantic category, i.e. the national language, different from the official one, as it would, according to the authors of the 1964 Constitution, serve a fuller internal integration of an exceptionally diverse society. Such a legal category did not appear in the 1923 and 1931 Constitutions. The content of Article №35 is as follows: '*doulat mouzef ast perogrām-e mo'asser-i barā-ye enkešāf va taqviye-ye zabān-e melli-ye pašto vaz' va tatbiq konad* (It is the duty of the State to prepare and implement an effective programme for the development and strengthening of the national language, Pushtu [Pashto—MMPK])' (*Rasmi*



*Ġarida* 1343 [1964]: 12; Wilber 1965: 221). Two languages recognised as official were, as already mentioned, Dari and Pashto.

The former one, Dari, i.e. the Afghan variety of Persian, has had the status of the language of high culture, a supra-ethnic ethnolect with an established history and a long tradition as the language of the court or state administration. Particularly noteworthy is the term ‘Dari (Dari/Pashto *dari*)’ itself, referring to the classic variant of Persian (10th–14th c.), reintroduced top-down by the Afghan authorities in two customs—to emphasise the reference to the Persian literary tradition represented by classical poets, *inter alia*, Ferdousi (10th/11th c.), Hāfez (14th c.) or Sa‘dī (13th c.), as well as to differentiate the Afghan variant of Persian from the Iranian or Tajik ones.<sup>36</sup>

The latter was Pashto—the language of the dominant ethnic group from which both ruling dynasties: Dorrāni (1747–1823) and Barakzāy (1823–1929, 1929–1973), originated. It was this language that, in the intention of the authors of the 1964 Constitution, was to become a plane that would unite the multi-element Afghan society.<sup>37</sup> One of the greatest supporters of Pashto identified with Afghan nationalism was Mohammad-Dā‘ud Xān. His ardent support would have made him the heir of the members of the Wiṣ Zalmiyān Party and their programme which emphasised the promotion and development of the Pashto language, if not for the fact that, although being a Pashtun by origin, he represented that part of the Pashtun *élite* that grew up in the culture of Persian literature and communicated more fluently in this language.<sup>38</sup> In order to preserve the national identity and promote the national language, all Afghan citizens, especially students, officials and military officers, were required to speak and write Pashto. The importance attached to the promotion of the Pashto language resulted from the conviction present in the discourse of nationalism that language, as the very embodiment of the national character and its genesis, is the main determinant of a national identity. For many Pashtun nationalists, the language itself was perhaps a symbolic link between the past and the present.

There is no doubt that language was the most crucial symbol of diversity in a country where Islam was shared by the vast majority of people. This concept of Pashto as the most crucial factor of ethnic nationalist

<sup>36</sup> For a detailed description of Persian as *lingua franca* see e.g.: Green (2019).

<sup>37</sup> Importantly, it was not the first attempt to raise the status of the Pashto language. Already in the second half of the 19th century, Šer-Ali Xān (1863–1866, 1868–1879) tried to break the monopoly of the Persian language.

<sup>38</sup> For a detailed description of Wiṣ Zalmiyān Party’s programme see e.g.: *Wiṣ Zalmiyān* (1326 [1947]). For a detailed discussion of the competition between the Persian- vs. Pashto-speaking elites see e.g. Parvanta (2001); Rzehak (2012a; 2012b).

discourse began to be promoted by the government before World War II. Already in 1936, by the royal decree, Pashto was approved as the national language and the language of instruction throughout the country at the expense of Persian/Dari. The aim was to promote Pashto as the only national language with a long history and excellent literature, and to prove that Pashto culture represents a national identity. However, the imposition of Pashto became a source of split, differentiation, suspicion and antagonism between different social groups. In fact, as Caron (Green 2017b: 79) noted, fostering Pashto studies at the centre: ‘[r]edirected the energies of talented intellectuals into a competitive arena divided between the Persian and Pashto language communities’.<sup>39</sup>

### 3.3.4 Articles №16–19, 21 and 23

Articles №16–19, 21 and 23, which make up Chapter II: *Pādšāh/Bāčā* (*The King*), regulate the functions of the monarch in the redrawn system of the constitutional monarchy. They thus define him as the leader of the society as well as a leader with influence on the functioning of the local political scene. Article №16 provides information on the branch of the royal family within which the succession takes place: ‘*pādšāhi-ye afğānestān dar xānevāde-ye alāhazrat-e mohammad-nāder-šāh šahid bar hasb-e ahkām-e in qānun-e asāsi enteqāl minamāyad* (The succession to the Throne of Afghanistan shall continue in the House of His Majesty Mohammed Nadir Shah [Mohammad-Nāder Šāh—MMPK], the Martyr, in accordance with the provisions of this Constitution)’ (*Rasmi Ğarida* 1343 [1964]: 4; Wilber 1965: 218).

This passage is interesting insofar as no analogous (or similar) information is to be found in neither the 1923 Constitution nor the 1931 Constitution. In the latter case, i.e. the 1931 Constitution, Article №5 only mentions the entrustment of power in the hands of Mohammad-Nāder Šāh in recognition of his role in the war for the full independence of Afghanistan from British rule (1919). In the same Article №5 also appears the following phrase: ‘[...] *banā aleyeh-e mellat-e nağibe-ye afğānestān mote’ahhed mišavad ke soltanat-e afğānestān be xāndān-e in pādšāh-e taraqixāh-e mamlekat be entexāb-e alāhazrat-e pādšāhi va ahāli-ye mellat-e afğānestān enteqāl mikonad* ([...] accordingly, the exalted and noble nation of Afghanistan pledges to succession of the State of Afghanistan within the family of this

<sup>39</sup> In this context, the provisions of the last, 2004 constitution are rather surprising. It granted a number of minority languages the status of auxiliary one in those regions which are inhabited by these minorities. On the other hand, it was not decided to give the status of an official language to Uzbek and Turkmen (Rubin 2004: 16–17).

progressive king of the state [Mohammad-Nāder Šāh—MMPK] through selection, to be made by His Majesty and the people of Afghanistan)' (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 37–38; Yunis 2001: 18). What is striking is the guarantee of power given by the Afghan people, who are rising to the role of active political players here.

A clear definition from which branch the future rulers of the Afghan monarchy would be chosen did not only serve to standardise the question of succession *per se*. It was also intended to prevent the disputes that so frequently arose throughout the 19th century, when the right to the throne was claimed by relatives of the deceased ruler, mostly consanguine brothers or rival sets of cousins.<sup>40</sup>

Equally significant was Article №17 which settled the question of the possible abdication of the king:

*har gāh pādšāh erāde-ye este'fā' benamāyad be maġles-e morakkab az ra'is-e wolesi ġerga, ra'is-e mešrāno ġerga, sadr-e a'zam, qāziyo-l-qozāt va vazir-e darbār-e pādšāhi ettelā' dāde ba'd dar xalāl-e moddat-e haft ruz loya ġerga-rā dā'er mikonad va este'fā'-ye xod-rā šaxsan yā tavassot-e vazir-e darbār be ġerge-ye mazkur eblāq minamāyad. dar surat-i ke loya ġerga tasdiq namāyad ke este'fā' az erāde-ye pādšāh-e naš'at namude az tārix-e tasdiq-e ān este'fā'-ye pādšāh nāfez šomorde mišavad. (Rasmi Ģarida 1343 [1964]: 4)*

Should the King resolve to abdicate, he shall inform a Council consisting of the President of the Wolesi Jirgah [Wolesi Ģerga—MMPK] (House of the People), the President of the Meshrano Jirgah [Mešrāno Ģerga—MMPK] (House of the Elders), the Prime Minister, the Chief Justice and the Minister of the Royal Court and, thereafter, convene a meeting of the Loya Jirgah (Great Council) within a period of seven days and announce therein his abdication in person or through the Minister of Court. If the Loya Jirgah (Great Council) attests that the abdication has stemmed from the will of the King, the abdication shall be considered effective from the date of the attestation. (Wilber 1965: 218)

As well as Article №18 which drew the line of intergenerational transmission of the prerogatives of royal power:

*dar mouqe'-e este'fā' yā vafāt-e pādšāh—pādšāhi be pesar-e bozorg-aš enteġāl miyābad. dar surat-i ke pesar-e bozorg-e pādšāh vāġed-e šarāyet-e pādšāhi ke*

<sup>40</sup> The only, in fact, exception to the rule was the case of Mohammad-Nāder Šāh (1929–1933), who ascended the throne after Amānollāh Šāh (1919–1929), although his ties with the ruling family were rather distant—he came from the Peshawar sardar lineage.

*dar in qānun-e asāsi zekr gardide nabāšad pādšāhi be pesar-e dovvom-e u va hamčēnān elā āxar enteḡāl mikonad. (Rasmi Ğarida 1343 [1964]: 4)*

On the King's abdication or death, the Throne shall pass on to his eldest son. If the eldest son of the King lacks the qualifications set forth in this Constitution, the Throne shall pass on to his second son and so on. (Wilber 1965: 218)

It is worth pausing here for a moment to consider the question of a possible abdication of the king, as such a possibility is not present in the provisions that make up the two earlier constitutions, i.e. those of 1923 and 1931. Abdication practically does not exist in the Afghan legal tradition, although it can be rarely observed in that country's history.<sup>41</sup>

In the 19th and 20th centuries, therefore, abdications could be counted on the fingers of one hand—Mohammad-Ya'qub Xān abdicated in 1878 in favour of his brother Mohammad-Ayub Xān and moved to Shimla, the then British Raj; Amānollāh Šāh, when he could not cope with the rebellion of Habibollāh Kalakāni *vel* Bačče-ye Saqā' in 1929, abdicated in favour of his brother Ināyatollāh Xān and moved finally to Rome, Italy; Mohammad-Zāher Šāh, facing a military *coup d'état* that removed him from power while he was abroad, abdicated in favour of his cousin Mohammad-Dā'ud Xān in 1973, complying with the 1964 Constitution, and remained in Rome, Italy; Babrak Kārmal stepped down as the General Secretary of the Hezb-e Demokrātik-e Xalq-e Afġānestān (PDPA People's Democratic Party of Afghanistan) in 1986 in favour of Mohammad Naġibollāh and moved to Moscow, the then USSR, although his resignation was forced by external factors, i.e. the Soviet authorities trying to reach a successful outcome of the conflict in Afghanistan.

The introduction of the practice of abdication into the Afghan legal system can therefore be regarded as a novelty. In the local tradition, a political leader does not resign from his functions. This is due to certain socio-cultural norms, which did not (and still do not) provide for such a legal solution that a political leader, regardless of the level at which they operate—local, regional, national—could/should/would voluntarily resign from their function. Resignation appears here as an overt expression of weakness and incompetence, and consequently takes the form of a black mark, irremovable blemish, which traces the personality of such

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<sup>41</sup> What I have in mind here is a tradition that stems from various processes shaping political norms and the resulting daily administrative practices, consisting of both indigenous Pashtun solutions and those typical of Persian-speaking civilisation (including the Indian one), or the Arab-Muslim civilisation more broadly.

a ruler with a deep stigma. In practice, abdication creates a political vacuum which needs to be filled immediately, but by disrupting the intergenerational exchange of power, it raises the question of the paths by which this exchange would take place. Would power then pass to the son, or should it go to the next brother? To resign is to retreat into political limbo. The best example of this is Amānollāh Šāh, who after announcing his abdication lost the support of numerous local leaders and was eventually replaced by one of his distant relatives, Mohammad-Nāder Šāh (1929). The second example is Mohammad-Zāher Šāh, who after the abdication in 1973 never played a significant political role, neither in the 1980s, i.e. during the Soviet intervention, nor in the 1990s, i.e. during the civil war, nor after 2001, when he was rather a symbol of the (remote *ergo* mythologised) past rather than an active moderator of changes of the time.

Article №19 reverted to the detailed instructions for the intergenerational transfer of power:

*har gāh pādšāh vafāt konad yā este'fā' namāyad va pesar-i nadāšte bāšad ke vāğed-e šarāyet-e pādšāhi bāšad, pādšāhi be bozorgtarin barādar-e pādšāh enteqāl minamāyad. dar surat-i ke bozorgtarin barādar-e pādšāh vāğed-e šarāyet-e pādšāhi nabāšad pādšāhi be barādar-i ke az nazar-e senn miyān-e barādarān belāfāsele ba'd az u vāqe' bāšad va hamčēnān elā āxar enteqāl miyābad. dar surat-i ke pādšāh barādar-i nadāšte bāšad ke vāğed-e šarāyet-e pādšāhi bāšad, ġānešin-e pādšāh az ġomle-ye bāzmāndegān-e pesari-ye alāhazrat-e mohammad-nāder-šāh šahid entexāb miğardad. dar in hālat entexāb-e pādšāh tavasot-e mağles-i morakkab az loya ġarğa, hokumat-o a'zā-ye stōra mahkama surat miğirad. in mağles dar surat-e vafāt dar xalāl-e moddat-e pānzdah ruz az tārix-e vafāt va dar surat-e este'fā' dar xalāl-e moddat-e haft ruz az tārix-e nafāz-e ān az taraf-e sadr-e a'zam dā'er mišavad. tasmim-e in mağles be aksariyat-e ārā-ye a'zā-ye hāzer ettexāz miğardad va ba'd az movāfeqat-e šaxs-i ke be heys-e pādšāh entexāb šode nāfēz šomorde mišavad. az tārix-e vafāt-e pādšāh bā enfāz-e este'fā-ye u tā entexāb-e ġānešin-e pādšāh, vazir-e darbār nā'eb-e pādšāh šenāxte mišavad. (Rasmi Ğarida 1343 [1964]: 4)*

Whenever the King abdicates or dies without a son possessing the qualifications to become the King, the Throne shall pass on to the oldest of the King's brothers. In case the oldest of the King's brothers lacks the qualifications needed, the Throne shall pass on to the second brother in line and so on. If the King does not have a brother possessing the qualifications required for the King, his successor shall be elected from amongst the male-lineal descendants of His Majesty Mohammed Nadir Shah, the Martyr. In this case the King shall be elected by an Electoral College consisting of the Loya Jirgah (Great Council), the Government, and the Justices of the Supreme

Court. This Electoral College shall be summoned by the Prime Minister, in the case of the death of the King within fifteen days from the date of the demise and in the case of abdication within seven days from the date when the King's abdication becomes effective. The decision of this Electoral College shall be by a majority of votes of the members present and shall be considered effective upon the consent of the person chosen as the King. The Minister of Court shall act as regent from the time of the death of the King or the validation of his abdication until the election of his successor. (Wilber 1965: 218–219)

The specific provisions governing succession stood in striking contrast to the general provisions contained in both the previous constitutions of 1923 and 1931. The setting out of seemingly elaborate, but in fact transparent rules for the smooth transfer of power to a successor, taking into account the various possible complications, is another argument in assessing the significance of the 1964 Constitution as a thoroughly modern document. At the same time, the inclusion of external bodies—those not from the ruling house (for its definition, see Article №24) in the decision-making process demonstrates a deep understanding of the need to streamline the rules for the selection of a successor. Moreover, it makes the entire society, which participates in the process through its representatives, indirectly co-responsible for it. The whole thing gave the succession all the hallmarks of a legal intergenerational transfer of power, with the maximum exclusion of disputes over the right to the crown, which were frequent in 19th century history of Afghanistan. Transparent definition of the principles of transfer therefore minimised the risk of possible claims by persons belonging to the ruling family, but not necessarily to the king's closest circle, as well as eliminated the risk of potential interference from third countries pursuing their own political and economic interests, often contrary to the interests of the Afghan state.<sup>42</sup> In this way, the authors have indirectly referred to Article №1 of the same constitution, which defines the nature of the Afghan state as an internationally independent and autonomous political entity.

The last two articles commented on in this subsection, i.e. №21 and №23, also contain a legal novelty:

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<sup>42</sup> I am primarily referring to the First (1839–1842) and the Second (1878–1880) Anglo-Afghan War, when the British authorities placed (favourable) rulers on the throne—Šāh Šoḡā' Dorrāni (1839–1842) and Abdorrahmān Xān respectively. In the latter case, the Governor-General, Lord Lytton, after some negotiation concerning the withdrawal of the British troops agreed to recognise Abdorrahmān Xān as the emir of Afghanistan.

*har gāh pādšāh vafāt konad va ġānešin-e u senn-e bist-rā takmil nakarde bāšad tā mouqe<sup>c</sup>-i ke senn-e mazkur-rā takmil mikonad malake niyābat-e pādšāhi-rā be ohde migirad. dar surat-i ke malake voğud nadāšte bāšad mağles-i ke dar māde-ye nuzdahom zekr gardid šaxs-i-rā az ġomle-ye bāzmāndegān-e pesari-ye alāhazrat-e mohammad-nāder-šāh šahid be heys-e nā'eb-e pādšāh entexāb mikonad. (Rasmi Ğarida 1343 [1964]: 5)*

In case the King dies before his successor has completed twenty years of life, the Queen shall act as Regent until his successor reaches the stipulated age. In case the Queen be not living, the Electoral College provided under Article 19 of this Constitution, shall elect someone from amongst the male-lineal descendants of His Majesty Mohammed Nadir Shah, the Martyr, to act as Regent. (Wilber 1965: 219)

*nā'eb va wakil-e pādšāh bāyad vāğed-e šarāyet mondareğ-e mādde-ye haštom bāšad. nā'eb-e pādšāh omur-e pādšāhi-rā bar tebq-e ahkām-e in qānun-e asāsi eğrā mikonad. dar surat-i ke malake niyābat-e pādšāh-rā be ohde dāšte bāšad az salāhiyat-e mondareğ-e faqare-ye dovvom-e mādde-ye nohom be mašvare-ye hokumat estefāde mikonad. nā'eb-e pādšāh nemitavānad dar moddat-e tasaddi-ye in ohde be mošāğel-e digar ešteğāl varzad. šaxs-i ke bar hasb-e ahkām-e moured-e bist-o yekom va bist-o dovvom-e in qānun-e asāsi be seffat-e nā'eb-e pādšāh ta'yin migardad hičgāh be heys-e pādšāh-e afgānestān entexāb nemišavad. dar doure-ye niyābat-e pādšāhi mavādd-e marbut be ġānešin-e fasl-e pādšāh-e in qānun-e asāsi ta'dil mišavad. (Rasmi Ğarida 1343 [1964]: 5)*

The Regent of the King must possess the qualifications specified in Article 8. The Regent shall perform the royal functions in accordance with the provisions of this Constitution. In the case of the Queen acting as Regent, the exercise of the authority described in section two of Article 9. shall take place with the advice of the Government. The Regent, during the tenure of his office, cannot engage in any other profession. The person elected as Regent by virtue of Articles 21 and 22 of this Constitution shall never be elected as the King of Afghanistan. During the period of Regency, the provisions relating to succession under the Title 'King' of this Constitution shall not be amended. (Wilber 1965: 219)

Until then, no such function as queen-regent was envisaged, as no function at all was provided for the wife of the head of state, the king, other than, possibly, representative.<sup>43</sup> Furthermore, under the provisions of the

<sup>43</sup> While Mohammad-Zāher Šāh appeared on stamps from 1939, the Queen Māh-Parvar Begom appeared only in 1968 to commemorate the Mother's Day as well as in 1969 due

1964 Constitution, in the absence of a male descendant, no provision is made for female members of the ruling family to inherit. Article №21 has never been put into practice, so it is impossible to determine how it would actually be implemented, but it is a clear step towards the recognition of the political role of women. The significance of Article №21 and the trust placed in the queen is toned down, however, by Article №23, which explicitly limits her duties as a regent by establishing control by the government. Indeed, this provision does not appear in the case of a male regent.

### 3.3.5 Article №24

Mohammad-Dāʿud Xān believed that the constitution should clearly define the rights (and responsibilities) of the royal family in the political life. At the same time, it should clarify the criteria for belonging to such a family, as the number of its members and their relatives had grown so much that it was impossible to recognise the boundaries of that belonging. Few felt a sense of responsibility for this, while many demanded privileges. In the Commission, the issue of the future participation of the royal family in the political life of the country caused the most disagreement and controversy—it is estimated that in the period preceding the systemic reforms the composition of the government was dominated in  $\frac{3}{4}$  by members of the royal family (Sierakowska-Dyndo 2002: 97). After long discussions, a compromise was reached, according to which the monarch retained his dominant position, while the closest members of the royal family were excluded from holding a number of public functions (Modrzejewska-Leśniewska 2010: 246–247).

Article №24 should therefore be regarded as the key legal solution contained in the new Constitution. For the first time the term a ‘ruling house (Dari *xānevāde-ye pādšāhi*/Pashto *bāčāʿi koranay*)’ was not only clearly defined, but also the rights, duties and limitations resulting from belonging to this house were outlined. The 1931 Constitution circumscribed the ruling house in Article №5 as: ‘[...] *xāndān ebārat ast az oulād-e zokur-e kabir va barādar* ([...] adult male descendants and brothers)’ (*Qavānin-e asāsi-ye Afġānestān* 1386 [2007/2008]: 38; Yunis 2001: 18). The 1964 Constitution, meanwhile, extended this concept to include female members. At the same time, however, it distinctly narrowed the circle of persons. The content of Article №24 reads as follows:

*pesar va doxtar va barādar va xāhar-e pādšāh va azvāġ-o zouġā va abnāʿ va banāt-ešān va amm va abnā-ye amm-e pādšāh xānevāde-ye pādšāhi-rā taškil*

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to the 51st Anniversary of Independence (Uyehara, Dietrich 1995: 159, 322, 330).



*midehand. dar tašrifāt-e rasmi-ye doulat xānevāde-ye pādšāhi ba‘d az pādšāh va malake axz-e mouqe‘ minamāyad. masāref-e xānevāde-ye pādšāhi dar budḡe-ye masāref-e pādšāhi ta‘yin mišavad. alqāb-e moxtass be xānevāde-ye pādšāhi mibāšad va motābeq be ahkām-e qanun ta‘yin migardad. a‘zā-ye xānevāde-ye pādšāhi dar ahzāb-e siyāsi šomuliyat nemivarzand va vazāyef-e āti-rā ehrāz nemikonand: 1. sedārat-e ozmā va vezārat; 2. ozviyat-e šurā; 3. ozviyat-e stāra mahkema. a‘zā-ye xānevāde-ye pādšāhi heysiyat-e xod-rā be seffat-e ozv-e xānevāde-ye pādšāhi mādāmo-l-hayāt hefz mikonand. (Rasmi Ğarida 1343 [1964]: 5–6)*

The Royal House is composed of the sons, the daughters, the brothers and the sisters of the King and their husbands, wives, sons and daughters; and the paternal uncles and the sons of the paternal uncles of the King. In the official protocol of the State, the Royal House comes after the King and the Queen. The expenditure of the Royal House shall be fixed in the budget of the Royal Expenses. Titles of nobility are exclusively confined to the Royal House and shall be assigned in accordance with the provisions of the law. Members of the Royal House shall not participate in political parties, and shall not hold the following offices: 1. Prime Minister or Minister; 2. Member of the Shura [Šurā—MMPK] (Parliament); 3. Justice of the Supreme Court. Members of the Royal House shall maintain the status as members of the Royal House as long as they live. (Wilber 1965: 219)

The ruling house thus consists of the king’s sons, daughters, brothers and sisters, their husbands, wives, sons and daughters, as well as the king’s uncles and their sons—so as it can be seen, further degrees of kinship are not included. There were two reasons for such a detailed definition of belonging to a ruling house. It dismissed possible claims of further relatives and descendants, eager to enjoy the privileges attributed to the reigning family. At the same time, Article №24 referred to the exclusion of the said persons from political life: ‘*a‘zā-ye xānevāde-ye pādšāhi dar ahzāb-e siyāsi šomuliyat nemivarzand va vazāyef-e āti-rā ehrāz nemikonand: 1. sedārat-e ozmā-vo vezārat; 2. ozviyat-e šurā; 3. ozviyat-e stāra mahkame* (Members of the Royal House shall not participate in political parties, and shall not hold the following offices: (i) Prime Minister or Minister; (ii) Member of the Shura (Parliament); (iii) Justice of the Supreme Court)’ (*Rasmi Ğarida* 1343 [1964]: 5; Wilber 1965: 219). It remains an open secret that this provision closed, *de facto*, the way for Mohammad-Dā‘ud Xān to engage in political activity and, if not closed, then made it considerably more difficult for him to do so openly.

Finally, the same Article №24 defined that a member of the ruling house remained a member for life, i.e. anyone who entered the ruling house,

even if they became a widower, widow or divorcée, did not lose the status once granted: ‘*a‘zā-ye xānevāde-ye pādšāhi heysiyat-e xod-rā be seffat-e ozv-e xānevāde-ye pādšāhi mādām-ol-hayāt hefz mikonand* (Members of the Royal House shall maintain their status as members of the Royal House as long as they live)’ (*Rasmi Ğarida* 1343 [1964]: 6; Wilber 1965: 219).

Advocates of such a solution argued that excluding members of the royal family from political life, thereby transferring power to the *élites* outside the family, absolved the monarchy of responsibility for policy and its implementation and reduced attacks on the royal house. It also gives the king more room for manoeuvre, as in the event of growing public dissatisfaction caused by the activities of the executive bodies, the middle link, namely the government, can be replaced without harming the dynasty, and the adopted policy direction can be preserved by appointing a new prime minister (Sierakowska-Dyndo 2002: 97).

I have mentioned above, referring to Modrzejewska-Leśniowska (2010: 246–247), that after some long discussions, a compromise was reached, according to which the monarch retained his dominant position, while the closest members of the royal family were excluded from holding a number of public functions. As said, it remains an open secret that such a legal solution was, *de facto*, aimed at the person of the former prime minister, Mohammad-Dā‘ud Xān, and his appetite for power. The non-substantive rationale behind some 1964 provisions is evidenced by the evolution of Article №24 As Seyyed Qāsem Reštyā (2005: 68), one of the authors of the 1964 Constitution, explains in his memoirs *Xāterāt-e siyāsi-ye Seyyed Qāsem Reštyā* (published also in English as *Afghanistan: The Making of the 1964 Constitution: Memoirs of Sayed Qassem Rishtya*, 2005), Mohammad-Dā‘ud Xān suggested the relevant article to be removed from the draft, but his proposal was rejected. Then, he asked to participate in the Loya Ğarga which was going to formulate the final text of the new constitution. His application was also rejected. Undaunted, he considered to start a political party. Consequently, Article №24 was supplemented with a clause preventing members of the royal family from founding political parties. In this situation, he even began to consider relinquishing his affiliation with the ruling house. The authors of the 1964 Constitution did not make him wait long for the answer—Article №24 was supplemented with a provision stating that one remain a member of the royal family for life.

### 3.3.6 Articles №31–32

Two articles, namely №31 and №32, should be considered as milestones on the way to full democratisation of political life in Afghanistan by breaking the state monopoly in the realm of access to information and public

activities. Both articles are included in Part III: *Hoquq-o vazāyef-e asāsi-ye mardom/De xalko asāsi haqquna au wazife (The Basic Rights and Duties of the People)*.

Article №31 guaranteed every citizen, enjoying, of course, full rights, freedom of expression regardless of the form chosen. This opportunity was limited only by the norms determined by particular legal solutions. Hence, the statement could not harm Islam or the monarchy as such, incite to disobedience or reveal details threatening public security:

*āzādi-ye fekr va bayān az ta'arroz-e masun ast. har afgān haqq dārad fekr-e xod-rā be vasile-ye goftār, nevešte, tasvir yā emsāl-e ān motābeq be ahkām-e qānun ezhār konad. har afgān haqq dārad motābeq be ahkām-e qānun be tab' va našr-e matāleb bedun-e erā'e-ye qabli-ye ān be maqāmāt-e doulati bepardāzad. eḡāze-vo emtyāz-e tāsis-e tāsis-e matābe'e omumi va našr-e matbu'āt tanhā be atbā' va doulat-e afgānestān motābeq be ahkām-e qānun dāde mišavad. ta'sis-e va tadvir-e dastgāh-e āmme-ye ferestande-ye rādyo va televizyun moxtass be doulat ast. (Rasmi Ġarida 1343 [1964]: 7–8)*

Freedom of thought and expression is inviolable. Every Afghan has the right to express his thoughts in speech, in writing, in pictures and by other means, in accordance with the provisions of the law. Every Afghan has the right to print and publish ideas in accordance with the provisions of the law, without submission in advance to the authorities of the State. The permission to establish and own public printing houses and to issue publications is granted only to the citizens and the State of Afghanistan, in accordance with the provisions of the law. The establishment and operation of public radio transmission and telecasting is the exclusive right of the State. (Wilber 1965: 220)

The tangible result of this article was the remarkable development of journalism, both professional and amateur. New periodicals started appearing on the local press market almost overnight—some disappeared after a few issues, others stayed on much longer. They represented various political options on the Afghan scene at the time, mainly left-wing circles, but also conservative or nationalistic ones. They also varied in quality. The abundance and vitality of the press market at the time is surprising given the small readership, inhabiting primarily major urban centres (Modrzejewska-Leśniewska 2010: 250–252).

The same Article №31 also guaranteed the state monopoly on radio and television. Although Radio Afghanistan Dari *rādyo afgānestān/Pashto rādyo afgānistān*; today's Voice of Sharia [dari *Sedā-ye šari'at/Pashto dā šari'at ḡaž*]) had already been operating since the 1920s, television did

not appear until the end of 1978, i.e. after the military *coup d'état* that brought the PDPA to power. Leaving radio, and implicitly television, in state hands was a guarantee of the development of these media. At the same time, given the low literacy rate of the population, it guaranteed the state a real influence on shaping public opinion; whether this was effective remains a matter for debate.

While Article №31 guaranteed freedom of expression, Article №32 allowed citizens to organise public assemblies and, above all, to establish associations and political parties:

*atbā<sup>c</sup>-e afġānestān haqq dārand barā-ye ta<sup>c</sup>min-e maqād-e ġāyez va solhāmiz bedun-e haml-e salāh motābeq be ahkām-e qanun bedun-e eġāze-ye qabli-ye doulat eġtemā<sup>c</sup> namāyad. atbā<sup>c</sup>-e afġānestān haqq dārand be manzur-e ta<sup>c</sup>min-e maqāsed-e mādi yā ma<sup>c</sup>navi motābeq be ahkām-e qanun ġam<sup>c</sup>iyathā ta<sup>c</sup>sis namāyand. atbā<sup>c</sup>-e afġānestān haqq dārand motābeq be ahkām-e qānun ahzāb-e siyāsi taškil dehand mašrut bar in ke: 1. hadaf va fa<sup>c</sup>āliyat-e hezb va mafkurehā-yi ke taškilāt-e ahzāb ru-ye ān benā<sup>c</sup> šode monāqez-e arzešhā-ye mondareġ-e in qānun-e asāsi nabāšad; 2. taškilāt va manābe<sup>c</sup>-e māli-ye hezb alani bāšad. hezb-i ke motābeq be ahkām-e qānun taškil miyābad bedun-e mouġebāt-e qānuni va hokm-e stōra mohakeme monhal nemišavad. (Rasmi Ġarida 1343 [1964]: 8)*

Afghan citizens have the right to assemble unarmed, without prior permission of the State, for the achievement of legitimate and peaceful purposes, in accordance with the provisions of the law. Afghan citizens have the right to establish, in accordance with the provisions of the law, associations for the realisation of material or spiritual purposes. Afghan citizens have the right to form political parties, in accordance with the terms of the law, provided that: 1. The aims and activities of the party and the ideas on which the organization of the party is based are not opposed to the values embodied in the Constitution; 2. The organization and financial resources of the party are open. A party formed in accordance with the provisions of the law cannot be dissolved without due process of the law and the order of the Supreme Court. (Wilber 1965: 220)

As Sierakowska-Dyndo (2002: 98–99) highlights, the preparation and approval of a new constitution was a condition for calling new parliamentary elections. In Mohammad-Dā<sup>c</sup>ud Xān's idea, parliamentary elections were to precede the formation of political parties. He believed that an appropriate act on political parties should already have been prepared during the drafting of the constitution. Similarly, a number of delegates to the Loya Ġerga considered it a necessary part of the systemic reforms to allow the establishment of political parties to take part in the announced

parliamentary elections. However, the members of the Constitution Committee argued that parties should form peacefully, during the term of the first elected parliament, and that the act on political parties itself should be subject to wide consultations. Mohammad-Dā'ud Xān's ideas were therefore not realised, and parliamentary elections were held without prior legalisation of political parties. The electoral rules were based on equal representation of the individual districts, which led, for example, to the limitation of the representation of the largest urban centre, Kabul.

Although Mohammad-Zāher Šāh was obliged to do so, he never decided to sign the executive acts formulated in 1966 allowing the association of citizens into political parties. His decision was influenced by the opinions formed in his environment, for example, it was believed that political parties would be formed according to ethnicity, thus deepening the already strong national divisions (Modrzejewska-Leśniewska 2010: 256–257). These, therefore, if they were created, were of an informal nature. Abandoning this crucial element of the systemic reforms, particularly those related to free political activity, should therefore be seen as an attempt to hinder, or even halt, the changes initiated by the 1964 Constitution and the first parliament elected under a reformed electoral law. The lack of a royal signature did not completely stop the democratisation processes, although it hindered them to a great extent, contributing to the weakening of the dynamics of these processes and their partial failure.

### 3.3.7 Articles №41, 43, 45, 57 and 63

According to Article №41, every adult, and therefore with full electoral rights, Afghan citizen can participate in the political life of the state *via* his/her representative to the parliament (Dari/Pashto *šurā*):

*šurā-ye afġānestān mazhur-e erāde-ye mardom-e ān ast va az qātebe-ye mellat namāyandegi mikonad. mardom-e afġānestān be tavassot-e šurā dar hayāt-e siyāsi-ye mamlekat sahm migirand [...]. (Rasmi Ğarida 1343 [1964]: 9–10)*

The Shura (Parliament) in Afghanistan manifests the will of the people and represents the whole of the nation. The people of Afghanistan participate through the Shura (Parliament) in the political life of the country [...]. (Wilber 1965: 221)

The deputies who serve as representatives are, in accordance with Article №43, elected to the lower house of parliament, the Wolesi Ğerga (House of the People) in free, universal, secret and direct elections for a period of four years:

*a'zā-ye wolesi ġerga tavassot-e entexābāt-e āzād—omumi—serri va mostaqim motābeq be ahkām-e qānun az taraf-e mardom-e afgānestān entexāb mišavad. afgānestān be in manzur be houzehā-ye entexābi taqsim migardad. te'dād va sāhe-ye houzehā tavassot-e qānun ta'yin mišavad. az har houze yek nafar vakil entexāb migardad. dāvtabal-i ke dar houze-ye xod motābeq be ahkām-e qānun ra'y-e bištar hāsel mikonad vakil šenāxte mišavad. (Rasmi Ğarida 1343 [1964]: 10)*

Members of the Wolesi Jirgah (House of the People) shall be elected by the people of Afghanistan in a free, universal, secret and direct election, in accordance with the provisions of the law. For this purpose Afghanistan shall be divided into electoral constituencies, the number and limits of which are fixed by the law. Each constituency shall return one member. The candidate who obtains the largest number of votes cast in his constituency, in accordance with the provisions of the law, shall be recognized as the representative of that constituency. (Wilber 1965: 221)

As for the members of the upper house, the Mešrāno Ğerga (House of the Elders), they are, according to Article №45, nominated—one-third of the members were royally appointed, one-third indirectly elected and one-third directly elected by the people of the province:

*a'zā-ye mešrāno ġerga be tartīb-e zeyl ta'yin va entexāb mišavad: 1. yek sols-e a'zā' az ġomle-ye afrād-e xabir va bātaġrobe barā-ye moddat-e panġ sāl az taraf-e pādšāh ta'yin mišavad; 2. do sols-e digar-e a'zā' bar hesb-e āti entexe āb mišavand: (alef) har ġerge-ye velāyat yek nafar az ġomle-ye a'zā-ye xod-rā barā-ye moddat-e se sāl be ozvīyat-e mešrāno ġerga entexāb mikonad; (be) sākenin-e har velāyat yek nafar-rā az tariq-e entexābāt-e āzād-e omumi-ye sere ri-ye mostaqim barā-ye moddate-e čahār sāl be ozvīyat-e mešrāno ġerga entexāb mikonad. (Rasmi Ğarida 1343 [1964]: 10)*

Members of the Meshrano Jirgah (House of the Elders) shall be nominated and elected as follows: 1. One-third of the members shall be appointed by the King for a period of five years from amongst well-informed and experienced persons. 2. The remaining two-thirds of the members shall be elected as follows: a. Each Provincial Council shall elect one of its members to the Meshrano Jirgah (House of the Elders) for a period of three years. b. The residents of each province shall elect one person for a period of four years by a free, universal, secret and direct election. (Wilber 1965: 222)

The fact that parliamentarians and senators act as representatives of the public is clearly emphasised by Article №57, which stipulates that ses-

sions are open to the public and may be listened to by any citizen, with the exception of closed sittings:

*mobāhese-ye ġalasāt-e har do ġarġa alani mibāšad. maġar in ke ra'is-e hokumat—ra'is-e ġarġa yā aqalan dah nafar az a'zā' serri budan-e ān-rā darxāst namāyand va ġarġa in darxāst-rā bepazirad. ġarġa mitavānad bā aksariyat-e do sols-e a'zā' mobāhese-i-rā ke be tour-e serri surat gerefte dobāre alani besāzad. ġaryān-e mobāhese-ye har do ġarġa sabt migardad. hiġkas nemitavānad onfan be maġar-e šurā dāxel šavad. motexallefin motābeq be ahkām-e qānun moġāzāt mišavad. (Rasmi Ġarida 1343 [1964]: 12)*

Debates in both Houses are open except when the Government, the President of the House or at least ten members request a secret session, and the House grants its approval. The House can, with a two-thirds majority of the members, convert secret proceedings into open debate. The proceedings of both Houses of Shura (Parliament) are recorded. Nobody may enter the meeting place of the Shura (Parliament) by force. Violators shall be punished according to the law. (Wilber 1965: 222)

However, Article №63 remained crucial:

*šurā mitavānad be amr-e pādšāh monhall šavad. enhelāl-e šurā dar hālat-e mondareġ-e mādde-ye yeksad-o-bist-o-yekom hatmi ast. enhelāl-e šurā šāmel-e a'zā-ye ġeyr-e entexābi-ye mašrāno ġarġa niz mibāšad. (Rasmi Ġarida 1343 [1964]: 13)*

The Shura (Parliament) may be dissolved by order of the King. The dissolution of the Shura (Parliament) is imperative under the conditions described in Article 121. The dissolution of the Shura (Parliament) encompasses the non-elected members of the Meshrano Jirġah (House of the Elders). (Wilber 1965: 223)

Indeed, this article guaranteed the monarch a clear influence on state policy, thanks to the prerogatives enabling him the dissolution of parliament. It cannot be said that the parliamentarians and the senators were dependent on his whims. It can be stated, however, that of all the ruling house, it was the monarch who enjoyed such wide-ranging rights that in the newly constructed system of constitutional/parliamentary monarchy he still played a major role, and not only served a representative function.

The fact that the turnout for the 1965 parliamentary elections was barely 15–20% is enough to prove that this understanding of the role of parliament was a novelty in Afghanistan at the time. Researchers like Modrzejewska-

-Leśniewska (2010: 261) explain this low turnout by, *inter alia*, Afghans' reluctance to vote in secret. Collaterally, illiterate people did not register as voters, and peasants and nomads were avoiding contact with state apparatus. An additional obstacle to the practical implementation of the assumptions presented in Articles №41, 43, 45 and 57 was the inability of candidates to run within political parties. This meant that each of them had to finance their election campaign independently. As a result, traditional leaders, local notables, village elders, religious leaders, wealthy merchants, teachers and civil servants, many of whom treated party activities as an opportunity to make up for the costs incurred and to take care of their own needs or those of the group they represented, entered the parliament.

### 3.3.8 Article №108

One of the most crucial tasks faced by the Kabul-based *élites* and administration apparatus was to break the strong (o)position of parallel structures of power remaining beyond their direct control inasmuch as self-organising at the local level in the form of a dense, non-hierarchical mesh networking of relationships between the leader (e.g.: a landowner [Dari *arbāb*] and the community, or a tribal leader [Dari *xān*]) and the tribe, or between the leaders (Dari *riš-sefid*/Pashto *spin-žar*/Uzbek *aqsaqal*) organised in councils (Dari *šurā*/Pashto *ğarğa*). Although Afghanistan emerged, *de jure*, as a state in 1747, the first, *de facto*, successful attempts to transform it into a coherent administrative and political organism were undertaken only at the end of the 19th century by Abdorrahmān Xān (Dupree 1980: 17).<sup>44</sup> The solutions proposed in Article №108 of the 1964 Constitution are therefore an extension of the previous actions:

*edāre-ye afgānestān bar asl-e markaziyat-e motābeq be ahkām-e in fasl ostovār ast. edāre-ye markazi be mouğeb-e qānun be yek edde-ye vāhedhā-ye edāri monqasem miğardad ke dar ra's-e har kodām-e ān yek nafar vazir qarār dārad. vāhed-e edāre-ye mahalli velāyat ast. te'dād, sāhe-ye eğrā va taškilāt-e velāyat tavassot-e qānun tanzim miğardad. (Rasmi Ğarida 1343 [1964]: 21)*

The administration of Afghanistan is based upon the principle of centralization, in accordance with the provisions of this Title. The Central Administration shall be divided into a number of administrative units each headed by a Minister, as provided in the law. The unit of local administration is the province. The number, area, subdivisions and organization of the provinces shall be fixed by law. (Wilber 1965: 227)

<sup>44</sup> See Chapter 2.3.2.



The expression ‘principle of centralisation (Dari *asl-e markaziyat*/Pashto *dā markaziyat asās*)’ was a novelty in the Afghan political jargon, since it justified the monopoly of the *élites* and authorities staying in Kabul to exercise power over culturally, ethnically, economically as well as geographically diverse regions of the state. This expression should be thus understood as incorporation of the above-mentioned independent structures self-organising at the local level into the hierarchical star network administrative apparatus. By successfully controlling the leaders who operate at the local level, the administrative apparatus, i.e. the government *via* its representative (e.g.: bureaucrats like governors), could take over a number of tasks that were traditionally under the local leaders’ responsibility and simultaneously transfer a number of missions determined this time by its Kabul-based centre, e.g. effective implementation of Article №38 (on tax liability) or Article №39 (about military service). At the same time, it would make it possible to remove (un)formal intermediaries currently mediating between the government and the citizen.

One of the basic tools to achieve such control was to divide the state into administrative units (not necessarily respecting geographical, historical or ethnic divisions). Such several-level structure would allow for closer supervision over individual regions, especially as the long-standing practice was to appoint people from outside the provinces as governors (Rubin 2004: 15)—it was one of the methods of breaking local dependency networks. Article №109 clearly stated that the provinces take part in projects planned and implemented by the state, i.e. the central government. Whereas Article №110 spoke of the fullest possible inclusion of councils established in individual provinces into the administrative structures of the state. Finally, Article №112 talked about centralism, explaining that the salaries of officials at the provincial level should be regulated by law.

Although the 1958 French Constitution attested in its Article №1: [1]a France est une République indivisible, laïque, démocratique et sociale. (...) Son organisation est décentralisée’ (*Constitution* 1958: 1), it seems that through the person of the adviser, Louis Fougère, the theoretical foundations for the idea of centralisation were provided by the French administrative practices.

## 4 Conclusions

The 1964 Constitution, although third in Afghanistan’s history, appears to be the first in many respects, not only due to its modern, by the standards of the time, nature. Apparently, for the first time the public atmosphere controlled by the state apparatus was supposed to help people to better understand that it was a document of vital importance. As Pasarlay

(2022) rightly points out this atmosphere affected also Western researchers—Arjomand (2005: 943, 952) believes that the 1964 Constitution connects: ‘liberal constitutionalism and Islamic modernism’; Dupree (1980: 565) calls it: ‘the finest in the Muslim world’; Reštyā (Rishtya 2005: 42) considers it as a document that: ‘set a progressive orientation for the future’; Wilber (1965: 215, 216) recognises it as: ‘liberal, enlightened, forward-looking, comprehensive and definitive’. A meaningful symbol of the political and ideological environment generated around the 1964 Constitution was a postage stamp, printed by Afghan Post (Dari/Pashto *da afgānistān post*), commemorating the monarch signing its text.<sup>45</sup>



Figure 1. From the left: Mohammad Nur-Ahmad E‘temādi (Minister of Foreign Affairs), Šamsoddin Mağruh (Minister of Justice), Mohammad Anas (Minister of Education), Mohammad Yusof (Prime Minister), Šer Olumi (Marshal of the Court), Abdollāh Xān Yaktā-Yaftali (Minister Planning), Mohammad-Nāser Kešāvarz (Minister of Agriculture), Mohammad Haydar (Minister of Communications), Abdozzahir (Minister of Health), Seyyed Qāsem Reštyā (Minister of Press and Information). Seated: Mohammad-Zāher Šāh. Interestingly, the photographer did not instruct the monarch to wear his glasses instead of having them on his forehead (Uyehara, Horst (1995: 303–304)<sup>46</sup>. Source: Author’s collection.

<sup>45</sup> The symbolism of the stamp was so visible that it later appeared as a graphic on the cover of Kaškaki’s monograph or Reštyā’s memoirs.

<sup>46</sup> Value: Afghani 1.50 (In 1964 Af. 1 was worth *ca* \$ 0.016). Colour: bright green and black. Quantity: 100.000. Performance: 12.65 x 13.25. Size: 43.5 x 36.0. Sheet count: 25 (5x5)? (Uyehara and Horst 1995: 303).

It is a truistic statement, yet no law is adopted for its own sake, but it is used as an instrument to achieve social goods. Careful reading of the 1964 Constitution shows that this basic legal document granted various rights as well as imposed numerous duties on the Afghan citizen. They were granted individual rights, *inter alia*, freedom of speech, thought, expression and assembly, right to free movement, right of work and privacy of the home, right of medical treatment education. They were in return expected to pay taxes, to serve in the military, to obey the law and, finally, to respect the monarch. Furthermore, the 1964 Constitution saw Islam as conforming to the law rather than establishing it. This meant that as a document it transferred the right to speak for/regarding Islam from a single group of religious scholars and judges educated in religious law to the whole of society and their representatives elected in general elections.

As Modrzejewska-Leśniewska (2010: 248) writes, the practical, everyday implementation of the assumptions made by the authors of the 1964 Constitution was neither easy nor effective. Mostly because the monarch's involvement in governing was not entirely successful. Mohammad-Zāher Šāh was not fully convinced of the direction the state policy should take. On the one hand, he saw the need for systematic reform that would facilitate modernisation (*ergo* centralisation) of the country. On the other one, he was against such changes that could/would lead to the weakening of his position as the ruler. This is also where the reasons why this democratic/parliamentary experiment failed in the end. For when looking closely at the political map drawn up by individual constitutional articles and their practical implementation, it is impossible to get rid of the impression that it was based on the persistent thought of eliminating all opponents of the monarch's power from political life. Excluding Mohammad-Da'ud Xān, as well as impeding leftist, Islamic or nationalistic circles to unrestrainedly participate in the political life, in a sense determined a future fate of the 1964 Constitution when in 1973 the former prime minister, helped by some PDPA members, seized power, abolishing the monarchy and establishing a republic in its place (Pasarlay 2016: 98–100; 2022). In this sense, Mohammad-Da'ud Xān's act was a late response to the model that had been already present in the post-colonial Islamic world in the 1940s and 1950s as a state of a nationalist, republican and secular nature (Benard and Hachigian 2003: 15).

Although the 1964 Constitution was intended to transform an absolute monarchy into a constitutional/parliamentary one, it did so quite superficially. It generated legitimacy to the state *per se*, limited to some degree the agency costs of government as well as facilitated the production of public goods but it did not channel political conflict through formal institutions leading to an increase in tension (Ginsburg, Huq 2014: 120).

Nevertheless, the democratic experiment symbolised by the 1964 Constitution, even if assessed critically today: '[i]t produced paralyzing political gridlock and mounting frustration within ruling elites' (Ginsburg, Huq 2014: 119), '[o]ver a mere ten years, the country had three elections and four governments, none of which succeeded in implementing needed reforms' (Rubin 2004: 8), was, undoubtedly, a major stage in the modernisation of Afghanistan *sensu largo*. Both politically, intellectually and socially. For if it activated various environments, it was not only with allowed solutions but also with (un)intentionally imposed restrictions.

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