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## The Interaction of the Islamic Emirate with Legislative Documents and the Legal System in Afghanistan

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### Abstract

*This article, titled “The Interaction of the Islamic Emirate with Legislative Documents and the Legal System in Afghanistan,” explores the practical and significant issue of the Islamic Emirate’s engagement with legislative documents and the legal framework. Notably, the absence of a well-defined legal system in Afghanistan and how the Islamic Emirate interacts with legal norms are central themes examined in this study. A critical observation made within the article highlights the lack of due reverence for the legal system in Afghanistan, emphasizing its implications and consequences.*

*This article addresses pressing societal needs by meticulously examining the legal landscape. Through rigorous analysis and comparison of the Republic and Emirate eras in Afghanistan, the study evaluates the efficacy of globally acknowledged legal components. Specifically, the focus is on addressing the persistent challenges of legal instability and inadequate engagement with legal norms. The research culminates in clear and pragmatic recommendations, underscoring the practical effectiveness of the proposed solutions.*

**Key Words:** *Law, legislative documents, principled documents, processing.*

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**Introduction**

The role of law as a societal framework for maintaining order and establishing standards of acceptable and unacceptable behavior has long been a focal point in human societies. Afghanistan, as an integral part of the international community, bears the responsibility to align itself with these global standards. Although the nation embarked on this journey some time ago, progress has been sluggish and insufficient. At times, the process even encountered unexpected interruptions and faced resistance. This article draws upon both written and unwritten sources to explore three fundamental aspects. First, it delves into general concepts related to legislation, law, and governance. Second, it assesses the current state of legal regulations within the country, shaped by the Islamic Emirate's victory in 1400 A.H. Finally, the article meticulously examines the evolution of legislative documents, drawing comparisons between the legal systems of the Islamic Republic of Afghanistan and the Islamic Emirate of Afghanistan.

In addition to the aforementioned themes, this article delves into the viewpoints of religious scholars and Islamic jurists concerning legislation and their engagement with Afghanistan's legal framework. Notably, a segment of jurists has outright rejected the existing legal system, providing their own justifications. Conversely, another group of jurists not only acknowledges the presence of a structured legal system but also deems it indispensable. These scholars can be categorized into two distinct groups: one emphasizing jurisprudence as the sole source of legislation, and the other considering jurisprudence as the primary foundation for legal norms. The article aims to elucidate the broader context of jurists' interactions with the country's legal landscape, although detailed discussions are beyond its scope. For in-depth exploration, readers are recommended to refer to specialized books and articles specifically related to this subject matter.

This article provides an in-depth examination of the legal systems in both the Islamic Republic of Afghanistan and the Islamic Emirate of Afghanistan. By juxtaposing these systems with established global legal standards, the study highlights their respective advantages, disadvantages, and potential scientific solutions. The practical implications of this research can guide policymakers and officials in enhancing the legal landscape within the country. Recognizing that adherence to a legal framework is essential, the article emphasizes the need for effective regulation and optimal utilization of the legal system. This endeavor represents a modest step toward progress and relative prosperity's Afghanistan seeks to rely on the rule of law, we extend our hopes for positive outcomes, accompanied by spiritual support and well wishes.

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### ***Significance and Objectives***

The examination of the legal landscape within the Islamic Emirate of Afghanistan holds paramount importance. This critical endeavor extends to individuals, institutions, society at large, and the government. Each entity must conscientiously comprehend its position, rights, privileges, responsibilities, and obligations. Preparing for legal adherence ensures that compliance with the law merits reward, while transgressions invite scrutiny and censure. The objectives of this article are thus multifaceted and significant, and stated as follows:

1. **Understanding the status of existing legal rules:** This examination focuses on the applicability and enforceability of the current legal rules. The analysis draws upon legal literature, with a specific emphasis on the government's role and its impact on the nation and government.
2. **Investigating the interaction of the Islamic Emirate with the legal system:** From a practical standpoint, this study scrutinizes how the Islamic Emirate of Afghanistan, as the current governing authority, engages with practical laws and regulations. Additionally, it explores the treatment of **the Islamic Emirate with** past legal norms within this context.
3. **Comparative study of legislative documents:** The examination focuses on the stages of legislative documents within the Islamic Emirate system and their comparison with the republican period. Notably, the Islamic Emirate lacks a specific legislative power, prompting an exploration of how the Islamic Emirate processes legal norms. This comparative analysis, especially concerning legal rules inherited from the republican era, sheds light on the system's dynamics.
4. **Comparing the current legal situation in Afghanistan in terms of jurisprudence with the major legal systems of the world:** In this article, we introduce major legal systems worldwide and assess the status of legal rules in Afghanistan. By examining international standards for establishing and implementing legal norms, we provide a detailed and concise evaluation of the country's legal landscape.
5. **Proposing solutions for legal enhancement:** Our analysis includes a succinct assessment of improving Afghanistan's current legal state and its system. Leveraging available opportunities, we explore pathways toward enhancing legality within the country. This endeavor aligns with the overarching goals of our research.

### **Research Questions and Hypothesis**

Regarding this research, it should be said that many questions must be answered, including the most important question that must be addressed:

1. The state of the country's law and legislative system in the government of the Islamic Emirate of Afghanistan as the ruler of this country, what kind of interaction do they have with them?
2. Is the Islamic Emirate system capable of having a legislative system and law or not?
3. What is their legislative process?
4. What advantages and benefits does the Islamic Emirate of Afghanistan interact with the law?

Our research explores various dimensions related to the legal landscape within the Islamic Emirate of Afghanistan. We outline our hypotheses as follows:

**First, lack of clarity regarding law and legislation:** The Islamic Emirate appears to lack a coherent perspective on law and legislation. Several factors contribute to this ambiguity, including divergent jurisprudential interpretations of the Holy Quran and the Prophet's hadiths. Additionally, the absence of a robust legal framework within the Islamic Emirate system, coupled with differing methodologies compared to global norms, further complicates the situation. Notably, special attention is given to the Emir's rulings, often considered obligatory.

**Second, divergent position of law in the Islamic Emirate System:** Contrasting with the global reverence for the rule of law, the Islamic Emirate of Afghanistan assigns a distinct position to legal norms. While some importance is attached to the law, it remains subordinate to the decrees of the Amir and the Ruler. Consequently, the Islamic Emirate seeks to address its legal gaps by referencing alternative sources, a challenging endeavor that impacts practical implementation.

### **Research Method**

This article employs an analytical-descriptive and analytical-applied research methodology. It meticulously examines the legislative systems within Afghanistan, focusing on their interaction with legal norms and the evolution of legislative documents over the past 25 years. The study predominantly contrasts legal arguments with jurisprudential perspectives. By drawing from authentic written legal and jurisprudential sources, the research aims to provide a scientific and realistic analysis of this complex subject matter.

Chapter one: Importance of the law and competent authorities for making and enacting the laws. The centrality of law to human dignity cannot be overstated. It serves as the bedrock upon which societal systems, including governments, institutions, and individuals. They all should adhere to legal norms that grant individuals access to privileges, fostering prosperity and stability. Conversely,

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those who defy the law, disregard its rules and transgress its boundaries face disciplinary consequences. The delicate balance between legal rights and responsibilities underscores the intricate fabric of societal order and justice. In fact, in societies where legal norms are disregarded and their provisions go unheeded, a host of irregularities emerge. Personal opinions and individual considerations gain prominence, leading to divergent perspectives. Within this context, various inclinations and temperaments vie for dominance, prompting individuals to create ad hoc laws based on their subjective viewpoints. However, it is essential to recognize that the issuance of laws and rulings should emanate from a legally legitimate authority—one that commands respect and accountability. The authority responsible for shaping legal norms must engage with the objective realities of society. Decisions should not emanate from a detached source lacking genuine knowledge of the local environment and sociocultural dynamics. Instead, a sociologically informed approach ensures that orders and laws align with the intricate fabric of societal needs and aspirations. While acknowledging the paramount importance of law and legal systems within a country, we must recognize that law constitutes an integral facet of human existence. Its significance extends beyond mere regulation; it permeates the very fabric of societal well-being. The interaction with legal norms should mirror the gravity of this role. Failing to do so would not only be detrimental to Afghanistan as a nation but also jeopardize the fundamental tenets of humanity itself.

**Topic # 1:** Introduction to the law and the interaction of several countries with famous legal systems .The concept of law encompasses a set of rules established by competent authorities to regulate society, uphold justice, and facilitate societal progress. Its implementation often involves coercion, reflecting its essential role in maintaining order. <sup>1</sup> The primary purpose of enacting laws is to centralize authority for issuing rulings, ensuring that all members of society are aware of legal norms and can base their interactions upon this foundation. Historically, various terms—such as “revelations” or “instructions of judges”—have been associated with legal norms. However, in contemporary times, a universally recognized and well-defined concept of law prevails. It constitutes an integral component of effective governance and the growth of nations, emphasizing the importance of legality in shaping societal structures and behaviors.

The term “law” has elicited diverse interpretations across linguistic and cultural contexts. Several etymological origins have been proposed: Some scholars trace the word “law” to the Latin term “kanon,” signifying “ruler.” This association underscores the authoritative nature of legal norms. Alternatively, the Arabic

language contributes to the term's meaning. Here, "law" is akin to "scale" or "criterion," emphasizing its role in measuring and evaluating societal conduct.<sup>2</sup> The concept of law transcends linguistic boundaries, resonating in various languages. Within this multifaceted framework, two predominant meanings emerge, both frequently employed in legal discourse.

**First**, the term "law" encompasses a wide array of rulings, despite variations in nomenclature. For instance, the constitution designates a distinct law-making authority separate from other legal rules. Ordinary laws comprise regulations, procedures, and guidelines, each with varying degrees of authority and hierarchical importance. In a broader context, all these legal constructs fall under the umbrella term "law," which also extends to the concept of a legal system.

**Second**, Legal norms can be broadly categorized into two main groups. These categories serve as foundational elements within legal frameworks, shaping societal behavior and governance.

**A. The Constitution:** The Constitution serves as a foundational legal document that meticulously regulates the entire system and macro-level affairs of a state and its citizenry. Analogous to a roadmap, it delineates rights and assigns duties between the state and its populace. Although constitutional versions may evolve, their rulings remain binding as legal norms within the same country. The significance, enactment procedures, adjustments, and other related aspects of constitutional law distinguish it from ordinary laws.

**B. Ordinary Laws:** Ordinary laws, sanctioned by legislative bodies or assemblies, constitute an integral part of government operations. These laws operate within the constitutional framework, ensuring compliance with legal norms. While diverse interpretations and definitions exist for ordinary laws, a consensus generally prevails regarding their role and function.

Across the globe, virtually all nations rely on a legal framework comprising both fundamental constitutional principles and ordinary laws. These legal constructs underpin governance systems and guide societal conduct.

The first Point is an introduction to the law and legal rules and stating the necessity for human society.

The law, as a fundamental societal necessity, plays a pivotal role in shaping human affairs. Its multifaceted duties encompass delineating the qualifications and responsibilities of officials while defining the rights and obligations of individuals. According to the interpretation of Professor Abdul Qadir Oudeh (RA), the purpose of establishing and promulgating laws lies in propelling society toward prosperity and serving its people comprehensively.<sup>3</sup> The law serves as a custodian of justice, safeguarding both individual and collective rights. In the



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absence of a robust legal framework, chaos ensues, rendering all actions morally ambiguous. Without a standardized criterion, determining legitimacy or illegitimacy becomes elusive.<sup>4</sup> In such a vacuum, societal interactions, individual perspectives, and subjective judgments prevail. This precarious situation invariably leads to discord and undermines the very fabric of the social system within a nation.

This study aims to elucidate a pivotal aspect of legal science that the term legal rules are used more commonly since a well-structured law, encompassing a comprehensive array of legal norms, is sufficient for organizing a nation's affairs. Such a legal system must address various hierarchical levels of legal rules. Consequently, we assert that the law serves as a safeguard for individual rights. In addition to the need for laws,<sup>5</sup> regulations, procedures, and other legal constructs, jurisprudence (as a legal reference) remains indispensable in this endeavor.

**Point # 2:** Introduction to the common law and its interaction with legal rules. Before the pivotal year 1066 AD, England operated under feudal governance, with distinct tribes appointing their rulers. However, the Norman Conquest in 1066 AD marked a transformative shift. The Normans ascended to power, dismantling local governments. Subsequently, the English government embarked on a comprehensive overhaul of the legal and judicial systems, aiming for uniformity across the entire country. This initiative sought to replace local and autonomous laws and courts with a more cohesive legal framework. Initially termed "common law," this system restricted the issuance of judgments primarily to royal courts.

In the Roman-Germanic legal system, custom, particularly the practices observed by judges, assumes paramount importance. These customs hold a dignified status akin to that of formal legal norms. The legal system itself emerges from the collective decisions rendered by courts of justice. While a comprehensive exploration of this legal framework lies beyond the scope of this article, interested readers are encouraged to delve further into this topic through additional scholarly sources.

Being unwritten and not having a logical sequence among the legal rules, exhibits distinctive features that set it apart from the Roman-Germanic legal system. Notably, the common law system lacks a codified, written body of law, relying instead on judicial precedents and unwritten norms. This unwritten quality has earned it the moniker of an "unwritten system." In contrast, the Roman-Germanic legal system adheres to a more structured hierarchy, although this hierarchical arrangement is not mirrored precisely in the common law system.

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Many countries in the world follow this legal system, examples of which are in the footnote.

**Point # 3:** Introduction to the Roman-German legal system and its interaction with legal rules.

The Roman-Germanic legal system, also known as the civil law system, traces its intellectual lineage to ancient Rome. Rome served as the epicenter for diverse civilizations, fostering multidimensional interactions across various domains. However, over time, Rome's once-dominant influence waned, and foreign invasions altered its cultural landscape. The resultant amalgamation of cultures and perspectives, particularly after the Germanic invasion in the fifth century AD, engendered a unique legal synthesis. Within this region, two distinct worldviews—the Roman and the Germanic—coexisted, shaping various facets of life. Notably, even the so-called “barbarians” in this locale significantly influenced the formation and evolution of the Roman-Germanic legal system.

The emergence of the Roman-Germanic legal system was rooted in a complex interplay of diverse ethnic groups, each possessing distinct cultures and legal norms. These disparate groups adhered to their own rules, resulting in a mosaic of conflicting laws. However, the convergence of cultures, ethnicities, and divergent legal traditions compelled these various factions to seek common ground. Consequently, a unified legal framework was forged—a comprehensive law capable of accommodating all parties and harmonizing their interests. This landmark development marked the birth of the Roman-Germanic legal system, which would later garner global recognition and acceptance.

The legal system possesses distinct specifications and foundational principles that underscore its integrity and exceptional status. Notably, this legal framework is codified, with the law serving as its primary source. Furthermore, it adheres to a structured hierarchy in matters related to lawmaking.

Drawing upon this rationale and guided by a rational hierarchy, a substantial majority of nations adopt this legal system either in its entirety or partially.

Previously, Afghanistan adhered to this legal system in its formal structure, meticulously observing its distinctive features and specifications. However, concerning the substantive content and inherent nature of laws, Afghanistan's legal framework is significantly influenced by internal factors within the country, which play a pivotal role in legislative considerations.

**Point # 4:** The general situation of the law and legal rules in the government system of the Islamic Emirate of Afghanistan.

Drawing from the preceding explanation, the interplay between global legal systems and jurisprudence rests upon a logical foundation. Each system possesses

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its distinct merits and challenges. However, Afghanistan's legal landscape diverges significantly from the major legal paradigms observed worldwide. Rather than adhering to established methodologies, Afghanistan has adopted a unique approach, which we will explore further in subsequent comparative analyses. In summary, the Islamic Emirate of Afghanistan engages with legal principles distinctively.

During the initial period of the **Islamic Emirate of Afghanistan**, several laws were enacted. Subsequently, under the current Emir's authority, some of these laws have been reaffirmed through official endorsement, while others have undergone amendments. These legal provisions now hold the status of law, and their continued validity is ensured.

Second: During the second period of the Islamic Emirate of Afghanistan, several additional laws were compiled distinctly and subsequently granted legal status. Citizens are urged to adhere to these laws.

Third: The interaction concerning the body of laws and regulations that have been in existence since the 20-year tenure of the Islamic Republic of Afghanistan can be analyzed from two perspectives.

A. From a theoretical standpoint, various written and oral statements from high-ranking officials of the Islamic Emirate warrant consideration. These viewpoints can be summarized as follows:

1. **Nullification of All Laws:** A significant majority of Islamic Emirate officials have underscored, both in their sermons and public addresses, that a directive issued by the leadership of the Islamic Emirate has nullified and invalidated all laws and regulations previously established by the prior government. Consequently, the government's actions are no longer bound by these repealed legal provisions. Furthermore, official letters have been dispatched to various departments to reinforce this stance.

2. **Laws under Suspension and Pending Ratification:** Another segment of Islamic Emirate officials acknowledge that all existing laws and regulations in Afghanistan are currently in a state of suspension. Following a thorough review, revision, and necessary amendments, these laws will be subject to ratification and subsequent enforcement by the Amir al-Momin of the Islamic Emirate of Afghanistan.

In light of the aforementioned considerations, it becomes evident that unanimity of opinion is lacking in this matter. Divergent interpretations prevail among various stakeholders. Some assert that the laws and regulations from the past (specifically, the republican period) hold no legal validity, while others adopt a more pessimistic stance, deeming these laws null and void. The latter group

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perceives themselves as exempt from adherence to such legal norms.

**B. Practical Perspectives on Legal Enforcement in the Islamic Emirate of Afghanistan:** From a pragmatic standpoint, the Islamic Emirate, as the governing authority in Afghanistan, faces the imperative of operationalizing its functions. Simultaneously, theoretical viewpoints within the government emphasize the non-enforcement of existing rules and regulations. However, the need arises to establish a normative framework for conducting affairs and advancing governance. In this context, officials can be categorized into two distinct groups:

1. **Adherents of Pre-existing Laws (Republican Period):** A subset of Islamic Emirate officials perceives a collection of laws from the previous republican era as practical and efficacious. They engage with these legal provisions quite literally, adhering strictly to their explicit wording and apparent intent. Occasionally, the formal aspects of the law lead them to overlook underlying concepts and broader societal considerations.

2. **Advocates for Law Cancellation or Suspension:** Conversely, another faction of Islamic Emirate officials contends that the current state of rules and regulations warrants their annulment or suspension. From this perspective, they disassociate themselves and their respective government departments from responsibility and accountability. While they implement certain regulations to support administrative functions, they simultaneously challenge the legitimacy of these laws. Consequently, they do not perceive themselves as bound by such legal frameworks.

In the context of the transition from the repeal and suspension of laws to their reestablishment, it becomes evident that the rights and privileges of government administration remain intact. Efforts are consistently made to reinforce these rights. However, despite their legal obligations, government administrations often fail to fulfill their duties, rendering reliance on existing legal norms problematic. Consequently, government departments perceive themselves as absolved of responsibility in certain domains.

A critical concern arises when the court system must consider the government as a defendant according to legal provisions. In practice, however, the government cannot be held accountable in this manner. The judicial system actively safeguards citizens' rights but does not assume the responsibility of enforcing rights against the government.

In summary, the legal framework in Afghanistan, particularly during the Republic period, can be characterized as rules and regulations that lack enforceability and suspension.

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In the current context of Afghanistan, the legal and legislative system faces significant challenges in terms of stability and immunity. The possibility of law cancellation or modification remains conceivable. One of the fundamental attributes of law lies in its establishment by a collective body, while stability and durability are integral features that ensure the continuity of legal provisions within society.

A businessman seeking to invest, an individual providing educational services, a company embarking on construction projects, or a hospital offering medical services. In all these cases, stability is crucial. Service providers, as active and efficient actors, need clarity regarding their obligations and rights under the law. However, when the legal system lacks stability and becomes subject to the rule of a single individual, rational actors hesitate to invest their energy, capital, and confidence. No one willingly immerses themselves in a situation where benefits are uncertain, and future losses remain unclear. Thus, the absence of stability undermines the very essence of law and its role in fostering a conducive environment for societal progress.

In legal systems, there exists a unanimous debate among legal scholars regarding the importance of strictly considering the hierarchy in the establishment and implementation of legislative documents. Failure to do so renders the legal system in a country meaningless and incomprehensible. An illustrative example of this issue arises when a higher legislative document contradicts a ruling made in a lower legislative document. In such cases, the lower legislative documents must adhere to the authority of the higher legislative documents in terms of executive power, even if they oppose the specific ruling.

Another evident example pertains to the cancellation and non-enforcement of legislative documents. For instance, regulations that form part of legislative documents can be invalidated either by ordinary laws or by constitutional provisions. When a law is set to lose legal validity, the Constitution assumes the role of ensuring this transition. While parallel legal documents may also serve a similar purpose, the specifics vary across legal systems in different countries. For instance, a procedural rule can be invalidated by another procedural rule, leading to its downfall. However, a lower legislative document can't nullify a higher legislative document, rendering it invalid and unenforceable. Such an outcome would signify disorder and disorganization within the legal framework, undermining the very essence of a functional legislative system.

In Afghanistan, there has been a recurring experience where subordinate documents and lower legislative authorities have been able to invalidate higher legislative documents through various means. Our primary focus in this model is

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the interaction between the Emir of the Islamic Emirate of Afghanistan and the government system. From a legal perspective, the orders issued by the first person of the country (the Emir of the Islamic Emirate of Afghanistan) are referred to as decrees. If these orders pertain to legislative matters, which are typically handled by the government on behalf of the legislative authority in specific situations, they are termed legislative decrees.

Legislative decrees hold a position in the legislative hierarchy after the constitution and ordinary laws. While some jurists equate the status of legislative decrees with that of regular laws,<sup>6</sup> it is essential to consider the process of issuing such decrees and their referral<sup>7</sup> back to the legislative assembly. In practice, the position of legislative decrees is somewhat diminished compared to normal laws. By definition, legislative decrees occupy a lower position than laws, and their rulings must generally conform to existing legal provisions. However, exceptions may arise if there is a specific ruling from the legislative assembly that effectively transforms a legislative decree into a full-fledged law.

Against this backdrop, following the victory of the Islamic Emirate in Afghanistan in 1400 A.H., all laws and regulations—ranging from the constitution to the smallest legal documents in the country—were invalidated (either repealed or suspended) by the Emir of the Islamic Emirate of Afghanistan<sup>8</sup> through a decree. The subsequent narratives across various fields bear witness to this significant development.

Our central argument revolves around the distinct status of legislative decrees and their inability to nullify existing laws and official documents. Consequently, we analyze the interaction of the Emir of the Islamic Emirate of Afghanistan within two distinct scenarios:

1. **Formal and Substantive Process:** If the Emir adhered to the formal and substantive process of issuing legislative decrees to invalidate all laws and regulations, it implies that the entire system collectively endorsed this decision. Legally, such unanimity carries significant implications. However, it is essential to recognize that this decision was made by a group—albeit not directly elected by the people. The concentration of powers and responsibilities in the hands of a select few challenges the fundamental rights and duties of the populace.
2. **Individual Decree:** Alternatively, if the Emir issued the decree unilaterally, bypassing considerations of form and substance, it assumes the character of a simple juristic ruling.<sup>9</sup> In this case, a single individual asserts that all laws and regulations—previously established and approved by elected representatives—are invalid. Such an unprecedented interaction with legal norms lacks precedent in contemporary legislative models. It diverges from the

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spirit of law and the democratic process, which should ideally involve deliberation by elected representatives, safeguarding the interests of the entire society. When a single person assumes the role of the ultimate authority, both written and oral pronouncements must be regarded as binding legal rulings.

Despite the various cases previously discussed regarding the legal framework in the country, it is evident that the decrees issued by the Emir of the Islamic Emirate hold significant authority and have effectively supplanted formal legislation. No document or ruling can contradict these Emir's orders. Furthermore, all legal documents must be grounded in this type of decree. The compilation of decrees published in the official gazette of the Ministry of Justice, along with the collection of unpublished decrees from the Emir of the Islamic Emirate, serves as evidence that this form of decree has indeed replaced and surpassed conventional legal norms.

### **Second Topic: Analyzing the Process of Establishing Rules and Common Regulations from an Islamic Shari'a Perspective**

In this topic, we delve into two fundamental issues that are subject to intense debate among Islamic jurists. Numerous articles, books, and scholarly writings exist in this field, providing reasons and documentation for various viewpoints.

**The first issue is that** the concise expression of legislation and the formulation of laws and regulations from the standpoint of Islamic jurists warrant closer examination. We will explore the arguments within legal science and discuss the current state of legal norms worldwide in a practical context.

**The second issue is that** Islamic jurists grapple with the question of to whom legal authority is attributed and in what directions. This issue remains contentious, with each jurist presenting their rationale. In general, we analyze these perspectives within the framework of legal science.

### **The Perspectives of Islamic Scholars on Laws, Regulations, and Their Interaction**

Islamic scholars engaged in profound debates that revolved around two fundamental axes. These discussions have been meticulously compiled in scholarly works, reflecting the depth of inquiry in this field. Among the critical issues under scrutiny is the tension between jurisprudence (fiqh) and secular law. In this brief analysis, we will explore the two primary theories that shape these debates.

1. **The Axis of Opposition to Legal Establishment:** Some scholars argue against the need for creating laws and regulations, citing the existence of the Qur'an, Sunnah (traditions of the Prophet), and fiqh. According to this perspective, jurisprudence adequately addresses all societal needs, rendering

additional legislation unnecessary. However, a subset of scholars finds this exclusionary stance dissatisfactory. They perceive secular law as conflicting with the spirit of Islam and even consider it heretical. These scholars can be categorized into two main groups: absolute imitators and absolute appearanceists.

2. **The Axis in Favor of Legal Implementation:** Scholars who advocate for the establishment and implementation of laws fall into two distinct categories:

○ **Group A: Sharia-Centric Legislation:** These scholars maintain that Islamic Sharia and fiqh should serve as the sole sources of legislation. In other words, legislators must confine themselves to deriving legal rulings exclusively from Islamic jurisprudence. Any legislation outside this framework is deemed incorrect and unworthy of respect.

○ **Group B: Sharia-Informed Legislation:** This group emphasizes that while Islamic Sharia and fiqh remain crucial, they should inform rather than limit legal decision-making. Minor issues and practical matters should be considered in light of these principles. The goal is to adapt legal norms to meet societal needs, even if this adaptation is relative and leads toward prosperity.

The central reason put forth by this group of scholars revolves around the primacy of societal needs over legal rules. Let us delve into the intricacies of this perspective.

Laws find their place within society based on the necessity perceived by the community. Whether driven by practical needs or collective sentiments, the creation and establishment of laws stem from an inherent inevitability—society's demand for legal norms.

Based on the need for laws in societies, laws are respected and derive their enforcement from society. Even though the law commands respect, it continually the need to create laws in various fields must be remembered and enforced. By understanding the above situation, we should be able to optimally use the law in a better and more regular way to regulate public order, better implement justice, and create a suitable platform for granting rights imposing obligations, and peaceful life.

The legitimacy of laws derives from their ability to meet social needs. In other words, if laws fail to adequately address the necessities of a country, or if they fall short of achieving their intended goals, their validity diminishes. When a law loses its relevance to societal needs, it also forfeits its legitimacy. In such cases, blind adherence to an obsolete law becomes unnecessary and unwarranted.



Beyond other considerations, the most fundamental reason for supporting the existence of laws lies in society's unavoidable dependence on them. These laws serve as instruments for creating order, promoting justice, and propelling both society and the nation toward progress and development.

### **Competent Authority in Establishing Rules, Regulations, and Laws from the Perspective of Islamic Sharia**

In the context of Islamic jurisprudence, the question of who possesses the authority to create and implement regulations has been a subject of scholarly debate. While various theories exist, two primary viewpoints emerge:

**A:** Some scholars attribute this authority to an individual, granting them the power to enact laws independently. In this perspective, council and consultation play a secondary role, and the decision-making process rests primarily with the designated authority.

**B:** Another group of scholars assigns this authority to a collective body—a select group of individuals. They consider the council (shura) as binding and view the leader (Amir) as obligated to consult with the council members and adhere to their decisions. This theory aligns with the broader principles of lawyers.

**Analysis of Competent Authority:** When examining the concept of competent authority to enact laws, we find two distinct approaches: individual consultation: The competent authority seeks input from others to supplement their knowledge. This process is termed “consultation” (shura). Mandatory group consultation: In this scenario, consultation within a group is considered obligatory. Islamic jurists generally favor this approach, recognizing the benefits of collective decision-making and the inclusion of diverse perspectives.

#### **Chapter Two: Legal Process Methods**

In this chapter, we delve into the intricacies of the legal process, aiming to achieve a state of law that is both well-defined and distinct from any ambiguities, conflicts, or discrepancies. Legal practitioners must execute their duties with precision and adherence to established norms.

The law which should be respected in society, possesses distinctive attributes that demand precise and articulate expression. To ensure effective governance and public welfare, legal texts must be crafted using clear, expressive, and professional language. By doing so, both the government and the citizenry can harness the benefits of this legal framework. To align legal norms with societal needs, governments strive to establish comprehensive legislative systems. These systems encompass various stages of law enforcement and periodic reviews. Legal scholars universally recognize the value of this process. By meticulously drafting legislation, we mitigate potential pitfalls during implementation, such as

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divergent interpretations, conflicting judgments, and incongruent rulings.

It is essential to recognize that the process of drafting a constitution differs significantly from the formulation of ordinary legislation. In the case of the Islamic Emirate of Afghanistan, where official, transparent constitutional writings and votes have not yet materialized, we refrain from direct comparisons in this article. Instead, we focus on elucidating the standard rules and procedural steps involved. In this chapter, we delve into the legislative processes during two distinct periods: the Republic government era (The government of the Islamic Republic of Afghanistan) and the Islamic Emirate era (the government of the Islamic Emirate of Afghanistan) following the Taliban's victory. We aim to explore the merits and drawbacks associated with each period's legislative approach.

During the Republican era, a specific law known as the "Law on Procedures, Publication, and Enforcement of Legislative Documents" provided comprehensive guidelines. This law defined key terms, explained legislative documents holistically, and outlined the enactment process. We will refer to this framework as we proceed. However, decree No. 9, issued by the Amir of the Islamic Emirate of Afghanistan on 28/3/1444 AH, sheds light on the steps involved in handling legislative documents. These steps encompass verification, ratification, enforcement, and the subsequent publication of legislative documents at the next level. Notably, this decree emphasizes two fundamental points.

Firstly, the initial step in legal formulation within the Islamic Emirate system involves the issuance of an emir's decree. Essentially, the status of the law is subordinate to the edicts of the emir. This hierarchy becomes evident when examining the first law published in the official gazette after the victory of the Islamic Emirate of Afghanistan. According to this law, the emir's decree serves as the foundational basis for creating legislation.

While this approach aligns with the Islamic Emirate's practice, it diverges from the general global norm. In most legal systems worldwide, laws themselves determine the procedural stages, rather than relying solely on the command of an individual.

Secondly, it is essential to recognize that the decree primarily pertains to the stages of lawmaking rather than the comprehensive compilation of all legal documents. Although the decree employs similar language throughout, its focus remains on delineating the process and procedures for enacting laws.

The salient observation pertains to the transformation of terminology surrounding legislative documents following the publication of the Emir's decree

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in the official gazette. Before this decree, (Passing the stages of the basic documents...) was employed. However, after its official publication, the phrase was renamed to 'How to go through the steps of legislative documents.' This alteration in nomenclature yields several noteworthy implications:

1. **Lack of a Concrete Legal and Legislative System:** The Islamic Emirate system still lacks a well-defined legal and legislative framework. Consequently, the terminology and legal terms currently in use may not accurately reflect the underlying legal principles. As gaps and issues in terminology become apparent, corrective measures must be taken. Notably, while the Emir consistently used the term 'Sand Usul' in written documents, verbal communication employed the terms 'Qanun' and 'Taqqin.'

2. **Ambiguity Surrounding 'Legal Documents':** The decree's use of the term 'legal documents' raises two critical questions. Firstly, it appears that the Islamic Emirate interprets 'legal documents' as synonymous with 'law.' However, this raises the question of what terminology they employ for other legal rules and documents. Thus far, no such clarification has been provided to the public. Secondly, it is essential to recognize that 'law'<sup>10</sup> constitutes only a subset of legislative documents; not all legal documents fall under this category. This distinction presents challenges due to the conflict with the former legal system, making it difficult to redefine fundamental concepts. The decree's choice of the term 'principal documents' is imprecise. Instead, 'law' or 'ordinary law' would have been more appropriate. These terms are widely accepted within both academic and non-academic circles, contributing to the coherence of the decree. **Now we want to pose** a comparative analysis of the legislative processes between the Islamic Emirate and the Republic revealing significant differences.<sup>11</sup> Notably, the Republic's legal framework provided comprehensive details, whereas the Islamic Emirate system briefly outlines the process through an order. This brevity may not suffice for effective governance and legal clarity.

### **First Topic: Drafting**

Taswid refers to the initial stages of drafting legal documents, encompassing activities such as drafting, cream writing, sketching, and basic design. In both systems, approval constitutes the first stage of the legislative process. Under normal laws, the relevant departments are responsible for preparing their drafts of legislation and submitting them to the legislator.

### **Differences**

1. In the republican period, a commission was responsible for handling matters related to drafting laws. In contrast, the Islamic Emirate system employs

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the term “committee” instead of “commission.” The committee now serves as the official body overseeing the approval stage (National Council).

2. During the Republican era, the law drafting commission comprised professional staff with relevant experience, specialists, and experts in the field. In the Islamic Emirate of Afghanistan, the law drafting committee consists of scholars, specialists, and experienced professionals from the relevant sector. Notably, the term “scholars” refers specifically to religious scholars and jurists of the Hanafi School.

3. Another contrast is that while the republican system accounted for drafts related to multiple departments by creating independent commissions for review, the Islamic Emirate system remains silent on this matter.

4. Another difference existing in this regard is that under the Islamic Emirate, the drafting committee is tasked with excluding rulings that have a Sharia aspect according to Hanafi jurisprudence. Scholars within the committee bear this responsibility. In contrast, during the republican period, the primary condition was ensuring non-contradiction with Islamic Sharia, without specific reference to Hanafi jurisprudence.

### Second Topic: Verification (Taqdiq)

Literally, “Taqdiq,” means reviewing a piece of writing very carefully. It constitutes the second stage of the normal law-making process.<sup>12</sup> Both the Islamic Emirate and the Republic period entrusted this responsibility to the Ministry of Justice. The primary task during this stage is to prepare legal documents, subjecting them to rigorous scientific scrutiny to identify defects and address other relevant matters.

However, there are notable differences between the Islamic Emirate of Afghanistan and the Republic period regarding the verification process:

1. The most evident contrast is that during the Republic period, the Legislative Institute of the Ministry of Justice was obligated to engage relevant departments, civil society organizations, and the private sector. Their input enriched the law-making process. In contrast, the Islamic Emirate system does not actively involve civil society or the private sector. This difference stems from the Emirate’s preference for centralized decision-making, leading them to exclude external stakeholders.

2. In the Republican era, the legislative institute handled specialized matters related to verification. Their primary responsibility was to review laws in light of Sharia and Islamic jurisprudence. Presently, the Ministry of Justice has established a special committee called the “Takhrej Committee.” This committee comprises scholars who evaluate legal rulings. Two fundamental conditions for

Takhrij (extraction of rulings) exist: The ruling must align with Hanafi jurisprudence, and the second one is that the (Takhrej) must be explicitly referenced within the law itself (typically in footnotes).

3. In the Republican period, the primary focus during law review was comparing laws with other existing laws, while in the Islamic Emirate system, the review process begins with the decrees issued by the Amir of the Islamic Emirate. These decrees hold greater validity than the laws themselves. Only after considering the Amir's decrees do they proceed to review other laws. It reflects their emphasis on centralized authority and the primacy of the Amir's decisions in shaping legislation.

### **Third Topic: Approval**

In the republican system, approval was regarded as one of the legislative stages overseen by the government (specifically, the Council of Ministers). However, in the Islamic Emirate system, this legislative step is notably absent. Instead, after undergoing verification by the Ministry of Justice, the proposed legislation is forwarded to an independent commission for its final review.

### **Fourth Topic: Ratification and the Final Approval**

Ratification also means approval and final review, and it is another legislative process, which was existing in the republican period and also exists in the current Islamic Emirate system, which then goes to endorsement.

The major difference at this stage is that during the republican era, a specific legislative body—the National Council—held the responsibility and authority to approve or reject proposed laws. In contrast, the Islamic Emirate system abolished the National Council and established a distinct commission for this purpose. This commission operates independently and is governed by a separate decree. Notably, the term 'approval' has been replaced with 'final review in this context.

The composition of the commission is noteworthy. Its members consist exclusively of religious scholars and Taliban representatives. No other individuals or groups are part of this decision-making process. Additionally, there is a need to establish an independent organizational and secretariat commission to support this legislative function.<sup>13</sup>

However, this concentration of power within the government and a specific group raises concerns. By centralizing the law-making process, the Islamic Emirate of Afghanistan may inadvertently diminish the legitimacy and importance of laws among the populace. Ignoring the perspectives and advice of the broader population could lead to disillusionment and a lack of faith in the legal system.

### **The Fifth Topic: Endorsement**

The term 'Toshih' conveys the idea of signing and endorsing. Ratification, a

legislative step present in both the republican period and the Islamic Emirate system, involves formal approval and endorsement. Typically, the first person of a country—the president or the Emir of the Islamic Emirate—approves and signs the ratified legislation.

Upon ratification, the laws gain validity and become binding. Additional formalities, such as publication in the official gazette, must also be meticulously observed.

### **The Sixth Topic: Publication**

The official gazette and other official publications publish specific items to inform the people about the law and legal documents. The official gazette is related to the honorable Ministry of Justice and important items such as laws and legislative decrees and other items are published there during the republican period. The important issues of its publication were identified.

### **The Seventh Topic: Enforcement**

The stage of implementation of the laws is called enforcement; all the legal documents after they are published in the official gazette and the deadline is over, all these laws can be enforced and a violation of them is considered a crime. According to this type of document, Legislation is called a valid legal document.

## **The Third Chapter: Evidence and Results**

In this topic, we will try to present specific suggestions based on the current situation in point-wise form, on the other hand, we will express the results of this research in number-wise form so that users can benefit from it easily and correctly.

### ***The First Topic: Evidence and Results***

In this analysis, we delve into the legal system of the Islamic Emirate of Afghanistan, focusing on its legislative framework and the implications of its practices. The following key points emerge from our examination:

1. The stability and predictability of legal rulings are fundamental features of any legal system. Citizens rely on consistent laws to plan their activities and make informed decisions. However, in Afghanistan, the law lacks inherent immunity. Whenever an individual interacts with the legal system, there is a risk of modification or reinterpretation. While legal evolution is essential, authorities should exercise caution in altering laws unnecessarily. Frequent changes undermine stability and erode public trust.
2. The Islamic Emirate of Afghanistan operates without a separate legislative body. Instead, the government assumes all legislative functions. Following their victory, the Emirate abolished the legislative assembly. Now, the government itself approves and enforces laws. Unfortunately, citizens have no direct role in

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shaping legislation. Suggestions must navigate bureaucratic channels, making meaningful public input challenging.

3. The legislative system introduced by decree in the Islamic Emirate exhibits a strong inclination toward Hanafi jurisprudence. Hanafi jurisprudence, rooted in religious sources, serves as the foundation for legal rulings. This preference shapes the legal landscape, impacting interpretations and applications of the law.

4. In practice, legislative authority rests primarily with one individual—the Emir of the Islamic Emirate of Afghanistan. The Emir Issues decrees that carry legal weight, effectively bypassing formal legislative processes. While these decrees are considered legally valid, their legitimacy remains a subject of debate.

### ***The Second Topic: Recommendations***

In light of global legal norms and practices, the following recommendations aim to improve Afghanistan's legal system and align it with international standards. These measures seek to enhance societal order, foster public trust, and facilitate acceptance within the global legal community:

1. Legal stability is crucial for citizens and institutions. Frequent changes and developments should be minimized. Relevant authorities and departments must prevent hasty modifications to the law. Confidence in legal stability encourages people to base their interactions on established rules. The government and ruling system should prioritize processes that maintain law security without compromising its integrity.

2. Afghanistan should model its legal and legislative processes after well-established legal systems worldwide. By adopting a recognized legal framework, the country can establish logical relationships among legal rules. Harmonizing legal principles reduces conflicts, contradictions, and ambiguities, ensuring smoother legal implementation. While adapting to local realities, Afghanistan can draw upon the best practices from other legal traditions.

3. Legal rules, especially laws, should undergo rigorous scrutiny. A collaborative effort involving scholars, scientists, experts, and professionals is essential for compiling and approving legal texts. An independent institution, free from political influence, should oversee the legislative process. This institution, elected by the people, ensures transparency, accountability, and public trust in the legal system.

4. Before issuing potentially contradictory decrees, the Emir of the Islamic Emirate should prioritize strengthening and activating the legislative system. This entails ensuring that laws are effectively enforced across various government departments and that officials understand their executive responsibilities in this regard. The process of issuing decrees, if not carefully managed, can undermine

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the legislative system's significance. Therefore, it is crucial to establish specific solutions and appropriate positions for decrees, avoiding any perception that they supersede existing laws. Otherwise, the integrity of the legal framework may be compromised.

5. While Islamic jurisprudence (fiqh) should indeed be regarded as a vital source of legislation, exclusively relying on it can hinder the legislative process. Legislators often encounter matters for which jurisprudence does not provide clear guidance or accidental rulings are absent. In such cases, a sole reliance on fiqh can lead to impasses. Therefore, jurisprudence should be considered the most important source of legislation, but not the only one.

6. Deriving legal rulings solely from Hanafi jurisprudence, without allowing for flexibility, can impede the growth and development of legislation. Legislators should judiciously incorporate insights from other legal traditions and experiences. While Hanafi jurisprudence is valuable, it should not preclude the adoption of beneficial practices and useful heritage from other schools of thought. A dynamic approach ensures that the law remains relevant and adaptable.

7. To enhance the legislative process, the review of laws and their compatibility with Sharia and Islamic jurisprudence should be entrusted to a competent and singular authority. Fragmented reviews across multiple departments can lead to inefficiencies and delays. This central office, well-versed in jurisprudence, would streamline the evaluation process and maintain consistency in legal interpretations.

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