

Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of

Coordination and Deferral Theory

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A dissertation

submitted in partial fulfillment of the

requirements for the degree of

Doctor of Philosophy

University of Washington

2016

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ABSTRACT

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My objective in this dissertation is to provide a theoretically informed history of Afghanistan's many constitutions. While Afghanistan's constitutional history has attracted considerable scholarly attention, it remains under-examined from a theoretical perspective. Building on insights from coordination theory and constitutional deferral theory, this dissertation attempts to tell a complete, nuanced, and theoretically informed constitutional history of Afghanistan as well as a history of the drafting and reception of the 2004 Constitution of Afghanistan. Through this analysis, it normatively judges Afghan constitutions by examining whether they coordinated the various disparate factions of this deeply divided country.

This dissertation finds that the most successful Afghan constitutions deliberately left major issues unresolved when powerful stakeholders who could credibly threaten rebellion were unable to reach agreement. These constitutions created systems of government that, in the short-term, offered enough to all constitutional stakeholders to

win their acceptance and the people's acquiescence. In light of these findings, it argues that some of Afghanistan's most successful and longest-lived constitutions have done no more than enable coordination, primarily because (1) the constitution-making processes brought major stakeholders around the negotiation table; (2) the text of constitutions deferred on foundationally divisive issues in a way that secured elite bargaining and stakeholder inclusion after the constitutional order was in place; and (3) the government did not exercise its power to interpret and implement vague constitutional questions in a way that offended major stakeholders who had the ability to threaten the constitutional order.

This dissertation hypothesizes that in divided societies like Afghanistan, constitutional deferral (both explicit and implicit constitutional deferral) might help a constitution coordinate divisive factions effectively. Constitutional deferral does not attempt to answer all controversial foundational questions in a divided society. Instead, it leaves room for evolution and empowers the ordinary political institutions—the legislature and the judiciary—to resolve them in the future. Deferral prevents a zero sum game in constitutional negotiations. It provides hope to the losers, that they may eventually influence those institutions to answer the deferred questions in a way that secures their interests—a behavior that leads to constitutional coordination.

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Acknowledgments

Anyone who has completed a long, multi-year project will have many to thank. It would have been impossible to juggle the many demands over the last five years if I had not received assistance from myriad sources. It is one of the greatest pleasures of writing a dissertation that one is allotted space in which to thank many of those who have assisted me.

First and foremost, I must thank Allah (God) for all the blessings bestowed on me all these years and enabled me to complete my dissertation. I must also express special appreciation for my PhD dissertation advisor, friend, and intellectual father, Professor Clark Lombardi. Professor Lombardi has been a tremendous mentor to me, and I would like to thank him for encouraging my research and for bearing with me over many long (yet edifying) meetings over the past five years. His advice, moral support and assistance have been invaluable assets to my research as well as my career, guiding me toward intellectual maturity and encouraging me throughout the final stages of this dissertation. It is to Professor Lombardi that I owe my intellectual maturity. Without his guidance and support, neither this project nor my graduate education as a whole would have seen fruition.

I must also thank my parents who have been so supportive in every possible way. They have always been the source of my strength over all these years. Their support has been unconditional. They have cherished with me every great moment and supported me whenever I needed it.

I also owe my deepest gratitude to the members of my dissertation committee, who guided me through all the stages of this research and showed a sincere interest in my

work: Professor Jonathan Eddy, Professor Rachel Cichowski, Professor Hugh Spitzer and Professor Joseph Janes. Their academic support and input and personal support have been greatly appreciated, and I thank them all for the time and effort they gave to this dissertation.

I further owe a sincere thanks and gratitude to my former Dean at Kabul University School of *Sharī'a*, the late Professor Dean Mohammad Gran, for his support and encouragement. I also want to thank Professor Jonathan Eddy and Alice Stokke, Co-Directors of the Legal Education Support Program-Afghanistan (LESPA), who supported this dissertation and my entire PhD education through grants and personal support, both in the United States and in Afghanistan. I also owe a special thanks to Professor Elizabeth Baldwin for her dogged assistance with and helpful comments on each chapter of this dissertation; I really appreciate all of her efforts. I want to thank Alice Stokke for helpful comments on each chapter of this dissertation. I also want to thank Professor Greta Austin, Rebecca Alhadeff and Akbar Rahel for their comments and proofreading of each chapter of this dissertation. Further, I would like to thank Professor Ghulam Mustafa Nukhba who made most of my research interviews possible. I likewise thank the University of Washington School of Law for the facilities and support it made available to me in the course of my research and writing at the University. The advice of every person involved in this dissertation has been invaluable. I take full personal responsibility for any mistakes and shortcomings that remain.

For Sayyid Mohammad Ahmadzai, my father

Note on Transliterations, Translation and Islamic Terminology

When dealing with questions of transliteration, I have generally followed the transliteration system used in the International Journal of Middle East Studies. However, I have opted not to transliterate a few words that have become familiar in English language. Among these are the words Qur'an, hadith, Sunna, Sunni, and Shi'ite.

As for the plurals, Arabic and Persian (Dari) words often have irregular plurals, and even the "regular" plural forms will not be immediately recognizable to many English speakers. To deal with these plurals, I have followed Clark Lombardi's example. I have opted in most cases simply to form plurals of Arabic (and in some places plurals of Dari and Pashtu) words by affixing an "s" to the Arabic and Dari singular. Thus, I refer to *madhahib* (plural form of *madhhab*) as *madhhabs*, and so on. In cases where the Arabic word is most often used in the plural, or where English speakers may be familiar with the plural form of the Arabic word, however, I will use the Arabic plural form. Hence, I will use the word *fuqahā* to refer to the scholars in the traditional madhhab of law who were largely responsible for developing the Islamic legal tradition in pre-modern times. I will use the term '*ulamā*' to refer to classically trained Islamic scholars generally and to the modern Islamic legal scholars whose authority does not derive primarily from their position within a guild.

In dealing with the Pashtu and Dari language sources, I have provided an English translation of the sources and a transliteration of the original language in footnotes and the bibliography. There is no transliteration system for the Pashtu language in the International Journal of Middle East Studies, but I have followed the rules that apply to the Persian language and have transliterated Pashtu sources accordingly.

I have also tried to transliterate all Afghan (both Pashtu and Dari) terms used in this dissertation, but I have not transliterated proper names (of people, places and dynasties). Therefore, instead of using “Ḥabībullah,” I have used “Habibullah;” and instead of using “Dūrrāni,” I have used “Durrani.”

Throughout this dissertation, I will be using terms such as *Sharī‘a*, fiqh, traditional Islam, and modernist Islam, so this section provides a word of detail about these terms. Classical Sunni legal theorists distinguished between three types of “ethico-legal norms”: *Sharī‘a*, fiqh, and Islamic state law.¹ *Sharī‘a* is considered to be God’s law—the body of commands that God has ordered people to obey. God has revealed some of these norms to prophets such as Mohammad who would teach them to the Muslims.² After the death of the Prophet Mohammad, no one had complete knowledge of *Sharī‘a*. Only highly trained jurists (*fuqahā*) could try to understand them by studying scripture and logic, but they understood that most of their conclusions were inherently fallible.³

To understand God’s law, these jurists developed “*ilm usul al-fiqh*,”⁴ which might be translated as “the science of understanding *Sharī‘a*.” A scholar’s interpretation of the *Sharī‘a* is referred to as his fiqh (literally, his “understanding”).⁵ It was understood that competent jurists could disagree in their interpretation of the *Sharī‘a*, and, if this occurred, it would be impossible to know which jurist was correct. Thus, there might at

¹ Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari‘a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379, 395 (2006); *see also*, CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI‘A INTO EGYPTIAN CONSTITUTIONAL LAW (2006).

² Lombardi & Brown, *supra* note 1, at 395-96.

³ *See generally*, NORMAN CALDER, STUDIES IN EARLY MUSLIM JURISPRUDENCE (1993).

⁴ Lombardi & Brown, *supra* note 1, at 396.

⁵ *Id.*

any one time be several competing bodies of fiqh (each related to a particular jurist), and those who followed one body of fiqh did not consider the champions of another interpretation to be heretics.⁶

Muslim jurists have used different methods to interpret the *Sharī‘a*. These theories have included classical (traditionalist) methods and modernist methods (the modernist methods have many varieties and a detailed discussion is outside the scope of this dissertation).⁷ Traditional jurists have recognized two approaches to interpreting the *Sharī‘a* and developing fiqh: *ijtihād* (independent reasoning) and *taqlīd* (precedent).⁸ Performing *ijtihād* meant looking for knowledge about God’s law in the four main sources of: the Qur’an, the hadith literature, juristic logic (*qiyās*), and juristic consensus (*ijmā‘*). To derive a rule of fiqh, a scholar would first look to the Qur’an.⁹ Because the number of explicit Qur’anic commands is limited, scholars often had to move to the hadith literature.¹⁰ When faced with a question that was not governed by a trustworthy scriptural command, a traditional jurist would have to derive a rule by expanding logically from previously established scriptural commands. Permissible methods of extrapolation constituted a fourth option for interpreting God’s commands.¹¹

By the twelfth century C.E., all jurists had come to be associated with one of four mutually orthodox madhhabs of jurists—the Hanafi, Maliki, Shafi‘i and Hanbali madhhabs.¹² Almost all members of these madhhabs (and thus almost all Islamic jurists)

⁶ *Id.*

⁷ For a complete discussion of these methods, see LOMBARDI (2006), *supra* note 1.

⁸ Lombardi & Brown, *supra* note 2, at 396.

⁹ See generally, BERNARD WEISS, THE SPIRIT OF ISLAMIC LAW (1998).

¹⁰ See, e.g., Lombardi & Brown, *supra* note 1; see also, *id.*

¹¹ Lombardi & Brown, *supra* note 1, at 396.

¹² See generally, CHRISTOPHER MELCHERT, THE FORMATION OF THE SUNNI SCHOOLS OF

were thought to be in a posture of taqlīd, meaning that they did not perform independent reasoning, rather they were required to follow the precedents laid down by the early masters of their madhhabs. Through sophisticated (and often creative) methods of precedential reasoning, jurists in a guild worked from the precedent of that particular guild to develop their associated fiqh.¹³

By the nineteenth century, the traditional method of Islamic legal interpretation was challenged by new methods. These methods, dubbed as “modernist legal theories,” represented attempts to re-imagine the classical method of legal Islamic interpretation with an eye to creating modern codes of Islamic law.¹⁴

Modernist theories departed from the classical tradition and hold that humans are bound to respect classical interpretations of Islamic law only to the extent that these classical interpretations follow inexorably from commands that are certain with respect to both their authenticity and their meaning.¹⁵ In areas of law where there is no scriptural text that is certain with respect to both its authenticity and meaning, modernists feel that they can (and should) use methods of legal interpretation that rely heavily on non-scriptural sources of law such as utility or custom.¹⁶ As modern Islamic thinkers have explored new ideas about textual criticism, epistemology, and hermeneutics, they have developed new methods of legal reasoning to identify the Islamic rules and goals against which the law of the state should be measured.¹⁷ As a result, modernists developed a different understanding of God’s commands.

LAW, 9TH-10TH CENTURY C.E. (1997).

¹³ Lombardi and Brown, *supra* note 1, at 396.

¹⁴ LOMBARDI (2006), *supra* note 1, at 80.

¹⁵ Lombardi & Brown, *supra* note 1, at 399.

¹⁶ *Id.* at 399-400.

¹⁷ *Id.*

Introduction

When I first began this dissertation, I was planning to write a fairly straightforward history of the long process by which the 2004 Afghan Constitution was drafted and evaluate the Constitution that was finally ratified. I had access to previously unused documents from the drafting process and to people who had taken part in it. Using those resources, I believed that I could add greatly to our understanding of what happened from 2002 to 2004 during the constitution-making process.

As my research progressed, I decided that I could be more ambitious. Reading the documents produced by the Drafting and Review Commissions and interviewing participants in the drafting process, I became convinced that Afghanistan's 2004 Constitution must be evaluated in light of its broader historical context. Through my research, I came to understand that the 2004 Constitution was drafted in the shadow of earlier constitutions, and it cannot really be understood or evaluated unless one sees it as the latest stage in a century-long struggle to develop a constitutional text that could, in Russell Hardin's terminology, "coordinate" politics in the remarkably diverse, deeply divided land that we know as "Afghanistan."

Hardin, a leading contemporary constitutional theorist, rejects the currently popular contractualist understanding of constitutions.¹ He emphasizes that contracts are binding promises with external guarantors to enforce the agreement; constitutions, in contrast, have no such guarantors or enforcement mechanisms.² Hardin argues that constitutions are better characterized as "coordination devices" that, ideally, create rules for political

¹ See generally, Russell Hardin, *Why a Constitution?* in SOCIAL AND POLITICAL FOUNDATION OF CONSTITUTIONS 61 (Denis J. Galligan & Mila Versteeg, eds. 2013).

² See generally, *id*; see also, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY (1999).

contests, devices that powerful actors in a country voluntarily choose to accept and to which they become habituated.³ More controversial still, Hardin posits that constitutions should be normatively evaluated exclusively on their success at coordinating politics, no matter how noble their aspirations or how admirable the values they contain.⁴ In his view, a constitution ceases to be “successful” as soon as its rules cease to be acceptable to members of the polity who have the power to ignore the rules and to resort to rebellion or other disruptive, extra-constitutional action. As a practical matter, constitutions fail when people feel that their national constitution does not serve their interests as well as it could, and they (1) believe they are worse off within the current constitutional scheme than they would be if they rebelled and tried to force a new scheme; and (2) find themselves able, as a practical matter, to disrupt or overthrow the existing order.⁵

Of course, constitutions can fail over time. Constitutions that coordinate well on the day after they are implemented may eventually cease to coordinate effectively. This declining success may result from shifting or evolving desires of parties over time. New parties may gain power and influence, and they may need to be incorporated into an existing constitutional structure. Alternatively, the practice of the parties who control the government might create uncertainty or resentment on the part of others, driving those others out of the constitutional structure. For this last reason, elites conceptualized as “winners” under the initial constitutional bargain, must uphold the commitments and limitations that are embodied in the constitution—and, if necessary, accept further

³ See generally, Hardin, *supra* note 1.

⁴ *Id.* at 59-61 (2013); see also generally, Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); Peter Ordeshook, *Constitutional Stability*, 3 CONST'L. POLIT. ECON 137 (1991).

⁵ See generally, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY (1999).

restraints; otherwise “losers” in the initial constitutional bargain might feel compelled to pursue their self-interest through extra-constitutional action, and usher in a coordination failure.

Although existing constitutional histories of Afghanistan do not engage with Hardin’s coordination theory, his work provides an important theoretical lens through which to analyze Afghanistan’s relatively short constitutional history, offering a new set of metrics to evaluate the success or failure of different Afghan constitutions. Since 1923, when Afghanistan drafted its first constitution, the country has been deeply divided and characterized by a weak central government. At any given time during this period, the government was trying to rule over a myriad of powerful, well-armed actors with conflicting interests and ideologies, actors who each individually had the military power to resist the constitutional order and together often had the power to overthrow it. When constitutions failed to establish rules under which a critical mass of these actors were willing to acquiesce, or when the government ceased to interpret and apply those rules in a way that a critical mass found minimally acceptable, resistance and rebellion led to the violent fall of the constitutional order. In fact, many governments in Afghanistan have come to power focused primarily on drafting a constitution and governing in a way that promoted the self-interest of a particular community or the ideology of a particular political faction. Invariably, however, those single-minded governments have failed to coordinate the country, resulting in devastating violence and social dislocations. From 1975 through 2001, in particular, Afghanistan experienced a series of coordination failures that traumatized the country, causing coups and a three-decade civil war.

Indeed, coordination theory provides a useful lens through which to understand and evaluate Afghan constitutional history up to 2001, lending a vocabulary and conceptual apparatus to help characterize and evaluate the motivations and choices of the participants in the 2001 to 2004 constitution-making process. Although they never used the language of coordination theory, many of the participants in the 2004 constitutional drafting process seem to have intuitively understood its logic and sought to avoid mistakes that led past constitutions to fail as coordination devices. Many of them had contributed to previous coordination failures by devising constitutions that failed and/or by resisting constitutions that they found unacceptable. In 2004 they aspired (1) to create a constitution that would align as much as possible with their priorities, while still serving as a coordination device, and then (2) to govern under that constitution in a manner that at a minimum would not provoke rebellion and, ideally, would instead inspire acquiescence as a barrier to rebellion. They understood they had to coordinate Afghanistan under rules that would promote their communal or ideological interests, while maintaining coordination as their first priority.

Just as Afghan constitutional history can be reframed as a series of coordination failures, it can simultaneously be cast as a cautionary tale about the importance of constitutional deferral as drafters tried to coordinate a deeply divided society like Afghanistan. Rosalind Dixon and Tom Ginsburg define constitutional deferral as a conscious decision by constitution makers “not to decide” a controversial constitutional issue, leaving it to be decided through the process of ordinary politics by ordinary

institutions, namely the legislature and the judiciary.⁶ While constitutional law scholars have only recently begun to categorize types of deferral and to explore their effects in different contexts,⁷ a combination of coordination and deferral theory makes particular sense when evaluating the Afghan context. Most Afghan constitutions have failed relatively quickly as coordination devices precisely because the constitutional text or the government that interpreted and applied the text answered too quickly questions that could have been left open to future negotiation as the constitutional order took hold; the failed constitutions answered those questions in a way that inspired rebellion and led to coordination failure.

Just as they implicitly embraced the logic of coordination theory, the participants in the 2001-2004 constitution drafting process also implicitly grasped the logic of deferral theory. Many were aware that the success or failure of prior Afghan constitutions had depended upon the degree to which those constitutions effectively recognized the importance of delaying decision on controversial constitutional issues, leaving those questions to be answered through political processes following the adoption of the constitution. Past constitutions, (including failed constitutions that the governments themselves had a hand in drafting), had tried to address too many divisive questions too quickly in a manner that important Afghan communities could not yet accept. Implicitly aware of this, many of the drafters of the 2004 Constitution tried to use constitutional

⁶ See generally, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L. J. CONST. L. 636 (2011); see also, Mark Tushnet, *Constitution-making: An Introduction* 91 TEX. L. REV. 1983 (2013).

⁷ See, e.g., Tushnet, *supra* note 6; Clark B. Lombardi, *The Constitution as an Agreement to Agree: The Social and Political Foundation and (Effects) of the 1971 Egyptian Constitution* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Dennis Galligan and Mila Versteeg eds., 2013); Dixon & Ginsburg, *supra* note 6.

deferral as a tool to increase the effectiveness of this constitution as a coordination device.

The documents produced during the drafting and review process, and as revealed in my interviews with participants, confirmed that the figures most involved in the making of the 2004 Constitution debated not only what to include in the constitution, but what to exclude. They consciously embraced ambiguity on a number of particularly divisive questions as a way to gain the acquiescence of a broad cross section of Afghanistan's fractured communities—each of whom could either operate under the constitution and try to reach consensus with others on an acceptable answer, or they could hope that when the time came to resolve the ambiguity, they would have the political power necessary to ensure that it was resolved in their favor.

Although some drafters, who represented a particular political and military faction, fought for their community or ideology, others remained uncompromisingly committed to particular visions for the state. This was further complicated by the role played by the international community and a fear that the N.A.T.O., then the International Security Assistance Force (ISAF) military power would disincentivize any possible rebellion against a constitutional order supported by the international community. These factions pushed for a constitution that did not defer on the issues that were important to them, even as they were pressured by the representatives of groups that had tried and failed to impose their very different constitutional visions in the past, groups that knew some deferral on these issues would be necessary to gain acquiescence.

In short, in order to place the 2004 Constitution in its proper context, to evaluate it realistically and to reflect more fruitfully upon its implications, it is necessary to analyze

the history of the 2004 Constitution that is embedded in a broader constitutional history of Afghanistan that was, itself, informed by coordination theory and constitutional deferral theory. This type of theoretically informed history would demonstrate that the 2004 Constitution is merely the latest step in an ongoing Afghan struggle to identify a set of constitutional rules that could coordinate the country. It would provide a lens through which to understand the concerns and choices of the figures who participated in the making of the 2004 Constitution.

Seen against the backdrop of coordination and deferral theory, the drafting of the 2004 Constitution is probably best understood as a protracted negotiation, a negotiation in which the representatives of deeply divided and mutually mistrustful factions came to the table with their experience of Afghanistan's past coordination failures. They tried to negotiate a document that reflected their interests, without alienating other factions to the point that those factions would risk the costs of rebellion and would refuse to acquiesce in the rules of the constitution. Given their irreconcilable positions on numerous issues and their painful experience of past coordination failures, these figures involved in the creation of the 2004 Constitution ultimately chose to use a great deal of constitutional deferral to obtain short term buy-in for the constitution with the implicit assumption that consensus on divisive issues could be negotiated over time through the political process.

Recognizing that many scholars resist Hardin's claim that constitution makers should prioritize the ability to coordinate effectively over other constitutional values,⁸ I suggest

⁸ See generally, Tom Ginsburg, *Constitutions as Contract, Constitutions as Charter* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Dennis Galligan and Mila Versteeg eds., 2013); Jeff King, *Constitutions as Mission Statements* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 79 (Dennis Galligan and Mila Versteeg eds., 2013).

that many and arguably most of the figures involved in the drafting of the 2004 Constitution did in fact take this position, and they used deferral to promote that goal, even when it created a risk that the Constitution would not realize their ideological vision of the state.

Coordination and deferral theories also provide a useful set of metrics by which to evaluate the performance of the Afghan Constitution to date. If the 2004 Constitution is viewed as a coordination device that made tactical use of deferral, we are better able to analyze it on its own terms. Assuming, for the sake of argument, that it is appropriate for a constitution to prioritize coordination over communal interests or ideological purity, questions remain as to whether the 2004 Constitution actually did coordinate; whether the Constitution's deferrals help or hurt the effectiveness of the Constitution as a coordination device; and how Afghanistan's Constitution might be amended to help bring political stability and incentivize Afghanistan's deeply divided people to engage in the types of political negotiation that could lead, over time, to broader and deeper agreement on questions of identity and governance.

It is my hope that if we see Afghanistan's experience in a broader, more theoretically informed light, we might also be able to identify ways to assist other countries engaged in constitutional development (and constitution-making exercises). Although it is beyond the scope of this dissertation to explore that question in detail, the final chapter suggests that Afghanistan is not the only country whose constitutional history is best told through the lens of coordination and deferral, and it offers some perspective on lessons about effective constitution-making in Afghanistan may be useful to other countries. I suggest,

for example, that these lessons may be particularly relevant in tribalized, majority Muslim countries like Yemen and Libya.

This Introduction has described Afghan constitutional history and introduced coordination and deferral theories as a lens for this dissertation's analysis and discussion of the 2004 Constitution. It will next explore in more detail the theoretical literature that informs the discussion of Afghan constitutional history up to 2001, as well as the history of the 2004 Constitution itself. Finally, it will provide a brief overview of the structure of this dissertation and the broader contribution that it might make to comparative constitutional law studies.

I. **Literature Review**

A. Secondary Literature on Afghanistan's Constitutional History

1. Histories of Afghan Constitutions prior to 2002

This dissertation will begin by providing historical background about Afghanistan's constitutional history up to 2002 when Afghans began to draft a new constitution—a process completed in 2004. The background chapters of this dissertation will draw on Dari, Pashtu and English language secondary historical resources.

Much of the information about Afghanistan's constitutional history prior to 2004 comes from material embedded in broader studies of Afghanistan's political history.⁹

⁹ See e.g., JOSEPH PIERRE FERRIER, *THE HISTORY OF THE AFGHANS* (1858); GHULAM MOHAMMAD KATIB, *RŪDĀD-E LOYA JIRGA-YE DAR AL-SULTANAH* [NARRATIVES OF THE LOYA JIRGA OF THE KINGDOM] (1313) [1924]; VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION 1880-1946* (1967); LOUIS DUPREE, *AFGHANISTAN* (1973); MIR GHULAM MOHAMMAD GHUBAR, *AFGHANISTAN DAR MASĪR-I TĀRIKH* [AFGHANISTAN IN THE COURSE OF HISTORY] (1366)

Other works focus more specifically on the subject of Afghan constitutional developments. Although there is one detailed work by an Afghan author that has been published in English,¹⁰ most detailed histories are in Pashtu or Dari and have received less attention than they probably deserve from Western scholars.¹¹

The English language works on Afghan constitutional history make up for what they lack in historical detail with a theoretical sophistication that may be lacking from the other historical accounts. For example, some historians writing in English have looked

[1987]. SENZIL NAWID, RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN, 1919-29: KING AMAN-ALLAH AND THE AFGHAN (1999); AMIN SAIKAL, AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL (2004); MIR MOHAMMAD SEDIQ FARHANG, AFGHANISTAN DAR PANJ QARN-I ĀKIR [AFGHANISTAN IN THE LAST FIVE CENTURIES] (1371) [1992]; THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY (2010); MOHAMMAD ALAM FAYZAD, JARGAH HAI BOZURG-I MILLI AFGHANISTAN (LOYA JARGAH HA): JARGAH HAI NAMNEHĀD THAT-I TASALOṬ-I KAMONEST HA WA RŪS HA [AFGHANISTAN'S MAJOR JIRGAS: SYMBOLIC JIRGAS UNDER THE CONTROL OF THE COMMUNISTS AND THE SOVIETS] (1368) [1989].

¹⁰ See generally, NIGHAT MEHROZE CHISHTI, CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN (1998).

¹¹ MOHAMMAD TAHIR BORGAI, DA AFGHANISTAN LOMRI ASSĀSI QĀNUN TA YAWA KATANAH [AN ANALYSIS OF THE FIRST CONSTITUTION OF AFGHANISTAN] (1374) [1995]; MOHAMMAD TAHIR BORGAI, DA AFGHANISTAN DOHAM ASSĀSI QĀNUN TA YAWA KATANAH [AN ANALYSIS OF THE SECOND CONSTITUTION OF AFGHANISTAN] (1375) [1996]; MOHAMMAD TAHIR BORGAI, DA AFGHANISTAN DRIYAM ASSĀSI QĀNUN TA YAWA KATANAH [AN ANALYSIS OF THE THIRD CONSTITUTION OF AFGHANISTAN] (1376) [1997]; MOHAMMAD TAHIR BORGAI, DA AFGHANISTAN DA KHĀLQ AW PARCHĀM DA DAWRI ASSĀSI QAWĀNĪNO TA YAWA KATANAH [AN ANALYSIS OF THE KHĀLQ AND PARCHAM CONSTITUTIONS OF AFGHANISTAN] (Peshawar 1969) [1990]; MOHAMMAD ASHRAF RASOOLI, MŪRŪR-I BAR QĀWĀNĪN-I ASSĀSI AFGHANISTAN [REVIEW OF THE CONSTITUTIONS OF AFGHANISTAN] (2nd ed. 1392) [2013]; SARWAR DANISH, ḤUQUQ-I ASSĀSI AFGHANISTAN [CONSTITUTIONAL LAW OF AFGHANISTAN] (2nd ed., 1392) [2013]; MIR GHULAM MOHAMMAD GHUBAR, AFGHANISTAN DAR MASĪR-I TĀRIKH [AFGHANISTAN IN THE COURSE OF HISTORY] (1366) [1987]; MIR MOHAMMAD SEDIQ FARHANG, AFGHANISTAN DAR PANJ QARN-I ĀKIR [AFGHANISTAN IN THE LAST FIVE CENTURIES] (1371) [1992]; ABDUL HAI HABIBI, JUNBISH-I MASHROTYAT DAR AFGHANISTAN [CONSTITUTIONAL MOVEMENT IN AFGHANISTAN] (1378) [1999].

provocatively at Afghan constitutional history with a specific focus on the role of Islam.¹² Other scholars have looked at Afghan constitutional history from both a comparative and a historical perspective.¹³ Still some other scholars conceptualize Afghan constitutions as political legitimacy devices.¹⁴ A small number of scholars have begun to study the social and political background of Afghan constitutions and its impact on political discourse, focusing primarily on the impact of the 1964 Constitution of Afghanistan.¹⁵

To date, however, none of the histories of Afghan constitutions prior to 2002 have tried to provide a history that is informed by coordination theory. They 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

¹² ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* (1995); Mohammad Hashim Kamali, *Islam and its Sharī'a in the Afghan Constitution 2004 with Special References to Personal Law* in *THE SHARĪ'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN, AND EGYPT-IMPLICATIONS FOR PRIVATE LAW* (Najma Yassari, ed., 2005); Nadjma Yassari and Mohammad Hamid Saboory, *Sharī'a and National Law in Afghanistan*, in *INCORPORATED* (Jan Michel Otto ed., 2010); Ramin Moschtaghi, *Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between Them*, in *CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY* (Rainer Grote & Tilmann J. Roder eds., 2012); Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, 5 *J. PERSIANATE. STUD.* 205 (2012); Said Mahmoudi, *The Sharia in the New Afghan Constitution: Contradiction or Compliment?*, 64 *HEIDELBERG J. OF INT'L L.* 867 (2004).

¹³ Said Amir Arjomand, *Constitutional Development in Afghanistan: A Comparative and Historical Perspective*, 53 *DRAKE L. R.* 943 (2005); Mohammad Hamid Saboory, *The Process of Constitutionalism in Afghanistan* in *THE SHARĪ'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW* 5 (Nadjma Yassari, ed., 2005); NIGHAT MEHROZE CHISHTI, *CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN* (1998); Mohammad Hasan Kakar, *Constitutional History of Afghanistan*, *Encyclopedia Iranica* (1992).

¹⁴ *See generally*, MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY* (1997).

¹⁵ Ralph Magnus, *The Constitution of 1964: A Decade of Political Experimentation in AFGHANISTAN IN THE 1970S* (1974).

increase the odds of long-term coordination. Drawing on the theoretical literature on constitutional coordination and deferral—which I will describe in detail below—this dissertation will explore Afghanistan’s constitutions as a history of mostly unsuccessful coordination devices, and it will suggest that many of these failures were due to a reluctance by figures controlling the drafting to engage in constitutional deferral on divisive foundational questions.

Having reframed Afghan constitutional history before 2002 as a history of constitutional coordination, in which decisions about whether to engage in constitutional deferral play an important role, this dissertation will provide an account of the process by which the 2004 Constitution was drafted and of Afghanistan’s experience of government under that Constitution.

In the extant literature on the 2004 Constitution of Afghanistan, some works explore the process through which the 2004 Constitution was adopted—works that this dissertation will expand upon and, in some cases, problematize.¹⁶ Other scholarship focuses on specific aspects of the 2004 Constitution. Some explore the way in which ethnic representation was (or was not) guaranteed by state institutions.¹⁷ Others describe the guarantees of women’s rights under the 2004 Constitution, evaluating those rights normatively through the lens of international human rights law.¹⁸ A handful of scholars

¹⁶ See, e.g., Barnett R. Rubin, *Crafting a Constitution of Afghanistan*, 15 J. OF DEMOCRACY 5 (2004); J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557 (2007).

¹⁷ See, Katherine Adeney, *Constitutional Design and the Political Salience of “Community” Identity in Afghanistan: Prospects for the Emergence of Ethnic Conflict in the Post-Taliban Era*, 48 ASIAN SURVEY 535 (2008).

¹⁸ Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women’s rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155 (2007); Muhammad

have looked at issues related to separation of powers, focusing on the problems of constitutional interpretation and constitutional review that have emerged under the 2004 Constitution.¹⁹ As Chapter Five illustrates, this dissertation looks at this issue from the perspective of constitutional coordination and deferral theories and will draw somewhat different implications from the debate.

A number of other scholars have explored whether the 2004 Constitution should be conceptualized as an “imposed constitution.”²⁰ Finally a limited number of works explore the history of the 2004 Constitution through the paradigm of constitutional survival. They evaluate the 2004 Constitution by assessing whether the Constitution has (1) generated legitimacy for the state; (2) channeled political conflict through formal institutions, rather than violence; (3) limited the agency costs of government; and (4) facilitated the production of public goods, and if it has survived, how it has achieved these goals.²¹

Relying on a variety of primary sources, this dissertation provides a far more detailed history of the drafting of the 2004 Constitution than has hitherto been available. As it provides this account, this dissertation continues to frame the story as one that should be

Hashim Kamali, *References to Islam and Women in the Afghan Constitution*, 22 ARAB L. Q. 270 (2008).

¹⁹ Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 HEIDELBERG J. OF INT’L L. 897 (2004); Mohammad Qasim Hashimzai, *The Separation of Power and the Problem of Constitutional Interpretation in Afghanistan*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY (Rainer Grote & Tilmann J. Roder ed., 2012).

²⁰ Noah Feldmann “*Imposed Constitutionalism*” 37 *Conn. L. Rev.* 857(2005); Zachary Elkins; Tom Ginsburg; James Melton, *Baghdad, Tokyo, Kabul: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139 (2008); Benedikt Goderis and Mila Versteeg, *Transnational Constitutionalism: a Conceptual Framework* in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan; Mila Versteeg, eds., 2013).

²¹ Tom Ginsburg & Aziz Huq, *What Can Constitutions Do? The Afghan Case*, 24 J. DEMOCRACY 116 (2014).

told through the lens of coordination and deferral literature, the same perspective that informs the discussion and analysis of earlier Afghan constitutions.

B. Primary Sources for the History of the Drafting of the 2004 Constitution and Methodology

In Chapters Three through Six, this dissertation provides a new account of the drafting of Afghanistan's 2004 Constitution. In drafting Chapter Four, I familiarized myself with the secondary sources described above. Unfortunately the existing written histories of the drafting, reviewing, and ratification process are incomplete, and in places even inaccurate.²² In order to supplement and, where necessary, correct these accounts, I drew heavily on primary sources, many of which I uncovered during field research in Afghanistan.

1. Archival Materials

Primary archival materials on the 2002-2004 constitution-making process, available through the Afghanistan National Archive, were carefully reviewed. When the constitution-making process ended in early 2004, the Secretariat of the constitution-making commissions saved the notes, discussions, and debates on each article of the Constitution, in each stage of the process, and gave them to the Afghanistan

²² INTERNATIONAL CRISIS GROUP, AFGHANISTAN'S FLAWED CONSTITUTIONAL PROCESS, ICG, ASIAN REPORT NO. 56 (June 2003); J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557 (2007). These works report the division of the Constitutional Drafting Commission (CDC) into two factions and the creation of two divergent drafts in the CDC. Nevertheless, my interviews and the archival materials on the process do not indicate the creation of two drafts. Similarly, some other works claim that after the approval of the 2004 Constitution, President Karzai did not promulgate the Loya Jirga version of the draft, but rather a different one that benefited the Pashtu language and entrenched the power of the President. This dissertation will problematize this history also.

NationalArchive. A copy of these archival materials was also provided to Kabul University Law School Library. In 2012, the Stanford University Law School's Afghan Legal Education Program digitized these materials and made them briefly accessible to the public on their website. I was fortunate to be able to access all of these materials in that short window of opportunity. Having done so, I confirmed in Kabul that the copies I accessed were accurate transcriptions of the original materials stored at the Archive. Today, soft copies of these materials can be accessed by request through the Afghan Legal Education Program at Stanford University. Hard copies are available in the Kabul University Law School Library and the National Archive, and some of them can be found in the Afghanistan Center at Kabul University.

Most of these materials are in the Dari and Pashtu languages, while a handful of them are in English. These archival materials include the earlier drafts of the 2004 Constitution; the presidential decrees about the process; records of the public consultation process, lists of questions asked during the public consultation process; speeches and lectures of foreign advisors to the drafters; records of the drafters' debates and their notes; reports of the different committees of the Constitutional Review Commission (CRC); reports of the working groups of the Constitutional Loya Jirga; reports of the Constitutional Loya Jirga Reconciliation Committee; the list of the articles that the Constitutional Loya Jirga changed; records of expert opinions on the drafts of the Constitution; and other important information and documents.

To complement the archival materials, I conducted extensive interviews with people who were involved in the drafting process of the 2004 Constitution. I interviewed three groups of people involved in the 2002-2004 constitution-making process. First, I

conducted extensive interviews with the members of the Constitutional Drafting Commission (CDC) and the CRC. These individuals included nine members of the CDC and thirty-five members of the CRC (seven of CDC members were also members of the CRC). The second category of people I interviewed for this dissertation included some of the most prominent members of the Constitutional Loya Jirga (the popular body that adopted the 2004 Constitution). These people included individuals, such as Abdul Rab Rasool Sayyaf and Abdul Hafeez Mansoor, who tried to influence the outcome of the Constitution and gather support for a specific position they promoted. The third group of people I interviewed for this dissertation included members of the Secretariat of the two constitutional commissions and of the Constitutional Loya Jirga (CLJ). Through these interviews, I was given an insider's account on the constitution-making process and provided with information that has never been published before.

2. Research Interviews

For this dissertation, I sought to interview thirty-five members of the CRC (plus two CDC members who were not appointed to the CRC). Three out of the thirty-five members appointed to the CRC did not participate in the CRC sessions. Although I interviewed most of the active members of the CDC and CRC, it was not possible to interview every member of the two commissions. Not all of the members of the two commissions reside in Afghanistan. Five were in bad health and too old to remember enough details about the process. Four other members of the CRC had died by 2015. That left twenty-five members of the CRC. Seven of the twenty-three members reside outside of Afghanistan. Ultimately, I was able to conduct interviews with thirteen of the CRC members in Afghanistan (eleven in person and two over the phone). I was not able to

trace the remaining three CRC members in Afghanistan. As for the seven CRC members who reside outside of Afghanistan, I interviewed three of them (two through Skype and one through Facebook Voice Call).

Fortunately, almost every important member of the CLJ who I wanted to interview resided in Afghanistan. I interviewed ten CLJ members and three members of the Secretariat of the CLJ, all in person. I selected these people because they were important CLJ members, and they were willing to talk. I sought to interview some members of the Transitional Administration Cabinet who were involved in the constitutional process, but I was unable to because most of them are still in important governmental positions in Afghanistan and difficult to reach for security reasons.²³

The names and backgrounds on all of the individuals interviewed for this research are public records accessible through secondary resources and websites, such as *Who is Who in Afghanistan*. I contacted these individuals with the help of my former professors and colleagues at the Kabul University School of *Shari'a*. I read a participation consent form to the interviewees (I had prepared these forms in English, Dari and Pashtu languages). After the interviewees agreed and signed the consent form, I began my interview. Each interview lasted on average from 60-80 minutes. I audio-recorded these interviews when the interviewees agreed. If participants did not wish to be recorded, I took and kept detailed notes of our conversation (I have the notes and the records from these interviews on file).

Some interviewees were happy to be identified in the research and cited in the work, but others wished to be cited as anonymous sources. I have honored that request,

²³ Notably, in 2015, when I was conducting my research, the security situation was very poor in Afghanistan.

assigning different letters to these interviewees. Thus, the reader may find references in the footnotes to these interviewees such as the following: Interview with (A), Member of the Constitutional Drafting/Constitutional Review/Constitutional Loya Jirga. Or, Interview with (X), Member, Constitutional Review Commission. These letters represent the interviewees who wished to remain anonymous.

Using archival records and these interviews, Chapter Four describes the process by which the 2004 Constitution came into being. Chapter Five describes how the 2004 Constitution was received after ratification and the behavior of the factions who were supposed to be coordinated according to the rules set down in the Constitution. Chapter Five covers very recent history. This chapter relies on English language academic works in the area of political science, legal studies or security studies that describe and analyze some particular aspect of Afghan politics or social evolution during this period. There are, however, relatively few of these works and some of them seem to tell a rather “thin” story. Much of the available information is concentrated in contemporary Afghan news accounts in Dari or Pashtu, either in print or on the Internet.

C. Existing Literature on “Constitutions as Coordination Devices”

In telling the history of Afghan constitutions, this dissertation made use of theoretical literature that analyzes constitutions as coordination devices and argues that constitutions should be normatively evaluated primarily on their effectiveness at coordinating politics.²⁴ Hardin, who pioneered this approach, has argued that constitutions are devices

²⁴ See generally, Hardin (2013), *supra* note 1; See also, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY (1999); ADAM PREZEWSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORM IN EASTERN EUROPE AND LATIN AMERICA (1991); Gillian Hadfield; Barry Weingast, *Constitutions as Coordinating Devices* in INSTITUTIONS, PROPERTY RIGHTS, AND ECONOMIC GROWTH (Sebastian Galiani

for both enabling and constraining our actions.²⁵ The basis for organized government is best understood not as a contract between constituent groups, but rather as a social convention. Conventions are not followed simply because one’s ancestors formally agreed to them. They are followed because they create patterns of behavior that are “mutually advantageous.”²⁶ Conventions are reinforced by acquiescence, which is the most compelling characteristic of constitutions.²⁷ For Hardin, constitutions gain acquiescence by creating patterns of behavior that would be costly to change.

According to this view, people conclude that their interests will be better served by following the rules of the constitution than by defying them.²⁸ Although a constitution may not provide the best possible results, “it gives [us] the best [we] can expect *given that almost everyone else is following it* (emphasis in original).”²⁹ A constitution will be an effective coordination device so long as it is accepted by a critical mass of people—enough people that “mutiny by few [will seem] too costly to entertain.”³⁰ Of course, a constitution that successfully coordinates politics for a while might stop being effective, and after changes to its provisions, or some other forms of compromise, it might again start coordinating.

& Itai Sened, eds., 2014); Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

²⁵ HARDIN (1999), *supra* note 24, at 133.

²⁶ *Id.* Chapter 2.

²⁷ HARDIN (2013), *supra* note 1, at 60.

²⁸ HARDIN 1999), *supra* note 24, at 113.

²⁹ *Id.* at 109.

³⁰ *Id.* at 144.

Although many scholars find Hardin's conceptualization of constitutions as coordination devices useful,³¹ his approach has been controversial. Most critics focus on the normative aspect of his writing. Hardin suggests implicitly that a reasonable person might believe that the primary goal of any constitution must be to coordinate. It is only if there are multiple possible constitutions, any of which could serve effectively as a coordination device, that one should concern oneself with the question of whether the constitution promotes values such as democracy or liberalism.

Coordination theory is a natural anathema to people who are committed to the idea that constitutions should promote liberal democratic values. Critics complain that coordination theory does not provide any normative guidance as to the content a constitution should have.³² Others express concern that a thinker who evaluates constitutions only as a coordination device could characterize autocratic, repressive, and non-democratic constitutions as "successful."³³ Some claim it is problematic that under coordination theory, there is no reason to think that politically disempowered groups should be represented during the drafting of a constitution—as Jeff King has noted, “on

³¹ See e.g., Clark B. Lombardi, *The Constitution as an Agreement to Agree: The Social and Political Foundation and (Effects) of the 1971 Egyptian Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* (Dennis Galligan & Mila Versteeg eds., 2013); ADAM PREZEWSKI, *DEMOCRACY AND THE MARKET* (1991); Gillian Hadfield & Barry Weingast, *Constitutions as Coordinating Devices* in *INSTITUTIONS, PROPERTY RIGHTS, AND ECONOMIC GROWTH* (Sebastian Galiani & Itai Sened, eds., 2014).

³² See, e.g., Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters* in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* (Dennis Galligan & Mila Versteeg eds., 2013).

³³ Denis J. Galligan; Mila Versteeg, *Theoretical Perspective on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATION OF CONSTITUTIONS* 37 (Denis J. Galligan & Mila Versteeg, eds. 2013).

this view, one does not get a seat at the bargaining table without a sword behind one's smile."³⁴

Lurking behind each of these criticisms rest implicit assumptions that (1) constitutional theories should prescribe certain universal values for inclusion in any constitution, and (2) these values should be liberal. As Denis Galligan and Mila Versteeg point out, the claim that coordination theory does not provide any guidance as to the content a constitution might have seems misdirected.³⁵ The joint aims of designing a workable system of government and inducing popular acquiescence provide at least some guidance as to the content a constitution should have in a particular society, both what should be included and what should be excluded.³⁶ Hardin surely has a point when he suggests that it is a pyrrhic victory to ensure that a constitution guarantees liberal and democratic values if the inclusion of those values will lead to coordination failure and massive human suffering. The same point could be made to challenge the proposition that constitutions should not promote authoritarianism or illiberalism, even if these are the only types of constitutions that can coordinate politics in a particular country.

Addressing the criticism that coordination theory is flawed because it privileges the satisfaction of the powerful at the expense of the disempowered, one needs to point out that coordination theory does so in a qualified way. Hardin and other coordination theorists suggest that constitutions should be evaluated on how well they coordinate politics over time. Those who are powerless at the time a constitution is drafted may become powerful in the future. Thus, a constitution that ignores the views of people who

³⁴ Jeff King, *Constitutions as Mission Statements* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 79 (Dennis Galligan & Mila Versteeg eds., 2013).

³⁵ Galligan & Versteeg, *supra* note 33, at 37.

³⁶ *Id.*

are potentially powerful would be normatively problematic. A champion of coordination theory would, however, agree that it is reasonable and not necessarily unethical for constitutional designers to create a constitution that ignores the interests of a group that is unlikely to become politically or militarily powerful. A form of Galligan and Versteeg's argument is relevant to this point. If a constitution could represent the interests of the disempowered without driving away the powerful, one can plausibly argue that constitutional designers should try to design a constitution that protects all people. Sometimes, however, one finds a zero-sum situation in which a constitution's effectiveness as a coordination device requires that the interests of one or more disempowered communities be sacrificed. In such a case, constitutional drafters could plausibly believe that the benefit of avoiding the trauma of coordination failure has benefits that outweigh the satisfactions of knowing that one's failed constitution was, at least, fundamentally fair to all.

This dissertation assumes that Hardin is correct to argue that no constitution can be deemed successful if it fails to coordinate politics in a country— an position that, while unstated, seems to have informed the views of many people involved in the making of the 2004 Constitution. This dissertation sets the history of Afghan constitutions prior to 2002 in a framework focused primarily on the effectiveness of those constitutions as coordination devices. It explains the drafting of the 2004 Constitution as a tale of people struggling to design a constitution that, under the peculiar circumstances of the time, could coordinate Afghanistan as it rebuilt. More controversially, it evaluates the 2004 Constitution according to its effectiveness as a coordination device, and makes recommendations to enable future amendments to ensure effective coordination while at

the same time maintaining that, in cases where one can choose between two approaches to coordination, the liberal, democratic one should be preferred.

D. Existing Literature on “Constitutional Deferral”

As this dissertation tells the history of Afghan constitutions in a way that is informed by theories of constitutional coordination, it also draws upon the body of theoretical literature related to “constitutional deferral.” Under coordination theory, a successful constitution is likely to attempt no more than to coordinate a populace on the limited set of values that a society widely shares.³⁷ This set will likely be smaller in a divided society than in a society in which there is a strong commitment to a common set of religious beliefs or one national identity.³⁸ This suggests that in a divided society, such as Afghanistan, no issue on which two or more major groups strongly disagree can be easily constitutionalized.³⁹ Thus, when a constitution governs this kind of a society, “it must be relatively limited in its scope and perhaps it must often even be vague [at least on a divided society’s foundational issues].”⁴⁰ This insight explains why Afghan constitutions that have been successful as coordination devices had to “defer” on a significant number of issues.

Therefore, when telling constitutional history and evaluating choices made by constitutional drafters, it is important to focus not only on the constitutional rules that were written into the text.⁴¹ One must also pay attention to the rules that were deliberately

³⁷ Russell Hardin, *Liberalism, Constitutionalism, and Democracy*, 1 CHINESE PUB. AFF. Q. 255, 258 (2003).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ On constitutional deferral literature, *see generally*, Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L. J. CONST. L. 636

not written into a constitutional text or were written in an ambiguous way. Drafters often consider including clear rules covering a certain subject, and then, on further thought, decide that the constitution should not address this subject at all or, if so, in ambiguous ways that can be interpreted in differently in the future. Rosalind Dixon and Tom Ginsburg thus define constitutional deferral as a conscious decision by constitution makers “not to decide” a controversial constitutional issue, but rather to leave it to be decided through the process of ordinary politics by ordinary institutions, namely the legislature and the judiciary.⁴²

1. Literature Elaborating on Typologies of Constitutional Deferral

This dissertation identifies and focuses on a certain type of constitutional deferral, which I call “mega-constitutional deferral.” Mega-constitutional deferral, as this dissertation defines it, is the constitution-makers’ conscious decision not to decide a society’s foundational issue(s) that they would like to address in the constitution but which they are unable to answer in a manner that is minimally acceptable to a critical mass of powerful stakeholders. It is a decision by constitutional drafters for the purposes of ensuring coordination in the short term, to delegate to later resolution through the political process, a decision that the drafters would have ideally wanted to answer in the constitutional text. Deferrals of this type occur when drafters identify constitutionally significant issues, but because of the lack of agreement on the answers to such questions, they do not attempt to answer them in the text of the constitution, even using ambiguous

(2011); Mark Tushnet, *Constitution-making: An Introduction* 91 TEX. L. REV. 1983 (2013); Lombardi, *supra* note 31; Tsvi Kahana, *Majestic Constitutionalism: The Notwithstanding Mechanism in Israel* in ISRAELI CONSTITUTIONAL LAW IN THE MAKING (Gideon Sapir, Daphne Barak-Erez & Aharon Barak, eds., 2013).

⁴² See generally, Dixon & Ginsburg, *supra* note 41; see also, Tushnet, *supra* note 41.

language; without this kind of deferral, they would be unlikely to get necessary buy-in.

Theorists of constitutional deferral have identified several different types. The first is to explicitly identify an issue and to state that it is to be resolved by the legislature after the constitution is ratified (this takes place through using a “by-law clause” in the text of the constitution).⁴³ This is the type of deferral on which Dixon and Ginsburg focus their attention.⁴⁴ It is important to note that not all by-law clauses signal an act of constitutional deferral—or constitutional questions that the current literature might consider to be deferral. A number of the drafters of the 2004 Constitution said that they used by-law clauses to rid the Constitution of insignificant issues or unnecessary details.⁴⁵ In fact, they used by-law clauses on more than thirty occasions to identify questions that were deemed constitutionally unimportant.⁴⁶ According to them, as the supreme law of the land, a constitution is not a document that should include every topic or every detail, but only those that are extremely important to the polity.⁴⁷ In many instances, they used by-law clauses to identify issues the drafters agreed to exclude from the Constitution because they were constitutionally unimportant.

Using the example of Egypt’s 1971 Constitution, Clark Lombardi has explored a

⁴³ Dixon & Ginsburg, *supra* note 41, at 643-46.

⁴⁴ *See Id.*

⁴⁵ Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015); Interview with Shukria Barakzai, Member, Constitutional Review Commission, in Kabul, Afghanistan (March 25, 2015); Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (April 7, 2015); Interview with Mohammad Amin Ahmady, Member, Constitutional Review Commission, in Kabul, Afghanistan (April 9, 2015); Interview with Abdul Rab Rasool Sayyaf, Chairman, Second Working Committee of the Constitutional Loya Jirga, Member, Emergency Loya Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (March 26, 2015).

⁴⁶ *See, infra*, Chapter Four.

⁴⁷ *Id.*

second form of deferral, which he calls “implicit deferral.”⁴⁸ In this case, the drafters of constitutions deliberately use unclear or ambiguous language to describe a structural rule or a constitutional right, thereby requiring in practice that the rule be interpreted in the future by institutions entrusted with the power to interpret the constitution and resolve the ambiguity.⁴⁹ Just as one can find by-law clauses that do not signal constitutional deferral, one can find constitutional vagueness that is not a sign of deferral. Similarly, although the 2004 Afghan Constitution is riddled with ambiguity, the drafters did not admit that this was intentional in all cases. Instead, they maintained that in many cases they used general language to avoid length rather than to promote acceptance of an issue on which there was profound, potentially destabilizing disagreement. Only in the most controversial areas, such as the role of Islam, did they admit that they deferred by using vague language.⁵⁰

Constitutional silence may constitute yet another type of implicit deferral, although in matters of law and politics, silence is usually challenging to evaluate with certainty. This type of deferral may arise when constitutional drafters face an issue that could or should be regulated through a constitution, and which some drafters, in fact, wanted to regulate at the constitutional level. However, if the drafters are unable to reach agreement on what the rule should say, they simply choose to leave it out, leaving the issue to be resolved later through other mechanisms. It is, in other words, a lacuna that functions as a “by-law clause.”

⁴⁸ Lombardi, *supra* note 31, at 409.

⁴⁹ *Id.*

⁵⁰ *See, e.g.*, QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] arts. 1, 2, & 3, OFFICIAL GAZETTE NO. 818, 1382 (2004).

There is a particular type of constitutional deferral through silence that Jeremy Webber has called “constitutional reticence.”⁵¹ Constitutional silence can sometimes be obvious in that the constitutional language seems to beg for an answer to a particular question and then fails to provide it. Constitutional reticence tries to eliminate from constitutional discourse any contact with contentious foundational issues—such as issues of national religious identity in multi-religious countries.⁵² Constitutional reticence scrubs from a constitution any suggestion that there is disagreement about an issue that cannot be resolved at the time of drafting, but should be resolved in the future. It articulates a vision in which divisive foundational issues are simply irrelevant to any question of governance, and thus, have no place in political discourse. In theory, it encourages communities to be open to a broad range of beliefs, and to revising those beliefs through discussion over time, hoping to influence those beliefs in a certain (often liberal) direction; it also suggests that constitutions should reflect this openness.⁵³ As Hana Lerner has noted, constitutional reticence of this kind is evident in multicultural societies that adhere to the basic principles of political liberalism.⁵⁴ She explains that in these societies, constitutions could perhaps function as neutral mechanisms of conflict resolution.⁵⁵

Although Lerner does not describe her work as one on constitutional deferral, she has greatly contributed to the deferral literature with her important work, “Making Constitutions in Deeply Divided Societies,” in which she argues that an “incrementalist

⁵¹ See generally, Jeremy Webber, *Constitutional Reticence*, 25 AUSTL. J. LEG. PHIL. 125 (2000).

⁵² *Id.*

⁵³ *Id.* at 153.

⁵⁴ HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).

⁵⁵ *Id.* at 36.

approach to constitution-making” may help coordinate citizens in divided societies.⁵⁶ Lerner describes “incrementalist constitution-making” as a process through which drafters elaborate on the limited number of values that the society shares, while implicitly deferring to the future decisions about whether (or when) to address more controversial, foundational values.⁵⁷ Where polities are still grappling with the very definition of their collectivity in divided societies, it remains a daunting challenge to craft a formal democratic constitution that reflects shared norms and values.⁵⁸

2. Literature Discussing how Constitutional Deferral Promotes Coordination

Scholars of constitutional deferral are interested not only in typologizing deferral, but also in understanding its effects. They have investigated whether constitutions containing significant deferrals are constitutionally fragile—deferrals such as delegation of constitutional questions to the legislature and decisions to deal with important issues by using vague language.⁵⁹ Some argue that it is inherently dangerous for drafters to defer a large number of important questions on constitutional design.⁶⁰ Nevertheless, others suggest that under some circumstances, certain types of significant constitutional deferral can help constitutions survive and coordinate citizens.⁶¹ For example, Lombardi suggests that deferrals in the 1971 Egyptian Constitution were useful for a time for promoting productive ongoing negotiations of constitutional principles—discussions that citizens

⁵⁶ *See generally, id.*

⁵⁷ *Id.* at 6-7.

⁵⁸ *Id.* at 1.

⁵⁹ Lombardi (2013), *supra* note 31, at 426.

⁶⁰ *See generally*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

⁶¹ Dixon & Ginsburg, *supra* note 41, at 648; Lombardi (2013), *supra* note 31, at 426.

thought were useful and which they believed might lead to outcomes that suited their needs.⁶² So long as citizens felt they had incentives to continue discussing the open issues rather than seeking to overthrow the constitutional order, they continued to acquiesce in the constitutional order, and the Egyptian Constitution continued to coordinate Egyptian society.⁶³ Indeed, it was only when Hosni Mubarak's government began to clarify constitutional ambiguities in a manner that the polity found unacceptable that the government faced the massive public protests that eventually led to the fall of the regime.

Similarly, Lerner argues that in divided societies, it is not always necessary, or even advisable, to attempt to decide even the most basic constitutional questions at the time of the drafting of the constitution. She argues that divided societies should adopt an incrementalist constitutional toolbox, which includes such strategies as avoiding clear-cut decisions during the drafting process of constitutions, using ambiguous legal language, and inserting internally contradictory provisions into the constitution.⁶⁴ Accepting the competing visions of the state as impediments to the attainment of workable constitutional arrangements, the incrementalist approach does not ignore them or choose to minimize their significance.⁶⁵ Rather, it embraces them, for to do otherwise would be to wrongly disregard the identity of the people at the time of constitutional drafting, a critical mistake given the divided nature of that identity.⁶⁶

⁶² See generally, Lombardi (2013), *supra* note 31.

⁶³ *Id.* at 426.

⁶⁴ LERNER, *supra* note 54, at 7; see also Lombardi, *supra* note 31, at 426.

⁶⁵ LERNER, *supra* note 54, at 202-204.

⁶⁶ *Id.*

Most of the discussions of deferral and coordination highlight the positive aspects of deferral.⁶⁷ While there is literature that highlights some of the negative aspects of deferral from a coordination perspective, there is probably not enough. Deferral does have inevitable costs. One danger with deferral is that it may ultimately overburden the decision-making capacities of legislatures in a way that undermines their ability to perform other key functions.⁶⁸ A second danger is that deferral may lead to troubling gaps in the coverage of the constitution, because downstream legislatures may fail to prioritize the decision-making tasks deferred by the constitution.⁶⁹ A third danger is that the deferred question(s) may not be answered in a timely fashion; the inability of the constitutional regime to provide a delegated answer to a question that people want answered will cause people to lose faith in the constitutional regime. All of these are dangers that can affect the expected survival, optimality, and coordination of the constitution.

II. Overview of Chapters

Drawing on the historical and theoretical sources outlined above, this dissertation tells Afghanistan's constitutional history up to the present day as a struggle to create coordination devices for a deeply divided, rapidly evolving state with a heavily armed citizenry and a history of meddling by foreign powers who are willing to try and embolden communities aggrieved by the client communities to engage in active resistance or rebellion against it. It describes the evolution of certain constitutional

⁶⁷ See, e.g., Dixon & Ginsburg, *supra* note 41; Tushnet, *supra* note 41.

⁶⁸ Dixon & Ginsburg, *supra* note 41, at 369.

⁶⁹ *Id.*

traditions and of deep disagreements over how those traditions should, as a practical matter, be realized in Afghan society.

Chapter One looks at the emergence of Afghanistan as a modern nation state during the reign of Amir Abdul Rahman Khan (1880-1901) and explores his decision to avoid entrenching his approach to governance through the technology of a written constitution. It then describes the attempt of subsequent Afghan rulers to entrench their own slightly different approaches to governance through written constitutions. It begins this discussion by exploring the failure of Afghanistan's first constitution, the 1923 Constitution. This constitution was remarkably liberal, provoked tremendous resistance from conservative forces, and never effectively coordinated Afghanistan. A number of scholars who are normatively committed to liberal democracy have praised the 1923 Constitution as being "before its time."

Against that background, Chapter One goes on to evaluate Afghanistan's 1931 Constitution—a constitution that has been criticized by many observers. While acknowledging that some of the secondary literature calls the 1931 Constitution a "do-nothing constitution," or a "step backwards" in Afghan constitutional history, this chapter argues that it was actually far more effective as a coordination device than the one that preceded it. It suggests that its success was directly related to the fact that it deferred on answers to many of the controversial questions that Afghanistan's first Constitution had tried to answer, answers that powerful communities ultimately found unacceptable. Although both the 1923 and the 1931 Constitutions left the king discretion to answer deferred questions by decree, the government under the 1931 Constitution was careful

never to exercise any of its latent powers in a way that would offend powerful stakeholders.

Many commentators seem to regret the fact that the Afghan governments that ruled under the earlier days of the 1931 Constitution followed policies less liberal than those implemented by the government that ruled under the 1923 Constitution.⁷⁰ However, if one sees constitutions as being coordination devices, as this dissertation does, then the 1931 Constitution was effective and deferral played a large role in its success.

Finally, Chapter One attempts to explain why, over time, the 1931 Constitution ceased to be viable as a coordination device, and explores the challenge that Afghan regimes began to face in the second half of the twentieth century when satisfying old elites ceased to be a sufficient way to prevent coordination failure. During this time, new groups were attracting support and uniting under the banner of ideologies such as democratic liberalism, communism, and modernist Islamism. As new ideological groups became self-conscious and powerful, Afghan governments found it increasingly hard to govern in a way that was satisfactory both to old elites and to the increasingly assertive new elites. The government tried and failed to coordinate these new groups through the adoption of the 1964 Constitution.

Chapter Two explores why from 1964 to 2001, no government was able to successfully draft a constitution that gained sufficient acquiescence for a sufficiently long time that it could be considered an effective coordination device. It explores why the

⁷⁰ See, e.g., LOUIS DUPREE, *AFGHANISTAN* (1973); AMIN SAIKAL, *MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* (2005).

1964, so-called “liberal,”⁷¹ Constitution failed in its attempts to coordinate, Afghanistan’s increasingly complex polity. It then discusses the forty-year period of political contests in which ideologically-committed Afghan political groups instigated rebellions that brought them temporarily to power.

The chapter further discusses how, during their brief period in power, each of these mutually antagonistic ideological groups drafted a constitution that reflected its own controversial, divisive ideology. These constitutions failed to defer on the most divisive questions. As a result, Afghanistan experienced a series of constitutional and coordination failures. Each regime hoped that with the assistance of foreign allies, it would be able to exercise sufficient military power that it could impose its unpopular policies. In practice, however, even with the assistance of foreign allies, no Afghan executive from 1974 onwards was able to compel dissenting factions into obedience. During that period, subsequent regimes with differing ideologies tried to establish strongly centralized governments whose policies antagonized powerful local figures and other ideological groups, but their ideologies had narrow appeal, and they did not have the disproportionate military power that they needed to compel obedience from their disgruntled and ideological opponents.

With that background, this dissertation turns to the history of the 2004 Constitution. Chapter Three makes clear that the Afghans who set out to make a new constitution in 2002-2004 were attempting to break the cycle of short-lived, failed constitutions. It focuses on the Bonn process, which established a procedure for drafting the new constitution. In 2001, an external military invasion toppled the unpopular Taliban

⁷¹ DUPREE, *supra* note 70; Said Amir Arjomand, *Constitutional Development in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. R. 943 (2005).

regime. The international community then assembled in Bonn many people previously associated with failed experiments at coordinating Afghanistan, people who, when ousted from power, had resisted the attempts of their successors to coordinate in a different way. Those who initiated the process and those who participated in it committed themselves to try again and to develop a new constitution for Afghanistan that could coordinate most of Afghanistan's powerful political groups. These people became "insiders" at the 2002-2004 constitutional negotiations. At the same time, the Bonn process made a risky bet that it could treat the Taliban as a faction who would be too powerless to disrupt the political order, and did not need to be included in the constitutional negotiations

Chapter Four explores the history of the drafting of the 2004 Constitution through the paradigm of coordination, constitutional deferral, and incremental constitutionalism. It analyzes the work of the Constitutional Drafting and Constitutional Review Commissions to suggest that although they did not speak in the language of comparative constitutional theorists and did not use terms like "coordination," those involved in the drafting and revision of the 2004 Constitution clearly understood their task as one of creating a constitution to which their constituents could acquiesce.

While each would gladly have drafted a constitution modeled on one of the ideologically informed constitutions of the past, they disagreed about which of those previous constitutions was preferable. Their goal was to create a constitution that laid down rules to which they could all acquiesce and that could serve as a coordination device for politics in the new Afghan state. They also realized that to achieve this goal, it was useful to engage in both explicit and implicit constitutional deferral. For example, although this is not apparent from the text of the 2004 Constitution, those who drafted

and ratified the Constitution saw themselves as deferring on the structure of the government because they approved a presidential system only after receiving verbal assurances that the government would be willing to revisit in the near future the decision to adopt such a system and would be willing to move to a different type of system.

The 2004 Constitution also contains significant ambiguities in the way that Islam affects state behavior. The Constitution provides that state legislation should respect Islam, but does not clarify how much or whose Islam.⁷² It also provides guarantees to fundamental rights, but leaves it to the legislature to define the scope of these rights.⁷³ Similarly, the Constitution defers on which institution conducts constitutional review, including constitutional interpretation, let alone which body resolves deferred questions.⁷⁴ It leaves these questions to be answered through the ordinary political process by the ordinary legislative and judicial institutions. The hope was that when the time came to answer these questions, the answer would take a form that continued to be acceptable—if not ideal—for their constituencies.

Chapter Five describes how the 2004 Constitution was received by the governing elites of Afghanistan and by the people. It examines why, early on, the Constitution was attractive to broad segments of the Afghan population. Elites and the people as a whole were willing to acquiesce in the rules set out by the Constitution—enough so that the 2004 Constitution has survived for longer than any other, with the exception of the 1931 Constitution. It also explores why this acquiescence has begun to break down.

⁷² QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 3, OFFICIAL GAZETTE NO. 818, 1382 [2004].

⁷³ *Id.* arts. 22-50.

⁷⁴ *Id.* arts. 121, 157.

In addition, Chapter Five suggests that the drafters' decision to defer on numerous questions promoted acquiescence and coordination in some ways, but that it hindered those goals in others. In 2002-2004 Afghanistan was concerned with re-establishing physical security and rebuilding a shattered economy; the weakened government would probably not have the power necessary to enforce either religious or human rights clauses. In this context, Afghan elites and everyday people alike were comfortable leaving to the future important ideological questions that the constitution left open, including the scope of the guarantees of fundamental rights and the constraints ideological clauses may have put on executive power. Although people had unresolved reservations about some of the ideological abstractions written into the document, they considered them to be second order questions given the high stakes of the circumstances. So long as the state did not formally adopt a position with which they disagreed, they were willing to hold the debate later.

Chapter Five reveals that some of these constitutional deferrals have proven to be problematic, in part, because powerful actors have tried to use the political process to answer questions left open by the Constitution, thereby provoking unrest. Among these are questions about the structure of the government, and the electoral system. Throughout his two terms in office under the 2004 Constitution, President Hamid Karzai repeatedly argued that ambiguous provisions in the Constitution should be interpreted in a way that, in theory, allowed him to entrench himself. More controversial still, he exercised his contested powers in a way that systematically promoted his own interests and those of his political allies. As a result, Karzai's opponents began to work together to argue for alternative interpretations of the Constitution and to ensure that the few institutions that

protected their political interests maintained, in practice, their independence and power.⁷⁵ A disputed presidential election after President Karzai left office only intensified the battle between the supporters of a strong presidency and other stakeholders whose only power lay in the parliament. As the president claimed to answer a growing number of deferred questions, and did so in ways that offended important political figures, some of those figures began to threaten to stop playing by the rules of the Constitution. At the same time, disgruntled outsiders who had never accepted the 2004 constitutional order, including the Taliban, were gaining in strength in large areas of the country. These combined challenges to the constitutional order have been so strong that there is now broad recognition that the 2004 Constitution, as it has come to be interpreted, will not be able to coordinate Afghanistan effectively for the long term. There is agreement on some, but not all, of the changes necessary to make it more effective.

Chapter Six considers some lessons that can be drawn from this analysis of the history of Afghan constitutions, and it attempts to determine whether these lessons can inform constitution-making processes in other divided societies that are struggling to reform their shattered polities. The chapter argues that, as a general matter, it is useful to conceptualize and evaluate constitutions as coordination devices and to think carefully about the role that deferral plays in ensuring that constitutions coordinate effectively. These explanations enable a better understanding of some otherwise puzzling aspects of Afghan constitutional history. This chapter explores some of the implications that Afghan history might hold for those who study comparative constitutional law, and provides new data points that can help answer unresolved questions about constitutional deferral—such

⁷⁵ See, *infra*, Chapter Five.

as, what types of deferral are most useful and under what circumstances? What types are most harmful?

Chapter Six further suggests some adjustments to improve the current Afghan Constitution to ensure continued acquiescence and coordination. Finally, it explores the failed constitution-making processes in Libya and Yemen, as two examples from divided societies, to indicate that coordination is more important than mere contract, and that constitution-making in those countries might not succeed unless they bring all the relevant players with guns to the table and draft a constitution that is directed at coordination.

III. The Academic Contribution of this Dissertation

By using the lens of coordination and deferral theory to tell a new history of Afghan constitutions, including the 2004 Constitution, this dissertation adds in several ways to our understanding of Afghanistan, as well as to issues of great importance to comparative constitutional scholarship. First, this dissertation contributes to the literature on Afghan political and legal history. While asking us to reconsider the way that we have told the story of Afghanistan's twentieth century constitutions, it also provides the most comprehensive history of Afghanistan's first constitution of the twenty-first century by uncovering facts that have not been discussed before. Second, it contributes to the field of comparative constitutional law by considering how examining Afghanistan's constitutional experience can help us build a more nuanced understanding of phenomena such as constitutional coordination and constitutional deferral.

To understand fully the nature of this dissertation's contribution to comparative constitutional studies, one needs to understand a bit about the state of the field. Scholars

of comparative constitutional law use a variety of different methods, and there is some tension among the practitioners of these methods.⁷⁶ Many of the most prominent scholars today engage primarily in large-n quantitative empirical studies.⁷⁷ Other scholars argue, however, that unexpected occurrences and the contingent information matter more than empiricists are willing to admit.⁷⁸ It does only a limited amount of good to say that the life expectancy of a constitution with a large number of deferrals is, on average, higher than the life expectancy of a clear and fixed constitution, or that a constitution with more deferrals might serve as better coordination device. What most scholars want to know about constitutions is whether Afghanistan or France, for example, would do better if a constitution they drafted with certain types of ambiguity used to resolve their own political challenges. Thus, a typical and urgent issue in constitutional studies is to know whether the experiences of one constitutional setting are helpful for understanding another. This depends on how similar other constitutional systems are to one's own or whether they have dealt with the same types of historical problems. While large-n studies may be useful for identifying patterns and probabilities, it is essential to supplement them with a detailed study of individual constitutions, studies that are sometimes described as "constitutional ethnography."⁷⁹

⁷⁶ See generally, Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law in The Migration of Constitutional Ideas* (Sujit Choudhry ed. 2007).

⁷⁷ See e.g., Tom Ginsburg, Zachary Elkins, & James Melton, *The Lifespan of Written Constitutions*, THE RECORD ONLINE (Spring 2009), <http://www.law.uchicago.edu/alumni/magazine/lifespan>; David S. Law, Mila Versteeg, *Sham Constitutions* 101 CAL. L. REV. 863 (2013); Elkins, Zachary, Tom Ginsburg, & James Melton, *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg; Alberto Simpser, eds., 2014).

⁷⁸ See generally, Kim Lane Scheppele, *Constitutional Ethnography: An Introduction* 38 L. & SOC. R. 389 (2004).

⁷⁹ *Id.*

While each specific constitutional setting has distinctive features that cannot be generalized, a particular constitutional context does have logics that link various specific features found in the particular case into patterns whose traces may also be visible elsewhere with different specific manifestations. As a constitutional ethnography, this research emphasizes the particularities of the Afghan constitutions. It also has theoretical contributions by practically examining certain generalizations that have been made in the scholarship on constitutional coordination and constitutional deferral.

Finally, this dissertation should be helpful to academics and policy makers who are currently grappling with how to approach thorny problems of constitutional design and nation-building in post-conflict countries.

Part I: A History of Afghan Constitutions 1923-2001

Chapter One:

From “Yaghistan” to “Afghanistan”: Early Attempts to Coordinate the Peoples of

Afghanistan

For millennia, the land now called Afghanistan sat in the center of the action, the meeting place of four ecological and cultural areas: the Middle East, Central Asia, the Indian subcontinent and even the Far East...until 1890, the process of alternating fusion and fission dominated the political scene. By political fusion and fission, I mean the following pattern of events: A charismatic leader arises in a tribal society and by military power, intrigue and judiciously arranged marriages, unites several tribes into a confederation which spreads as far as its accumulated power permits, creating an empire not a nation-state. With (sometimes before) the death of the emperor, fission occurs. . . Created partly as a result of imperialism, but never a colony, Afghanistan, like all new states, now tries to build a stable nation . . . The task of achieving stability may not be impossible, but it is certainly challenging.

--Louis Dupree¹

The nation state of “Afghanistan” emerged towards the end of the nineteenth century. Before then, the region was simply a harsh ecological space, primarily mountainous and populated by diverse groups of people, organized by tribes.² Among the various Afghan ethnic groups were the Pashtuns, who resided in the south and east of the country, while other groups inhabited the northern parts of the territory of today’s Afghanistan.³ The land that became “Afghanistan” was surrounded on all sides by empires, and from the earliest recorded times, it was the meeting place of many peoples.⁴ Standing as it does on the high road between Eastern and Western Asia, and on the fringe of the empires that

¹ LOUIS DUPREE, AFGHANISTAN xvii-xx (1973).

² *See generally*, JOSEPH PIERRE FERRIER, THE HISTORY OF THE AFGHANS (1858); 1 PERCY SYKES, A HISTORY OF AFGHANISTAN 13 (1940).

³ VARTAN GREGORIAN, THE EMERGENCE OF MODERN AFGHANISTAN: POLITICS OF REFORM AND MODERNIZATION 1880-1946, 25-38 (1967); GENERAL GEORGE MACMUNN, AFGHANISTAN: FROM DARIUS TO AMANULLAH 18-25 (1929); THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 23-32 (2010).

⁴ WILLIAM KERR FRASER-TYTLER, AFGHANISTAN: A STUDY OF POLITICAL DEVELOPMENT IN CENTRAL ASIA 47 (1950).

rose and fell in Persia and India, Afghanistan was affected by the stream of migration from Northern Asia, and by the retreat and flow of conquest from the west and south.⁵

Empires based in more fertile regions often met and fought in this space—with the winner often demanding that the local population recognize its sovereignty. As Thomas Barfield notes, “Indeed [the area] had a positively magnetic attraction for conquerors, not because they coveted the wealth of Afghanistan, but because control of the Afghan territory gave them access to more prosperous places like India or Central Asia, or because it gave them control of the trade routes.”⁶ Thus, for most of the past two and a half millennia, the land currently known as Afghanistan was conquered and formed parts of larger empires, constituting a frontier zone of conflict between neighboring empires, such as those based in today’s Iran and India.⁷ Sometimes, however, indigenous leaders in the area were able to unite local tribes and conquer parts of the fertile neighboring regions. This would be the case in the nineteenth century, when the world began to divide into nation states.

In the middle of the eighteenth century, as European nation states were forming and embarking on colonial adventures in Asia, a group of Pashtun tribal leaders elected one of their own to serve as *primus inter pares*. Formally adopting the title of “king,” this leader, Ahmad Shah Durrani and his successors from the Durrani tribe, would create a powerful confederation of Pashtun tribes and would conquer the lands that currently

⁵ *Id.*

⁶ BARFIELD, *supra* note 3.

⁷ HENRY WALTER BELLEW, *JOURNAL OF A POLITICAL MISSION TO AFGHANISTAN IN 1857, WITH AN ACCOUNT OF COUNTRY AND THE PEOPLE* 78-80 (1962).

make up Afghanistan and lands that today fall inside the borders of India, Iran, and several Central Asian nation states to the north.⁸

In the nineteenth century, leadership of the confederation and sovereignty over the lands under its control would pass into the hands of another tribal clan, the Mohammadzai clan.⁹ At the time that the Durrani and Mohammadzai-led confederations were consolidating their power, Pashtuns were commonly referred to as “Afghans.”¹⁰ Accordingly, outsiders came to call the lands controlled by the Pashtun confederation the “kingdom of the Afghans” or “Afghanistan.”¹¹

In the nineteenth century, the borders of Afghanistan were shaped by a contest between two colonial powers—each of which had established itself in one of the fertile regions bordering the lands that are now part of Afghanistan. The British government colonized the Indian sub-continent, and the Russian Empire expanded into Central Asia.¹² Over the course of the nineteenth and early twentieth centuries, international law would fix the boundaries of these empires. Between the areas controlled by these empires sat

⁸ FRASER-TYTLER, *supra* note 4, at 62-63; GREGORIAN, *supra* note 3, at 48-49; MACMUNN, *supra* note 3, at 60.

⁹ *See generally*, DUPREE, *supra* note 1; BARFIELD, *supra* note 3; GREGORIAN, *supra* note 3.

¹⁰ AMIN SAIKAL, *AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL*, 18 (2004).

¹¹ *See, e.g.*, 1 & 2 GEORGE FORSTER, *A JOURNEY FROM BENGAL TO ENGLAND, THROUGH THE NORTHERN PART OF INDIA, KASHMIRE, AFGHANISTAN, AND PERSIA, AND INTO RUSSIA, BY THE CASPIAN-SEA* (1798); *see also* FERRIER, *supra* note 2; HENRY WALTER BELLEW, *THE RACES OF AFGHANISTAN, BEING A BRIEF ACCOUNT OF THE PRINCIPAL NATIONS INHABITING THE COUNTRY* (1880); HENRY WALTER BELLEW, *AFGHANISTAN AND THE AFGHANS: BEING A BRIEF REVIEW OF THE HISTORY OF THE COUNTRY, AND ACCOUNT OF ITS PEOPLE, WITH A SPECIAL REFERENCE TO THE PRESENT CRISIS AND WAR WITH THE AMIR SHER ALI KHAN* (1879).

¹² *See generally*, WILLIAM DALRYMPLE, *THE RETURN OF A KING: THE BATTLE FOR AFGHANISTAN 1939-42* (2014); *see also* GREGORIAN, *supra* note 3, at 91-93 (1967); DUPREE, *supra* note 1, at 363, 370-375; MIR MOHAMMAD SEDIQ FARHANG, *AFGHANISTAN DAR PANJ QARN-I ĀKIR 159-180 [AFGHANISTAN IN THE LAST FIVE CENTURIES]* (1371) [1992].

regions that had historically been parts of tribal empires, tribes that had never been annexed by either of the great empires. Bordered on the west by the nation of Iran, to the south by the British Raj in India, and to the north by the Russian Empire, this space was marked on maps as Afghanistan¹³ as early as the rise of the Durrani Empire.¹⁴

This new state of Afghanistan was ethnically, linguistically, and in some ways, religiously diverse. The inhabitants of nineteenth and early twentieth century Afghanistan included Pashtuns, Persians, Turks, the Uzbeks of Oxus Valley, Mongolians, and Aryans of the Hindu Kush.¹⁵ Vartan Gregorian states that “[n]owhere is the difficult legacy of Afghanistan more sharply revealed than in her ethnic mosaic and socioeconomic structure.”¹⁶

Throughout its history, Afghanistan’s linguistic, racial, cultural, and religious diversities, coupled with the country’s predominantly semi-feudal, tribal and nomadic social organization, presented great obstacles to coordination and development of a modern state.¹⁷ Early Afghan rulers took pains to coordinate all political factions of the divided society. The problem of coordination was partly regional and partly religious. The regionalist tribes demanded autonomy and did not submit to any central authority over their regions.¹⁸ The traditionalist ‘*ulamā*’—the class of people formally schooled in Islamic scriptures, theology and law—demanded that they take control over the

¹³ See generally, GREGORIAN, *supra* note 3; DUPREE, *supra* note 1, at vii-xiv.

¹⁴ See generally, FORSTER, *supra* note 11.

¹⁵ SYKES, *supra* note 2, at 13; For a complete description of the ethnic groups who resided in today’s Afghanistan, see DUPREE, *supra* note 1, at 57-65; GREGORIAN, *supra* note 3, at 25-37; FRASER-TYTLER, *supra* note 4, at 47-61; BARFIELD, *supra* note 6, at 23-30.

¹⁶ GREGORIAN, *supra* note 3, at 25 (1967); BARFIELD, *supra* note 6, at 17-30.

¹⁷ SYKES, *supra* note 2, at 13; GREGORIAN, *supra* note 3, at 25; DUPREE, *supra* note 1, at 57.

¹⁸ FRASER-TYTLER, *supra* note 4, at 61-62.

administration of justice and the interpretation of the *Sharī'a*, arguably through their traditionalist approaches.

To understand how communal differences and tribalism created challenges for early rulers who wanted to politically coordinate the society and bureaucratize the state, it is important to remember that power flowed from the highly armed people up through several chains of elected leaders and on to the king of the land.¹⁹ The financial position and the military power of a tribal “king” depended upon his ability to summon levies of tribal warriors from the regional notables or tribal chieftains who paid allegiance to him.²⁰ The ability of the notables to provide those soldiers depended, in turn, upon the goodwill of the families of those soldiers. If those families challenged the legitimacy of a summons, their children might not answer the notable’s summons. The king could not solicit warriors without acting in a way that promoted the interests of the tribal notables, and to do this, arguably he had to empower the tribal notables to promote the interests of the families within his tribe. He also had to be sensitive to the religious sensibilities of local religious leaders who were deeply ambivalent about any attempt to centralize governance or to unify the laws of the country that threatened their power and influence over the local population and vis-à-vis the state.²¹

Afghan and outside observers often assert that the vast majority of the people of what is today Afghanistan have for many centuries been united by a common allegiance to

¹⁹ QAZI ATAULLAH KHAN, *DA PAKHTANO TARĪKH* 99 [HISTORY OF THE PAKHTOONS] (1962).

²⁰ *See generally, id.*

²¹ *Id.*

Islam.²² At a broad level of generality, that is true. At the same time, in some mountain valleys of the Northeast, one could find regions peopled by pagan tribes.²³ In the cities, one could find urban communities who practiced Hinduism, Buddhism, or other religions.²⁴ Nonetheless, the overwhelming majority of people living under the Afghan kings considered themselves to be Muslim.²⁵

Islam constituted the ideological framework of references for almost all members of Afghanistan's ethnically heterogeneous and divided society.²⁶ Islam was also part of the legal and moral basis of the society guiding policies.²⁷ For many centuries, all learning and education in the country had taken place within an exclusively religious framework.²⁸ As a result, every educated person was trained in Islam by a member of the 'ulamā. By necessity, all public offices that required literacy, had to be staffed by people who had been trained by the 'ulamā.²⁹ The 'ulamā' thus enjoyed considerable power and influence in the areas of education, administration of justice, and enforcement of public morals.³⁰ It

²² See generally, Ashraf Ghani, *Islam and State-Building in a Tribal Society Afghanistan: 1880-1891*, 12 MODERN ASIAN STUD. 269 (1978); GREGORIAN, *supra* note 3, at 39.

²³ HENRY WALTER BELLEW, *JOURNAL OF A POLITICAL MISSION TO AFGHANISTAN IN 1857, WITH AN ACCOUNT OF COUNTRY AND THE PEOPLE*, 18 (1962); FRASER-TYTLER, *supra* note 4, at 57; GREGORIAN, *supra* note 3, at 37.

²⁴ AGNUS HAMILTON, *AFGHANISTAN*, 148 (1910); JAMES BAILLIE FRASER, *HISTORICAL AND DESCRIPTIVE ACCOUNT OF PERSIA, FROM THE EARLIEST AGES TO THE PRESENT TIME: WITH A DETAILED VIEW OF ITS RESOURCES, GOVERNMENT, POPULATION, NATIONAL HISTORY, AND THE CHARACTER OF ITS INHABITANTS, PARTICULARLY OF THE WANDERING TRIBES, INCLUDING A DESCRIPTION OF AFGHANISTAN AND BALOOCHISTAN* (1834).

²⁵ See generally, Ghani (1978), *supra* note 22.

²⁶ ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* 36 (1995).

²⁷ *Id.*

²⁸ *Id.*

²⁹ GREGORIAN, *supra* note 3, at 38; see also, MOUNTSTUART ELPHINSTONE, *AN ACCOUNT OF THE KINGDOM OF CAUBUL, AND ITS DEPENDENCIES IN PERSIA, TARTARY, AND INDIA COMPRISING A VIEW ON THE AFGHAUN NATION, AND A HISTORY OF THE DOORAUNEE MONARCHY 277-78* (Kessinger, 2008); OLESEN, *supra* note 26, at 36.

³⁰ OLESEN, *supra* note 26, at 36.

is therefore unsurprising that Afghan governments have turned to Islam to create a sense of national identity, common purpose among their people, and ideological justification for their power.³¹

Looking below the surface, however, Islam in eighteenth and nineteenth century “Afghanistan” was less homogenous and less effective as a unifying force than the rulers might have hoped. In reality, there was no unified approach to Islam among the people.³² In the land that Ahmad Shah ruled, the majority of the inhabitants were Sunni Muslims who allied themselves with the teachings of the *Sharī‘a* Hanafi school. There was, however, a large number of Shi’ites from the Twelve Shi’ite Sects, also called *Ja‘farī* Shi’ites.³³ They inhabited an immense track of central Afghanistan in the region of Bamyan.³⁴ In addition, there were some communities who followed a rival sect of Shi’ism—*Isma‘ilī* Shi’ism.³⁵ These communities are located in the mountainous regions of Badakhshan and Wakhan.³⁶

Members of different sects of Islam looked to rival religious texts and authorities for guidance. They often had different views about the morality of a particular private deed or legitimacy of a particular government action. Even within a single sect, religious authorities were not organized in a hierarchical fashion.³⁷ Islamic doctrine taught that different scholars might reach different conclusions on many different questions of

³¹ For example, in order to broaden his basis of support, Ahmad Shah appealed to the Afghans’ religious ties, common nationality, patriotism and national honor.

³² Ghani (1978), *supra* note 22, at 270-77.

³³ GREGORIAN, *supra* note 3, at 38; OLESEN, *supra* note 26, at 53.

³⁴ FRASER-TYTLER, *supra* note 4, at 57; GREGORIAN, *supra* note 3, at 38; BARFIELD, *supra* note 3, at 26.

³⁵ GREGORIAN, *supra* note 3, at 38.

³⁶ *Id.*

³⁷ Ghani (1978), *supra* note 22, at 272.

religious law; it was to be expected that even within a single sect, different scholars might teach a different approach to Islam. Within any given sect, individuals had considerable freedom to select for themselves the scholar that they would follow. Therefore, different Hanafi Sunni clans might look to different Hanafi scholars for guidance. The same was true among *Ja'farī* Shi'ite clans.

While the functioning of the Afghan state depended upon these religious personnel and many others of religious learning, these scholars did not recognize an internal hierarchy. There was no formal centralized structure to coordinate their interpretations of Islamic law, nor was there any national-level organization.³⁸ The power of religious leaders depended upon the power of the people who followed them. A religious leader could be powerful because he had the ear of the king, or because he had the ear of a local notable upon whom the king himself depended.³⁹

Because of their own internal divisions and the local nature of their power, the '*ulamā*' were not well suited to dictate national policy on a daily basis.⁴⁰ On certain core issues, however, the '*ulamā*' regularly found themselves united. Sometimes this had the effect of supporting policies that empowered the central government. For example, the '*ulamā*' often united behind a king's calls for tribes to support wars of conquest against non-Muslim neighbors or to repel invasions by non-Muslim enemies.⁴¹ In many cases,

³⁸ OLESEN, *supra* note 26, at 37 (1995); *see generally*, Amin Tarzi, the Judicial State: Evolution and Centralization of Courts in Afghanistan, 1883, 1896, unpublished Dissertation, Department of Middle East Studies, New York University (2003).

³⁹ *See generally*, QAZI ATAULLAH KHAN, *supra* note 19; *see also*, GANDA SINGH, AHMAD SHAH DURRANI: FATHER OF MODERN AFGHANISTAN (1959).

⁴⁰ *See generally*, Ghani (1978), *supra* note 22; *see also* Ashraf Ghani, *Afghanistan: Islam and Counterrevolutionary Movements*, in ISLAM IN ASIA: RELIGION, POLITICS, AND SOCIETY (John Esposito ed., 1987).

⁴¹ *See generally*, DUPREE, *supra* note 1; *see also*, GREGORIAN, *supra* note 3.

however, they united to resist over-aggressive attempts to centralize national policy—a development that threatened to strip their local followers, and by extension themselves, of rights and privileges.⁴² They were wary of royal attempts to unify the administration of policies over local areas or to unify the administration of law around the country. These attempts included requiring judges to apply a ruler’s interpretation of God’s law over that of the local ‘*ulamā*’, and subjecting these rulings to review by courts in the capital. These policies, which could reduce the control of the ‘*ulamā*’ over their own communities, tended to unite the ‘*ulamā*’ and to provoke joint resistance. Therefore, far from being a uniformly centralizing force, Islam in eighteenth and nineteenth century “Afghanistan” played a multi-dimensional role.

When the “proto-state of Afghanistan” emerged in mid-eighteenth century, the population lacked geographic, ethnic, linguistic, political, or even religious unity. Society was also organized by tribal affiliation, with vast areas controlled by powerful tribes who were themselves governed in a decentralized manner and were hostile to the idea of centralized authority.⁴³ While the country was overwhelmingly Muslim on the surface, and Islam could unite powerful factions behind a king and his policies, Afghan understandings of Islam were hardly uniform.⁴⁴ Local religious leaders were ambivalent about any attempt to empower the central government if they believed that the empowered ruler might limit their ability to control local behavior.

⁴² Ghani (1978), *supra* note 22, at 272; OLESEN, *supra* note 26, at 37.

⁴³ QAZI ATAULLAH KHAN, *supra* note 19, at 98-103.

⁴⁴ Ashraf Ghani has commented that the religious establishment could not be sociologically isolated as a group with distinctive style of life and potential access to power, and ideologically they did not follow one uniform doctrine. Their interpretation differed widely from one another and there was no religious organization to impose a unity of belief on them, at least until the rise of Amir Abdul Rahman Khan. Ghani (1978), *supra* note 22, at 272.

Ahmad Shah and his successors were challenged by this complexity as they struggled to coordinate different sections of the society and create a centralized nation-state within the Afghan territory. Their efforts to coordinate resulted in the rise of some unwritten constitutional principles that defined the power relationship between the government and the people. These principles included the following: (1) that rulers must recognize the power of the regional notables; (2) to the extent that rulers claimed a right to impose a single body of law and a single set of policies over all the diverse peoples of Afghanistan, they must justify this right in Islamic terms and laws based on traditional Hanafi fiqh; and (3) that the ruler must wait for the members of the *'ulamā'* (as an expert legal body) to say what *Sharī'a* requires and act accordingly.⁴⁵ Prior to the 1880s and the reign of Abdul Rahman Khan, rulers experimented with different degrees of delegation to regional powers—as well as different ways of delegating—to politically coordinate the tribes, the *'ulamā'*, and the palace courtiers. Some chose to avoid imposing their will in these regions, while others tried to build consensus among tribal notables in favor of certain policies. Similarly, over time rulers explored different ways of trying to justify their rule in Islamic terms. Some deferred to the independently organized traditional *'ulamā'*; others tried to organize and control the *'ulamā'* and justify their policies through the state's version of Islam; finally, some turned to modernism.

⁴⁵ *Fatawa-ye Ahmad Shahi*, which was a collection of rules that governed the Durrani Empire during Ahmad Shah, is an example.

I. Abdul Rahman and the Emergence of a Modern “Nation-State” in Afghanistan

In Afghanistan, before the reign of Abdul Rahman Khan, rulers were supposed to be constrained by respect for a particular type of Islam (Hanafi Islam).⁴⁶ In theory, the rulers were supposed to recognize their obligations to act in consultation with the *‘ulamā’*. These scholars were masters of a particular interpretation of Islamic law (the Hanafi *Sharī‘a*). Theoretically, kings were expected to rely on the *‘ulamā’* as legal advisors and as judges in the courts of general jurisdiction.⁴⁷ The ruler could then assert his legitimacy partly through the fact that his advisors and judges ensured that the state acted in a religiously moral fashion and adjudicated disputes according to law that was consistent with *Sharī‘a* (more particularly, Hanafi *Sharī‘a*).⁴⁸ In addition, in dealing with the powerful Pashtun tribes, which formed the military and political backbone of the kingdom, rulers before Abdul Rahman Khan were subject to the same limitations of authority as the tribal chieftains of those relatively egalitarian tribes.⁴⁹ The actions and decisions of the rulers had to conform to *Pashtunwāli* (customary practices used among the Pashtun tribes) and especially to the decision of the *jirgas* (tribal councils), which were based on the concept of communal authority.⁵⁰

⁴⁶ GREGORIAN, *supra* note 3, at 48; ELPHINSTONE, *supra* note 29, at 243-47.

⁴⁷ FERRIER, *supra* note 2, at 302; HAMILTON, *supra* note 24, at 224.

⁴⁸ Asta Olesen, *the Political Uses of Islam in Afghanistan During the Reign of Amir Abdur Rahman (1880-1901)*, in CONTRIBUTION TO ISLAMIC STUDIES: IRAN, AFGHANISTAN AND PAKISTAN 59-105, 59 (Danish Research Council for Humanities, 1987).

⁴⁹ *Id.* at 63.

⁵⁰ *Id.*

At the end of the second Anglo-Afghan War, 1878-1880, Amir Abdul Rahman Khan came to power.⁵¹ In the absence of any other strong leaders after the war, the British supported Abdul Rahman Khan's claim to the throne.⁵² After the new Amir accepted British control over his foreign policy, they also provided the Amir with subsidies and weapons.⁵³ The Amir used these resources to build a strong military, which in turn, he used to suppress the tribes and the traditional 'ulamā'.⁵⁴ As a result, the state survived relying on its official and well-organized military; it did not need to secure the interests of the tribal notables and the 'ulamā' for survival.⁵⁵ The monarch was no longer *primus inter pares*, but rather the only powerful institution.

Abdul Rahman Khan therefore completely abandoned the traditional model of moral and tribal legitimacy, changing the implicit principles of Afghan governance. He began to structure his government on European models of "nation-state," imposing a more intrusive regulatory system and restructuring courts in a way that promoted his vision of Islam, not that of the traditionalist 'ulamā'.⁵⁶ Unlike previous rulers, the new Amir did not need to make compromises with the 'ulamā', but rather imposed his rule directly on all the inhabitants of the land.⁵⁷

⁵¹ See generally, SULTAN MOHAMMAD KHAN, I & II THE LIFE OF ABDUR RAHMAN, AMIR OF AFGHANISTAN (1900); STEPHAN WHEELER, THE AMEER ABDUR RAHMAN (1985).

⁵² SAIKAL, *supra* note 10, at 35.

⁵³ See generally, DUPREE, *supra* note 1; GREGORIAN *supra* note 3; KHAN, *supra* note 51; WHEELER, *supra* note 51.

⁵⁴ See, e.g., MOHAMMAD ESA GHURJISTANI, KALLAH-YE MINĀR HA DAR AFGHANISTAN [MINARETS OF HEADS IN AFGHANISTAN] (1993).

⁵⁵ SAIKAL, *supra* note 10, at 36.

⁵⁶ GREGORIAN, *supra* note 3, at 129-133; Ghani (1978), *supra* note 22, at 273-277; OLESEN, *supra* note 26, at 61-68; Olesen (1987), *supra* note 48, at 64-65.

⁵⁷ See generally, GHURJISTANI, *supra* note 54.

Backed by a strong military, Abdul Rahman Khan began to concentrate power in a centralized government.⁵⁸ He first extinguished the rule of alternative centers of power (the tribes and the 'ulamā').⁵⁹ He did not cede local control to regional notables, instead he justified his exercise of centralized power by advancing a form of Islam that he himself controlled.⁶⁰ In this way, he exercised more control than past rulers by attempting to create official (government controlled) Islamic institutions that promulgated a version of Islam that supported his policies and by claiming to promote the interests of the people—as opposed to promoting the interests of the tribes.⁶¹

Abdul Rahman Khan managed to suppress the 'ulamā' by forcefully establishing a uniform formal religious doctrine and implementing it countrywide.⁶² He checked the moral influence of the 'ulamā' by having them propagate a form of Islam that justified his program of centralization and made the Amir the sole interpreter of religious doctrine.⁶³ He also tried to limit the economic privileges of the 'ulamā'.⁶⁴ In 1885, he declared that most of those who had received grants and salaries from the state for

⁵⁸ See generally, MOHAMMAD HASAN KAKAR, *AFGHANISTAN: A STUDY IN INTERNAL POLITICAL DEVELOPMENTS 1880-1896* (1971); DAVID EDWARDS, *HEROES OF THE AGE: MORAL FAULT LINES ON THE AFGHAN FRONTIER* (1996); MOHAMMAD HASAN KAKAR, *GOVERNMENT AND SOCIETY IN AFGHANISTAN; THE REIGN OF AMIR ABD AL-RAHMAN xx-xxi* (1979); Ghani (1978), *supra* note 22, at 271.

⁵⁹ GREGORIAN, *supra* note 3, at 129-134; DUPREE, *supra* note 1, at 419-421.

⁶⁰ For complete and thorough discussions of how Abdul Rahman Khan used Islam to justify his rule, see Ghani (1978), *supra* note 22; EDWARDS, *supra* note 58; and WHEELER, *supra* note 51.

⁶¹ Ashraf Ghani, *State-Building and Centralization in a Tribal Society: Afghanistan 1880-1891*, 74 (MA Thesis, American University of Beirut). For a fascinating account of these efforts, see also Tarzi, *supra* note 38, at 35.

⁶² Ghani (1978), *supra* note 22, at 272.

⁶³ *Id.*

⁶⁴ Before Abdul Rahman Khan, these 'ulamā' received considerable economic benefits from the state in the form of salaries, grants of land, and exemption from taxation. At the same time, they had substantial respect from the people, playing an active role in all local matters. *Id.* at 273.

allegedly descending from the Prophet of Islam, or for having reputations for being learned in Islam, had in truth no knowledge.⁶⁵ He then proposed an exam to test the credentials of each member of the ‘*ulamā*’ and to determine who actually deserved such grants.⁶⁶ Only those who passed the exam would be employed by the state and receive salaries. In addition, all *auqāfs* (religious endowments) were nationalized by the state and their proceeds were assigned to the upkeep of the official religious institutions.⁶⁷ The reallocation of these proceeds gave the Amir the necessary leverage for reshaping the ‘*ulamā*’ and the official interpretation of Islam.⁶⁸ Only those who fulfilled the necessary requirements were given stipends by the state.⁶⁹

In addition, Sharī‘a courts played a major role in the Amir’s centralization scheme.⁷⁰ He replaced all local mechanisms of dispute resolution and brought them under the direct control of the state. Only the state appointed “*Qādhi*” administered justice.⁷¹ The Amir’s courts applied the *Sharī‘a* based on the state’s interpretation of the Hanafi school.⁷² The crux of the Amir’s efforts was to establish a policy to administer justice based solely on

⁶⁵ *Id.* at 272-74.

⁶⁶ SULTAN MOHAMMAD KHAN, THE LIFE OF AMIR ABDUL RAHMAN, AMIR OF AFGHANISTAN Vol. I 252-53 (1900).

⁶⁷ 3 FAIZ MUHAMMAD KATIB, SERĀJ A-TAWĀRĪKH: THE LANTERN OF HISTORY 475 (1953).

⁶⁸ Ghani (1978), *supra* note 22, at 274-275.

⁶⁹ Attempts to control the ‘*ulamā*’ also included the establishment of a special committee of ‘*ulamā*’ directly appointed by the Amir, which was entrusted with drafting general handbooks of religion as well as pamphlets on various aspects of faith. The Amir himself carefully scrutinized the content of each handbook or pamphlet. Only then did he issue orders for publication. Moreover, some ‘*ulamā*’ were made to travel all around the country to show people the correct forms of religious behavior, the form of religion that the state promoted. *Id.* at 275.

⁷⁰ For an analysis of Abdul Rahman Khan’s centralization of courts, *see generally*, Tarzi, *supra* note 38.

⁷¹ *Id.*; *see also*, Ghani (1978), *supra* note 22.

⁷² HAMILTON, *supra* note 24, at 231-32; GREGORIAN, *supra* note 3, at 136; OLESEN, *supra* note 26, at 62-63.

the Hanafī *Shari‘a* to serve as the law for all inhabitants of Afghanistan. He proclaimed that the royal decrees he issued would reflect divine commands, but the Amir himself would determine this compliance.⁷³ Therefore, deviation from his decrees was equal to disobedience of divine rules.⁷⁴

Through these policies, Abdul Rahman Khan managed to create a centralized nation-state, a goal that many earlier Afghan rulers had tried but wholly failed to achieve. Much of the existing scholarship on this history attributes the Amir’s success to his ability to provide strong religious arguments for his policies.⁷⁵ While these justifications may have played a role, Abdul Rahman was mostly successful because he had a strong military that backed his reforms and suppressed tribal and religious opposition. Indeed, he initiated what one commentator has called the “reign of terror.”⁷⁶ The tribes and the ‘*ulamā*’ did not necessarily agree with the Amir on his religious arguments, but they feared that resistance to the Amir meant certain death.⁷⁷ The tribal aristocrats and the ‘*ulamā*’ did oppose the Amir’s policies and his Islamic argument, but they were crushed by the Amir’s well-equipped army. At least, forty rebellions took place during the Amir’s reign,

⁷³ Tarzi, *supra* note 38, at 141-42.

⁷⁴ *Id.* at 142.

⁷⁵ For instance, Abdul Rahman Khan claimed to be “God-sent, answering the prayers of the Afghans to deliver the nation from the distress following the second Anglo-Afghan War of 1878.” Declaring himself the champion of Islam and the liberator of Afghanistan from “infidel and foreign” domination, the Amir effectively used the theme of imminent external aggression and the need for national unity in a religious context and to justify his centralization policies. For each of his centralization policies, the Amir provided religious arguments. *See e.g.*, Ghani (1978), *supra* note 22, at 274.

⁷⁶ *See generally*, GHURJISTANI, *supra* note 54.

⁷⁷ The Amir created a dreadful spy system that reported to on any opposition that existed in the Kingdom.

challenging his centralization policies.⁷⁸ Had the Amir been militarily weak, these rebellions would have overthrown him with great ease.

In sum, Abdul Rahman Khan established the governmental structure for an Afghan nation-state, changing the implicit principles of governance that have been followed ever since.⁷⁹ These principles included the following: (1) all power resides in the state, and regional tribes do not have any regional autonomy; (2) the Hanafi *Sharī'a* should be the supreme law of the land, and the Amir's laws should comply with Hanafi Islam, not the traditional *'ulamā'*'s interpretation, but the state's version of Islam (the state's version of Islam might be called "neo-traditionalist Islam"); and (3) the state would determine whether or not it had legislated in accordance with Hanafi Islam.

Interestingly, however, Amir Abdul Rahman Khan did not entrench this structure through the technology of a written constitution, believing that, at the time, Afghanistan was not ready to be coordinated that way.⁸⁰ Instead, he deferred the entire project of constitution-making to a time when the people had "become accustomed to modern innovations."⁸¹ However, after his death, Afghan rulers would draft constitutions that reflected principles of governance that developed under his rule. Many failed to succeed because they did not have the dominant military power that the Amir possessed.

⁷⁸ BARFIELD, *supra* note 3 at 5; KAKAR (1979), *supra* note 58, at xxi.

⁷⁹ KAKAR (1979), *supra* note 58, at 22; SULTAN MOHAMMAD KHAN, CONSTITUTION AND LAWS OF AFGHANISTAN 56-67 (Cambridge 1900).

⁸⁰ KHAN, *supra* note 79, at 56-59.

⁸¹ *See generally*, KHAN, *supra* note 51; KAKAR (1979), *supra* note 58.

II. From “Unwritten” Constitutional Principles to “Written” Constitutions: Attempts at Coordination Through a New Technology

After the death of Abdul Rahman Khan, his son, Habibullah Khan, came to power. Habibullah Khan’s reign inaugurated a formative, eventful, and interesting period in the evolution of Afghan politics and society. The Anglo-Russian competition for dominance in Central Asia (popularly known as the Great Game) at the beginning of the twentieth century,⁸² helped generate a “nationalist reformist movement that put Afghanistan on a speedy course of change to “modernize and achieve full independence.”⁸³ Unlike his father, Habibullah proved more politically astute, socio-culturally open minded, and amenable to “modern” changes.⁸⁴ He came to power at a time when Afghanistan could no longer remain distant from certain reformist and nationalist movements that were deeply affecting a number of regional Muslim states.

Two developments were particularly important in this period. The first was the pan-Islamic efforts of the celebrated Afghan thinker, Sayyid Jamaluddin al-Afghani (1839-1897), which called for the reformation and unity of the Muslim world against British and colonial domination.⁸⁵ The second concerned the fact that a number of Muslim states, especially Iran, Ottoman Turkey and Egypt, were undergoing growing demands for internal reform and for resistance to outside intervention.⁸⁶ These demands resulted in

⁸² On the Anglo-Russian competition for dominance in Central Asia at this period, *see* EVGENY SERGEEV, *THE GREAT GAME, 1856-1907: RUSSO-BRITISH RELATIONS IN CENTRAL AND EAST ASIA* (2014); PETER HOPKIRK, *THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA* (1992).

⁸³ SAIKAL, *supra* note 10, at 40.

⁸⁴ *Id.* at 41

⁸⁵ OLESEN, *supra* note 26, at 100; *Id.*

⁸⁶ SAIKAL *supra* note 10, at 41; OLESEN, *supra* note 26, at 100.

major national and regional changes and influenced the rise of modernist and nationalist thinking in Afghanistan.

One of the first tasks of the new Amir was to restore the monarchy's relations with the tribes and the traditional *'ulamā'*. He attempted to broaden the base of his power by improving the strained relations of the monarchy with the tribes by substituting cooperation for coercion.⁸⁷ Habibullah Khan appointed a tribal council to handle tribal matters in a way that secured each regional tribe's interests.⁸⁸ Similarly, under Habibullah, the *'ulamā'* regained substantial political power, and they influenced many of his decisions, although they did not regain their complete independence from the state.⁸⁹ To consult with the *'ulamā'*, Habibullah Khan created a council composed of the *'ulamā'* called *Jamīyyāt-i Ta'līf-i Fatwāḥ-i Sirāj al-Ahkām* (Society of Writing Rulings from the Lamp of Judgments).⁹⁰ This group was composed of fifty *'ulamā'*, all appointed by the Amir.⁹¹ This group was also engaged in drafting laws based on Hanafī *Sharī'a*.⁹² The Amir also formed another institution called the *Mīzān al-Taḥqīqāt-i Sharī'at*—this was a board of seven *'ulamā'* who ensured that the official policy of the state was in accordance with Islam; they also produced books on fiqh and interpretation of the Qur'an and the hadith.⁹³

In addition, the Amir established the first high school in the country, the Habībya

⁸⁷ GREGORIAN, *supra* note 3, at 181.

⁸⁸ MOHAMMAD ALI, AFGHANISTAN: THE MOHAMMADZAI PERIOD 152-3 (1959); *Id.* at 181.

⁸⁹ DUPREE, *supra* note 1, at 430; OLESEN, *supra* note 26, at 96.

⁹⁰ SAYED MASHUD PUHANYAR, ZŪHŪR-I MASHRŪTIYĀT WA QURBĀNI-I ISTEBDĀD DAR AFGHANISTAN 15 [THE RISE OF CONSTITUTIONALISM AND THE VICTIMS OF AUTHORITARIANISM IN AFGHANISTAN] (1375) [1996].

⁹¹ *Id.*

⁹² *Id.*

⁹³ OLESEN, *supra* note 26, at 96.

High School, where modern education was pursued.⁹⁴ Previously, education was obtained in madrasas (religious schools), where students learned traditional Hanafī Islam; those who wanted to pursue a modern education had to do it outside Afghanistan, mainly in the Ottoman Empire and in India.⁹⁵ In Habībya, Afghan students were introduced to a modern system of education.⁹⁶

During the first quarter of the twentieth century, a new group of intellectuals emerged from the Habībya and obtained permission to publish a bi-weekly journal called *Sirāj al-Akhhbār*.⁹⁷ Known as the “constitutionalists,” this group demanded that Afghanistan be governed by a constitutional monarchy.⁹⁸ They began to debate the degree to which the monarchy (the executive) should be subject to checks, if at all, and if so, what these constraints should include. They demanded establishment of a national assembly of the peoples’ representatives to secure the interests of the people, not that of the regional notables.⁹⁹ However, this movement was abruptly terminated in 1909 when the group openly appealed to the Amir for political change.¹⁰⁰ The Amir became suspicious of the

⁹⁴ FARHANG, *supra* note 12, at 310; *see also*, ABDUL GHANI, A BRIEF POLITICAL HISTORY OF AFGHANISTAN (1989).

⁹⁵ LUDWIG W. ADAMEC, HISTORICAL DICTIONARY OF AFGHANISTAN, 99 (1991); *See also*, GREGORIAN, THE EMERGENCE OF MODERN AFGHANISTAN, 184-85 (1967).

⁹⁶ Initially, the School offered mathematics, geography, calisthenics and the English and Urdu languages, as well as traditional subjects. Eventually, courses in education, physics, chemistry, history, zoology, botany, drawing, painting, and public health were added. GREGORIAN, *supra* note 3, at 184-185.

⁹⁷ ABDUL HAI HABIBI, JUNBISH-I MASHROTYAT DAR AFGHANISTAN 58-59 [CONSTITUTIONAL MOVEMENT IN AFGHANISTAN] (1378) [1999]; MAY SCHINASI, AFGHANISTAN AT THE BEGINNING OF THE TWENTIETH CENTURY: NATIONALISM AND JOURNALISM IN AFGHANISTAN-A STUDY OF SIRAJ AL-AKHBAR, 1911-1918 (1974).

⁹⁸ HABIBI, *supra* note 97, at 58-59.

⁹⁹ *Id.* *See also*, ABDUL GHANI, *supra* note 94.

¹⁰⁰ Amin Tarzi, *Islam and Constitutionalism in Afghanistan*, in 5 J. PERSIANATE. STUD. 205, 208 (2012). For more information on the early constitutional movement and lists of its members, *see* HABIBI, *supra* note 97; 1 MIR GHULAM MOHAMMAD GHUBAR,

movement's real intention (threats of a coup) and ordered the execution of eight of its important members, sending the rest to jail.¹⁰¹ Some members successfully went underground to later emerge as the members of the second constitutional movement.¹⁰²

In 1911, and after many requests, Habibullah Khan once again permitted the constitutionalists to publish *Sirāj al-Akhhbār*.¹⁰³ This time, permission was given to the Ottoman educated Mahmud Tarzi, who had returned to Afghanistan after years of exile.¹⁰⁴ Tarzi's return to Afghanistan coincided with the rise of Afghan nationalism that had already begun to take hold. Tarzi began his efforts to initiate a program of reform in Afghanistan, drawing the Amir's attention to the country's deficiencies in education, communications, and industry, and pointing out the undesirable effects of political, cultural, and intellectual isolation.¹⁰⁵ Tarzi and the surviving constitutionalists used *Sirāj al-Akhhbār* to advocate for social and political reforms.¹⁰⁶ Progress in the educational system and first steps towards a constitutionalist political system were amongst their

AFGHANISTAN DAR MASĪR-I TĀRIKH [AFGHANISTAN IN THE COURSE OF HISTORY] 716-23 (1366) [1987]; FARHANG, *supra* note 12, at 310-13.

¹⁰¹ FARHANG, *supra* note 12, at 312.

¹⁰² Tarzi (2012), *supra* note 100, at 208.

¹⁰³ *Id.*

¹⁰⁴ Mahmud Tarzi was one of Afghanistan's greatest intellectuals. He is known as the father of Afghan journalism. During the reigns of Amir Habibullah and King Amanullah, he held important government positions, and was an important advisor. He worked closely with King Amanullah to bring about reforms, and to modernize the nation. He was highly critical of various religious figures whose ideas kept Islam and its development in the dark ages. *See generally*, RAWAN FARHADI, KHATIRĀT-I MAHMUD-I TARZI [MEMORIES OF MAHMOOD TARZI] [1389] [2010].

¹⁰⁵ SCHINASI (1974), *supra* note 97, at 197; RAWAN FARHADI; MAQĀLĀT-I MAHMUD-I TARZI DAR SIRĀJ AL-AKHBĀR-E AFGHĀNĪYA [THE ARTICLES OF MAHMUD TARZI IN SERAJ AL-AKHBAR OF AFGHANISTAN] (Kabul 1355) [1976]; RAWAN FARHADI, KHATIRĀT-I MAHMUD-I TARZI [MEMORIES OF MAHMOOD TARZI] [1389] [2010]; 8.1 LOUIS DUPREE, MAHMUD TARZI: FORGOTTEN NATIONALIST, AMERICAN UNIVERSITY FIELD STAFF, ASIAN SERIES (1964).

¹⁰⁶ *See generally*, Vartan Gregorian, *Mahmud Tarzi and Saraj-Ol-Akhbar: Ideology of Nationalism and Modernism in Afghanistan*, 21 MIDDLE EAST J. 345-368 (1967).

major goals. Because of the efforts of Tarzi and the constitutionalists, access to education was no longer limited to the court, the aristocracy, and the *'ulamā'*; the urban middle-classes and tribal leaders sent their children to these new state sponsored schools.¹⁰⁷ This way, modern thought slowly penetrated tribal society. As a result of Tarzi's educational reforms, the educated class grew considerably over the following decades, forming a new social group whose interests needed to be secured by the state.¹⁰⁸

Although Amir Habibullah Khan had “ushered in the era of modernization and technological innovation,”¹⁰⁹ his unpopular policies and increasing negligence towards the affairs of state eventually alienated him from the people and the intelligentsia. This upheaval was characterized by complaints and demands for more attention from the central government, but the Amir remained distant from the people's demands.¹¹⁰ Finally, the constitutionalists and the modernists became frustrated with the Amir's foreign and domestic policies, calling for a constitutional monarchy.¹¹¹ In their view, Amanullah Khan, the Amir's son, was just the type of a leader Afghanistan needed.¹¹² Amanullah Khan had expressed sympathy toward liberal causes and possessed a desire for Afghanistan's independence from foreign control.¹¹³ Yet, Habibullah Khan once again terminated the constitutional movement based on reports that the movement wanted to overthrow him and replace the system with a constitutional monarchy.¹¹⁴ Still, these

¹⁰⁷ HABIBI, *supra* note 97, at 58-59.

¹⁰⁸ *See generally*, Gregorian, Mahmud Tarzi and Saraj-Ol-Akhbar, *supra* note 106.

¹⁰⁹ ANGELO RASANAYAGAM, AFGHANISTAN: A MODERN HISTORY 15 (2005); RALPH H. MAGNUS & EDEN NABY, AFGHANISTAN: MULLAH, MARX, AND MUJAHID 38-39 (2002).

¹¹⁰ HABIBI, *supra* note 97, at 78.

¹¹¹ *See generally*, ABDUL GHANI, *supra* note 94.

¹¹² GREGORIAN, *supra* note 3, at 226.

¹¹³ *Id.*

¹¹⁴ FARHANG, *supra* note 12, at 312.

modernist constitutionalists remained determined to change the way Afghanistan was governed.

III. Amir Amanullah Khan and the First Written Constitution of Afghanistan

Habibullah Khan was assassinated in 1919 while on a hunting expedition in Laghman.¹¹⁵ His assassination sparked a power struggle between two ideologically opposed political factions with different views—the “reformist-modernist” faction led by Amanullah Khan, the Amir’s son, and the “conservative-traditionalist” forces led by Nasrullah Khan, the Amir’s brother.¹¹⁶ Nasrullah Khan spoke for the anti-British faction and for those who opposed any kind of technological innovation and institutional change.¹¹⁷ The “reformists,” led by Amanullah Khan, advocated for both independence and institutional change.¹¹⁸ Ultimately, Amanullah Khan prevailed.¹¹⁹

By the time Amanullah Khan came to power, social and political changes in the first two decades of the twentieth century led to Afghanistan’s independence and an embrace by the constitutionalists of legal positivism. Many of these constitutionalists were inspired by modernist Islamic thinking.¹²⁰ Backed by the constitutionalists and the “modernists,” Amanullah Khan’s first significant state program was to reform the social

¹¹⁵ DUPREE, *supra* note 1, at 435 (1973).

¹¹⁶ SENZIL NAWID, RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN, 1919-1929: KING AMAN-ALLAH AND THE AFGHAN 50 (1999); GREGORIAN, *supra* note 3, at 227.

¹¹⁷ GREGORIAN, *supra* note 3, at 227.

¹¹⁸ NAWID, *supra* note 116, at 50.

¹¹⁹ The outcome of the power struggle was determined as much by political situations as by ideological consideration. Amanullah’s mother was the chief wife of Habibullah Khan and a member of the powerful Barakzai clan; her influential position increased the likelihood of Amanullah’s political prospects. In addition, Amanullah was the governor of Kabul and controlled the Kabul garrison, arsenal and treasury. Thus, it was the support of the Barakzai tribe and the army that helped Amanullah accede to the throne.

¹²⁰ OLESEN, *supra* note 26, at 116-117.

and political dynamic in the country by providing education and exposure to the world. He attempted to achieve this through the adoption of laws and regulations aimed at creating a modern secular state.¹²¹ But at the same time, the King wanted to make sure that his laws did not contradict the basic tenets of Islam (not necessarily Hanafī Islam, however). For this purpose, the new king established the High Religious Council for Religious Sciences (*Shurā-ye ‘Ulūm*) and the Legislative Council (*Mahfīl-i Qanūn*) to study Hanafī fiqh and Turkish law and propose legislation on that basis.¹²² The King had also established another religious body, the High Religious Committee (*Hai’at-i Tamīz*), which examined state laws for compliance with Islam (arguably with modernist Islam).¹²³ The legislative and the religious councils consisted of government appointed “modernist” ‘*ulamā*’ of the *Hai’at-i Tamīz*.¹²⁴ Badri Bey, a former Turkish Police Chief, advised these two councils.¹²⁵

The “reformist” constitutionalists under Amanullah’s leadership launched an excess of political, social, and economic reforms.¹²⁶ Among these, they convinced the King to adopt legal codes whose rules were not taken from classical Hanafi Islam, but rather from modernist Islam, leading to the enactment of some 140 *Nīzamnamās* (laws).¹²⁷ These

¹²¹ MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY* 20 (1997).

¹²² NAWID, *supra* note 116, at 79.

¹²³ *Id.* at 79-80.

¹²⁴ *Id.* at 79.

¹²⁵ *Id.*

¹²⁶ RASANAYAGAM, *supra* note 109, at 17, 20; HAFIZULLAH EMBADI, *STATE, REVOLUTION, AND SUPERPOWERS IN AFGHANISTAN* 3 (1990).

¹²⁷ LEON B. POUILLADA, *REFORM AND REBELLION IN AFGHANISTAN: 1919-1929*, 99-104 (1973).

laws concerned the appropriate age for marriage, required clothing (officials were required to wear European dress), and banned slavery.¹²⁸

Amanullah Khan's laws and regulations contained the basic framework of what the King and his modernist supporters envisioned for the modern Afghan state. These laws formalized the ideological break with the past, the departure from the autocratic but still tribally-based monarchy of Amir Abdul Rahman and Amir Habibullah Khan, and signaled Afghanistan's entry into the political thinking of the twentieth century.¹²⁹

A. Coordinating Opposing Factions: The Struggle Among the Constitutionalists, the Traditionalists and the "Modernists"

As a symbol of Afghanistan's independence from decades of British control over her foreign policy, Amanullah Khan gave the Afghan nation its first written constitution in 1923.¹³⁰ By the time the King initiated the process to draft the Constitution, Afghanistan had undergone a massive social, political and intellectual transformation.¹³¹ New social groups, such as the Islamic modernists, the nationalists, and the constitutionalists, had emerged, challenging the traditional groups and demanding that their interests be secured. At the same time, the traditionalist 'ulamā' and the tribes still remained powerful. Constitutional struggle during the adoption of the first written Constitution, therefore, can be conceptualized as a four-way struggle among the King and the constitutionalists; the traditionalist 'ulamā', who refused all forms of change; the "modernist" 'ulamā' who aligned themselves with a "modernist" interpretation of Islam;

¹²⁸ See generally, *id.*; see also NAWID, *supra* note 116.

¹²⁹ OLESEN, *supra* note 26, at 120.

¹³⁰ See, e.g., KAMALI, *supra* note 121.

¹³¹ See generally, POUILLADA, *supra* note 127.

and the tribal notables who refused any governmental control over their regions or their customs.¹³²

King Amanullah Khan envisioned Afghanistan as an independent, nationalist, “liberal” state based on a constitutionally-determined government that recognized the equality of women by reforming traditional legal customs of family, marriage, and dress, as well as by making education available to women.¹³³ This ideal put him at odds with the traditional power groups in Afghanistan, groups who opposed these changes.¹³⁴

Initially, in 1919, Amanullah Khan emerged as the hero of Afghanistan’s quest for independence and as a leader of Islam inside and outside Afghanistan.¹³⁵ His call for the independence of Afghanistan in the name of Islam and the subsequent victory won him the support of the traditional ‘*ulamā*’.¹³⁶ Within a few months of his rule, Amanullah succeeded in coordinating all of the powerful forces under his leadership; three years of close cooperation between the state and the ‘*ulamā*’.¹³⁷ At the height of his popularity,

¹³² MOHAMMAD ASHRAF RASOOLI, *MŪRŪR-I BAR QĀWĀNĪN-I ASSĀSI AFGHANISTAN* 75-76 [REVIEW OF THE CONSTITUTIONS OF AFGHANISTAN] (2nd ed. 1392) [2013].

¹³³ NAWID, *supra* note 116, at xvi.

¹³⁴ *See generally*, POUILLADA, *supra* note 127.

¹³⁵ Ludwig Adamec writes, “When Amanullah Khan attained power in 1919, the traditional political institutions of the caliphate and the sultanate were disappearing from the Islamic world, displaced by institutions of constitutional monarchy or, increasingly, by a new type of rulership, that of the military-political charismatic leader. Amanullah combined both in his person. Furthermore, he personified for many the Asian nationalist response to European imperialism when he successfully challenged Britain in the Third Anglo-Afghan War. Amanullah’s success against Britain united the Afghan people under his leadership and made him one of the recognized leaders of the Islamic world.” Amanullah chose to become the reformer when he might have aspired to the caliphate. LUDWIG ADAMEC, *AFGHANISTAN’ FOREIGN AFFAIRS TO THE MID-TWENTIETH CENTURY* 77 (1974).

¹³⁶ *See generally*, NAWID, *supra* note 116.

¹³⁷ *Id.* at 43.

Amanullah Khan began an immense program of reform, including the adoption of the Afghanistan's first constitution.

The Legislative Council, under the supervision of the *Hai'at-i Tamiz*, prepared the first draft of a constitution with no input from other stakeholders, including the traditional '*ulamā*' or the tribal aristocrats.¹³⁸ The King presented the draft for adoption by a loya jirga of 872 members (which served as Afghanistan's constitutional convention), comprised of the Mohmand, Bajwur, and Afridi tribes of eastern Afghanistan.¹³⁹

The 1923 Constitution declared Islam the official religion of the state, but it did not make the Hanafi school the official *madhhab* of the state.¹⁴⁰ The King himself argued that the state would not make the Hanafi school the official madhhab of the state because doing so would discriminate against the followers of other madhhabs.¹⁴¹ All Afghans were granted democratic rights, regardless of their faith or race.¹⁴² For the first time, the Constitution established a partially independent judiciary, which applied state law that was codified according to the *Shari'a* through modernist methodologies.¹⁴³ The Constitution directed the legislature to consider the "tenants of the *Shari'a*," not necessarily the Hanafi *Shari'a* while making laws.¹⁴⁴ Previous rulers' laws had to comply with Hanafi Islam and a body of traditional Hanafi '*ulamā*' would examine the

¹³⁸ See generally, POUILLADA, *supra* note 127.

¹³⁹ MOHAMMAD ALAM FAYZAD, JARGAH HAI BOZURG-I MILLI AFGHANISTAN (LOYA JARGAH HA): JARGAH HAI NAMNEHĀD THAT-I TASALOṬ-I KAMONEST HA WA RŪS HA [AFGHANISTAN'S MAJOR JIRGAS: SYMBOLIC JIRGAS UNDER THE CONTROL OF THE COMMUNISTS AND THE SOVIETS] 50 (1368) [1989].

¹⁴⁰ Neẓām Nāma-ye Assāsi-ye Dawlāt-ye 'Ālīā-ye Afghanistan, 1303 [Fundamental Principles of the Exalted State of Afghanistan/ Constitution of 1923], art. 2.

¹⁴¹ GHULAM MOHAMMAD KATIB, RŪDĀD-E LOYA JIRGA-YE DAR AL-SULTANAH [NARRATIVES OF THE LOYA JIRGA OF THE KINGDOM] 151 (1313) [1924].

¹⁴² Constitution of 1923 arts. 16-27.

¹⁴³ *Id.* arts. 56-57.

¹⁴⁴ *Id.* art. 72.

compliance of a ruler's law with Hanafi fiqh. By contrast, under Amanullah Khan, a modernist body of 'ulamā', the *Hai'at-i Tamīz*, examined the compliance of state laws with Islam.¹⁴⁵

The Constitution further created local assemblies, aiming to replace tribalism with nationalism.¹⁴⁶ It created a cabinet headed by a prime minister.¹⁴⁷ The post of the prime minister was a temporary and honorary position without any executive power; the King was the holder of all power.¹⁴⁸ The posts of the prime minister and other ministers were not designed to include the powerful tribal chieftains in governance.

From the outset, it appeared that the 1923 Constitution would fail to gain the acquiescence from the traditionalist 'ulamā' and the regional tribal notables. This point became clear when the influential Hazrāt-i Shor Bazār, a member of the traditional 'ulamā', threw the draft of the 1923 Constitution in front of Habibullah (Bachā-i Sāqqao) in a public *darbār* calling it the work of the "communists" and not of the Muslims.¹⁴⁹ Moreover, the tribes, who feared the Constitution was directed at their marginalization, joined the 'ulamā' and revolted in 1924.¹⁵⁰ The revolt forced the King to retreat some of his most radical reforms.¹⁵¹ As a result, in 1924, the King convened another loya jirga to

¹⁴⁵ See generally, NAWID, *supra* note 116.

¹⁴⁶ OLESEN, *supra* note 26, at 120-126

¹⁴⁷ Constitution of 1923 arts. 6, 7.

¹⁴⁸ FARHANG, *supra* note 12, at 366.

¹⁴⁹ RALPH H. MAGNUS & EDEN NABY, *AFGHANISTAN: MULLAH, MARX, AND MUJAHID* 100 (2002).

¹⁵⁰ Leon Poullada has attributed the revolt not to the Constitution's failure but to the traditional powerful struggle between the central state and the regional tribes. See generally, Leon B. Poullada, *Political Modernization in Afghanistan: The Amanullah Reforms* in *AFGHANISTAN: SOME NEW APPROACHES* (George Grassmur, Ludwig Adamec & Frances Irwin eds., 1969).

¹⁵¹ See generally, KAMALI, *supra* note 121.

amend the Constitution, responding to the demands of the traditional institutions of power in order to win their allegiance to the Constitution.

In the 1924 Loya Jirga, Islam became the center of the ideological debates, both within the *'ulamā'* (traditionalists vs. modernists), and between the *'ulamā'* and the King.¹⁵² The protests of the high-ranking *'ulamā'* fell into two broad categories. First, while the modernist *'ulamā'* of the *Hai'at-i Tamīz* had justified legal and social reforms through the principle of limited interpretation (*ijtihād-i moqayyād*), permitting a jurist under appropriate circumstances to reinterpret *Sharī'a* law within certain limits,¹⁵³ the “puritanical Deobandi trained” *'ulamā'* and some other members of the elite *'ulamā'*, who had supported the regime earlier, were offended by new laws that did not fit within Hanafī *Sharī'a*.¹⁵⁴ Second, most of the high-ranking *'ulamā'*, who had earlier supported the Amanullah Khan regime policies, were surprised by the rapid pace of change and the regime's growing control of religious institutions.¹⁵⁵ They felt threatened by the bureaucratization of the legal system, fearing that they would lose their position in the state machinery.¹⁵⁶

The *'ulamā'* in the 1924 Loya Jirga demanded a wide range of changes in the laws and in the Constitution.¹⁵⁷ From these demands, approximately five amendments

¹⁵² NAWID, *supra* note 116, at 110.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Changes advocated by the *'ulamā'* included restoration of the right of the Qaḍi to pass judgments in less severe cases not prescribed in the Qur'an. They also demanded that religious judges and Muftis be present on the civil courts. The *'ulamā'* wanted to make the Hanafī school the official madhhab of the state. Finally, the protesting *'ulamā'* at the 1924 Loya Jirga contended that the failure to make the distinction between Muslims and non-Muslims violated the provisions of Islam and created a danger to the Islamic State.

(Articles 2, 9, 24, 25 and 42) were made to the Constitution. Importantly, Article 2 was amended to make Hanafi *Sharī'a* the official madhhab of the state and required the followers of other religions to wear specific, identifying clothing and pay the Islamic tax. Article 9 was amended to place a religious limit on the right to liberty. Article 24 was amended to exempt punishments prescribed by *Sharī'a* from the prohibition against torture. The 1924 Loya Jirga further subjected all government legislations and laws to the approval of a committee of seven religious scholars (traditional '*ulamā*') chosen by the Loya Jirga, thus giving the conservative '*ulamā*' a veto in all political matters.¹⁵⁸ The task of this committee was to review all reforms for conformity with Hanafi *Sharī'a*.¹⁵⁹

The 1923 Constitution remained in force, with the amendments made to it in the 1924, until 1929. But Amanullah Khan did not give up on his reform efforts. He intensified his policies when he returned from a tour of Europe.¹⁶⁰ With this redoubled momentum in reform policies, resentment grew among the conservative religious leaders, the tribes, and dissident members of the royal family.¹⁶¹ By 1928, the state had become

¹⁵⁸ NAWID, *supra* note 116, at 111.

¹⁵⁹ *Id.*

¹⁶⁰ Upon his return from Europe, the King announced a new series of reforms in 1928, before a loya jirga of about 1000 Afghanistan's most influential tribal, ethnic, and religious leaders. The reforms included a nominated Upper House, an elected Lower House of 150 legislators, creation of a Western-style cabinet and constitutional monarchy, the separation of church and state, the emancipation of women, enforced monogamy, and compulsory education for all Afghans. The loya jirga rejected most of the proposals, but two months later, Amanullah convened a smaller jirga of about 100 loyal followers (mainly government officials) to approve the items not passed. Amanullah dramatically removed the veil from his wife to symbolize the voluntary abolition of purdah and announced himself a "revolutionary king." The proposals were never implemented, however, as anti-Amanullah elements inside and outside Afghanistan combined to overthrow the King. DUPREE, *supra* note 1, at 463.

¹⁶¹ GREGORIAN, *supra* note 3, at 261.

weaker while the tribes and the *'ulamā'* had grown militarily stronger.¹⁶² By this time, Amanullah Khan had already disbanded most of his military establishment in order to divert funds for his modernization policies.¹⁶³ Sensing an opportunity to topple the king, Shinwāri tribesmen revolted in 1928, burning down the king's palace and the British Consulate in Jalalabad.¹⁶⁴ The revolt quickly spread, and a tribal army moved on Kabul.¹⁶⁵ Amanullah sent the regular army to meet the tribal army, but most of the regular troops deserted to join the rebels.¹⁶⁶ Kabul lay open to invasion, which came from an unexpected direction—the north. Habibullah (called Bachā-i Sāqqao, "Son of a Water-carrier"),¹⁶⁷ a non-literate Tajik, entered Kabul and ruled for "nine bloody months."¹⁶⁸

B. Why the First Written Constitution Failed as a Coordination Device

The 1923 Constitution failed to coordinate politics in Afghanistan because its process did not include the majority of key stakeholders who had the means to threaten any constitutional order that did not secure their interests. Further, the text of the Constitution, as initially adopted, did not defer on key constitutional questions that could leave the door open for future stakeholder negotiations. Finally, the king exercised its discretionary powers in a way that would offend powerful stakeholders.

¹⁶² *Id.*

¹⁶³ Louis Dupree, *Afghanistan: the Political Uses of Religion*, in *CHURCHES AND STATES* 202 (K.H. Silver, ed., 1967).

¹⁶⁴ DUPREE, *supra* note 1, at 463.

¹⁶⁵ For different perspectives on why Amanullah Khan failed *see* Leon B. Poullada, *Political Modernization in Afghanistan: The Amanullah Reform*, in *AFGHANISTAN: SOME NEW APPROACHES* 99-149, 115 (George Grassmur, Ludwig Adamec & Frances Irwin eds., 1969).

¹⁶⁶ DUPREE, *supra* note 1, at 452.

¹⁶⁷ *Id.*

¹⁶⁸ POUILLADA, *supra* note 127, at 178; DUPREE, *supra* note 1, at 452.

When initially prepared, only the eastern tribes of the country adopted the Constitution in the 1923 Loya Jirga.¹⁶⁹ This meant that the powerful Southern tribes, who had usually been the king-makers in Afghanistan, remained “outsiders” to the constitutional bargain, and as a result did not acquiesce to the Constitution and were the first to revolt.¹⁷⁰ Moreover, it was drafted by the modernist members of the state appointed ‘*ulamā*’ who did not have the same understanding of Islam as the traditionalists—something that had a dominant position in Afghanistan. The traditionalist ‘*ulamā*’ did not have a role in drawing the rules embodied in the 1923 Constitution. Therefore, two major groups, the traditional ‘*ulamā*’ and the Southern tribes, remained outsiders to the constitutional order.

Most importantly, the 1923 Constitution failed to utilize constitutional deferral as an instrument to gain acquiescence from the powerful groups. It thus did not leave room for the evolution of key existential constitutional questions that the stakeholders who were left out of the process could exploit in the future. When initially adopted, the Constitution made some clear-cut decisions on some of the most fundamental issues of interest that had divided Afghan society. For instance, the Constitution recognized explicitly the right to freedom of religion for followers of religions other than Islam. The conservative ‘*ulamā*’ contended that the failure to make distinctions between Muslims and non-Muslims violated the provisions of Islam and created a danger to the “Islamic State.”¹⁷¹

¹⁶⁹ NAWID, *supra* note 116, at 79.

¹⁷⁰ *See generally*, Poullada, *supra* note 127.

¹⁷¹ NAWID, *supra* note 116, at 109

Even Mawlawi Abdul Wasi, one of the drafters of the first Constitution, opposed this provision stating that it had been included in the Constitution in his absence.¹⁷²

The 1923 Constitution also failed to explicitly make the Hanafi school of *Sharī‘a* the official madhhab of the state,¹⁷³ a divisive issue between the traditionalist and the modernist *‘ulamā’*. Further, Article 9 of the Constitution recognized the right to liberty for all Afghans. Members of the *‘ulamā’* became suspicious of this clear-cut provision, stating that the people had construed the word “liberty” to mean religious liberty (the freedom to change one’s religion) and the liberty to perform any action that could contradict the *Sharī‘a* (such as dancing and drinking alcoholic beverages).¹⁷⁴ In response to these complaints in the 1924 Loya Jirga, the King did clarify that liberty in Article 9 meant freedom within the limits provided by the *Sharī‘a*,¹⁷⁵ but the Constitution as written did not defer by requiring its limits to be defined by *Sharī‘a* or the laws of the state. When Article 9 was amended, the right to liberty was subjected to the provision of Islam that would be defined by the *‘ulamā’*. The amended version of Article 9 gained the agreement of the *‘ulamā’* because it was the *‘ulamā’* who would define the scope of this right.

The first Constitution of Afghanistan did defer on some (non-foundational) constitutional matters, but these deferrals were not enough to help gain the acquiescence of the powerful groups in the country. Most of them related to issues that were less controversial and less divisive. For instance, the scope of some of the King’s extensive

¹⁷² *Id.*

¹⁷³ KATIB, *supra* note 141, at 151.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

powers was deferred to ordinary legislation.¹⁷⁶ Other deferrals related to the method of the operation of ministries and other state institutions—issues that were of lesser concern. Moreover, the government exercised its discretionary power in a way that offended key stakeholders who then decided to rebel against the constitutional order. Under the Constitution, the king and his modernist allies drafted laws and regulations that were based on modernist interpretations of Islam that the traditionalists found unacceptable.

In short, Afghanistan's first Constitution sharply deviated from the traditional principles of Afghan governance. Amanullah Khan prepared a constitution for the state he had inherited from Abdul Rahman Khan's, a state characterized by a centralized structure of government with a powerful army. Amanullah Khan, however, did not have the same military strength that Abdul Rahman Khan had possessed. Without a powerful military, the first Constitution and Amanullah Khan both failed.

IV. Nadir Shah and the Second Constitution: Coordination Through Incremental Constitutionalism

After the fall of Amanullah Khan, Habibullah, Bachā-i Sāqqao, ruled Afghanistan for nine months. Nadir Shah became king after he defeated Bachā-i Sāqqao with the help of the tribes and the traditional *'ulamā'*.¹⁷⁷ Initially, Nadir Shah recommended that an assembly of tribal chiefs should act as a Jirga and elect a king.¹⁷⁸ But the tribal chiefs, who had participated in the fight against Bachā-i Sāqqao, urged Nadir Shah to accept the throne. At first Nadir Shah refused to do so. The tribal notables and warriors shouted that

¹⁷⁶ Constitution of 1923 arts. 4-7.

¹⁷⁷ See, DUPREE, *supra* note 1, at 458.

¹⁷⁸ BARFIELD, *supra* note 3, at 195; SYKES, *supra* note 2, at 321; GREGORIAN, *supra* note 3, at 287.

they would leave unless Nadir Shah accepted the throne.¹⁷⁹ In the face of such enthusiasm, Nadir gave in, saying, “Since the people do designate me so, I accept. I will not be the King but the servant of the tribes and the country.”¹⁸⁰ During his reign, Nadir Shah attempted to restructure the entire legal framework of the Afghan state in a way that conformed to the traditional principles of Afghan governance. To this end, one of his most important contributions was the adoption of a new constitution in 1931, which survived and coordinated Afghanistan after the death of Nadir Shah and during most of the reign of his son, Zahir Shah.

There is very little information surrounding the circumstances leading to the promulgation of the 1931 Constitution or who, for that matter, was involved in putting the document together. The 1931 Constitution was ratified two years after Nadir Shah acceded to the Afghan throne, in a loya jirga held in Kabul, attended by 506 delegates from various districts of the country as well as around twenty members of the diplomatic corps in Kabul.¹⁸¹ Nadir picked 105 members from this initial Loya Jirga and established a national assembly, which then adopted the 1931 Constitution.¹⁸² There is no evidence that any of the provisions of the Constitution were debated during the Loya Jirga. Rather, the central issue at the meeting was the basis of legitimacy of Nadir Shah’s kingship and how, and with whose support, he took control of Kabul.¹⁸³ The substance of the 1931 Constitution, however, clearly illustrates that the traditional Sunni ‘*ulamā*’ and the tribal

¹⁷⁹ BEN JAMES, *THE SECRET KINGDOM: AN AMERICAN JOURNEY*, 275-276 (New York, 1934); GREGORIAN, *supra* note 3, at 287; BARFIELD, *supra* note 3, at 195; SYKES, *supra* note 2, at 321.

¹⁸⁰ MOHAIUDIN, *BOHRĀN WA NIJĀT-E WATĀN*, 275-87 (THE CRISIS AND DELIVERANCE OF THE HOMELAND [1931]).

¹⁸¹ FAYYZAD, *supra* note 139, at 147-68.

¹⁸² FARHANG, *supra* note 12, at 407.

¹⁸³ Tarzi, *supra* note 100, at 215.

notables were either consulted or had direct influence over the constitution drafting process.¹⁸⁴

After the fall of Amanullah, the impact of modernists diminished and Islamic politics were again dominated by the members of the traditional ‘*ulamā*’ and the tribes.¹⁸⁵ Nadir Shah’s accession to the throne showed that the tribes, in spite of the policies of Abdul Rahman Khan and Amanullah Khan, had retained their force not only as “king-breakers” but also as “king-makers.”¹⁸⁶ Nadir Shah himself, however, was not a traditionalist, but had since the time of Habibullah Khan been counted among the “modernists.”¹⁸⁷ He apparently did not want to concede too much to the groups that had put him on the throne, but in the short term, his 1931 Constitution established a system of governance that offered these groups enough incentives to win their acquiescence.

Nadir Shah further appointed representatives of the tribes and the traditional ‘*ulamā*’ to important state offices. In 1932, he created a twenty-seven member house of nobles, which arguably included members of the powerful tribes and the ‘*ulamā*’.¹⁸⁸ Nadir Shah also established a traditional Hanafi national religious institution, the *Jamīyyāt-ye ‘Ulamā’* (Society of ‘*Ulamā*’); and consulted with this body on social, educational and political issues.¹⁸⁹ In addition, he reestablished the department of *Ihtisāb* to observe the

¹⁸⁴ *Id.*

¹⁸⁵ With the fall of Amanullah Khan, the struggle for ideological hegemony was over. The King and his small group of urban intellectuals and educated bureaucrats had fallen in their endeavor. Their modernist interpretation of Islam made little or no sense to the Afghans, living in a society where the socio-economic and political structures, communication and education all maintained the existing parochial identities. OLESEN, *supra* note 26, at 165.

¹⁸⁶ *Id.* at 172.

¹⁸⁷ *Id.* at 176.

¹⁸⁸ FARHANG, *supra* note 12, at 407.

¹⁸⁹ GREGORIAN, *supra* note 3, at 295.

application of the Hanafi fiqh.¹⁹⁰ Nadir Shah also made very real concessions to the Afghan tribes in order to secure their interests. For instance, the state could not levy any taxes without the consent of the tribal notables; neither could the state make radical changes to the laws and to the Constitution without the approval of the tribal notables and the ‘*ulamā*’.¹⁹¹ As such, the powerful Pashtun tribal leaders were effectively given a veto power on important changes to the status quo.

A. The Second Constitution of Afghanistan: A Successful Coordination Device

The 1931 Constitution is criticized in some of the secondary literature as a “do nothing constitution,”¹⁹² a “step backwards,”¹⁹³ and a “hodgepodge” of unworkable elements.¹⁹⁴ Seen from the paradigm of coordination theory, however, the 1931 Constitution was far more effective than the one that preceded it precisely because it identified key stakeholders who needed to be at the negotiation table; it deferred on many of the controversial questions that the first Constitution had tried to answer; and because the government was careful not to exercise any of its latent powers in a way that would offended powerful stakeholders. The 1931 Constitution was actually closer to the social and political realities of Afghan society than the 1923 Constitution.

At the time of the drafting of the 1931 Constitution, four major groups in Afghanistan needed to be coordinated. These groups included the tribes, the traditional ‘*ulamā*’, the

¹⁹⁰ FARHANG, *supra* note 12, at 407.

¹⁹¹ MOHAMMAD ALI, *PROGRESSIVE AFGHANISTAN* 191 (1933).

¹⁹² DONALD N. WILBER, *AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 145-149 (1962).

¹⁹³ Fausto Biloslavo, *The Afghan Constitution between Hope and Fear*, 62 (EINIRAS, 2004).

¹⁹⁴ DUPREE, *supra* note 1, at 464.

monarchy, and the modernists (the country's educated middle class). Nadir Shah arguably consulted the traditional *'ulamā'* and the tribal notables (two most powerful groups) in drafting the 1931 Constitution.¹⁹⁵ At the same time, the text of the 1931 Constitution deferred in a way that offered each of these groups (including the politically weak groups) enough to win their acquiescence and left the door open for future resolution of key constitutional questions.

The 1931 Constitution stated that state laws should be in accordance with “the tenets of the sacred religion of Islam”¹⁹⁶ without clarifying how much or whose Islam—traditional Islam or modernist Islam. This question was considerably divisive. Since the introduction of modernist Islam during the reign of Amanullah Khan, the traditionalists viewed it with suspicion and resisted its reintroduction. This constitutional ambiguity was important. Although an average person might reasonably interpret “the tenets of the sacred religion of Islam” to mean that the state must rule in accordance with the official Hanafi version of Islam, the King could reasonably propose a different view—namely that, as King, he would be a Hanafi, but had the right to act in accordance with rival understandings of Islam if that would promote the interests of the country. The ambiguity in this provision arguably promoted acquiescence because the Hanafi *'ulamā'* believed that the King would legislate in line with traditional Hanafi Islam, while the modernist factions believed that the King was not explicitly obliged to legislate in accordance with traditional Hanafi Islam, but rather in line with a modernist version of Islam.

¹⁹⁵ Tarzi, *supra* note 100, at 215.

¹⁹⁶ OŞŪL-YE ASSĀSI-YE DAWLĀT-YE 'ĀLIĀ-YE AFGHANISTAN [FUNDAMENTAL PRINCIPLES OF THE EXALTED STATE OF AFGHANISTAN, CONSTITUTION] art. 65, 1310 [1931].

Similarly, the 1931 Constitution did not contain any provisions about who would decide whether the state had legislated in accordance with “the tenets of the sacred religion of Islam.” While the text of the Constitution was silent on this question (deferral through silence), in practice, the *Jamīyyāt-i ‘Ulamā’* examined laws for compliance with *Sharī‘a* (arguably Hanafi *Sharī‘a*).¹⁹⁷ This deferral thus kept people believing that they had not already lost under the constitutional scheme, and in fact, going forward they might influence the interpretation of the *Sharī‘a* in accordance with the Hanafi school. At the same time, from the point of view of the state, it preferred an organized, cohesive body of ‘*ulamā’* to deal with and pacify, than the previous comparatively anarchic groups, which could only be co-opted as individuals.¹⁹⁸ Thus, both the state and the traditional ‘*ulamā’* found the scheme advantageous and agreed to operate under it.

The 1931 Constitution also deferred on the question of constitutional interpretation and constitutional amendment. The text of the Constitution did not contain any provision about who would interpret and amend the Constitution. In practice, however, a loya jirga comprised of tribal chieftains and ‘*ulamā’* could serve the function of both constitutional interpretation and a constitutional amendment convention.¹⁹⁹ The tribal notables and the traditional ‘*ulamā’* apparently agreed to the constitutional order because of these concessions—concessions that the first Constitution of Afghanistan had failed to provide. These deferrals kept the powerful tribes from rebelling because they believed they could influence constitutional matters through constitutional amendment and constitutional

¹⁹⁷ MOHAMMAD ALI, *supra* note 191, at 190 (1933); GREGORIAN, *supra* note 3, at 295; OLESEN, *supra* note 26, at 184.

¹⁹⁸ OLESEN, *supra* note 26, at 184.

¹⁹⁹ *See generally*, DONALD N. WILBER, AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE (1962).

interpretation, changing it to their advantage every three years when a loya jirga was convened.²⁰⁰

Guarantees of fundamental rights and freedoms had become controversial issues under the 1923 Constitution. The traditional '*ulamā*' and the modernist constitutionalists were deeply divided over provisions concerning these rights. As a compromise, the 1931 Constitution adopted a scheme that arguably appeared acceptable to both of these groups, attempting to guarantee fundamental rights and freedoms, but subjecting the scope of such rights to the provisions of the law and that of the *Sharī'a*. This was something that the 1923 Constitution failed to do, a failure that ultimately precipitated the Khost rebellion.

The requirement that fundamental rights must be protected within the framework of the Islamic *Sharī'a* was something the traditional Hanafī '*ulamā*' demanded.²⁰¹ Most importantly, the 1931 Constitution guaranteed only the right to "personal freedom," but apparently, it deferred on the right to "personal liberty." The reason for this deferral may be attributable to the problems the right to "personal liberty" created under the 1923 Constitution. This deferral meant that the state apparently tried to get buy-in with the powerful traditional members of the '*ulamā*', keeping them happy while incrementally transforming society through constitutional guarantees of freedom of speech and freedom of the press. The modernists apparently acquiesced in hopes that they would influence the legislature and pass the constitutionally mandated laws in line with their desires. In the

²⁰⁰ *Id.* At the same time, however, Nadir intended to incrementally form (1) a centralized education system that was designed to allow the state to put forward its message without having that message mediated—and perhaps modified—by independent religious scholars; and (2) a centralized army that could impose the state's will upon people, who at that time trusted their local leaders more than the authoritarian king.

²⁰¹ FARHANG, *supra* note 12, at 407.

1950s, the modernists dominated the legislature and adopted the constitutionally mandated laws the way they wanted.²⁰² While the traditional ‘*ulamā*’ were the initial winners, the modernists became the ultimate winners under the 1931 constitutional order.

In short, the 1931 Constitution was a remarkably vague document. In essence, it attempted to balance very different elements, such as maintenance of royal authority with other forms of political leadership; secularism with religious traditionalism; central authority with dependence on tribal power; and popular sovereignty with state monopoly of power. These elements were carefully designed to satisfy key stakeholders and keep them from rebelling against the constitutional order. The stress on the guarantee of individual equality and civil rights, as well as outward forms of constitutional government, although vague, might be seen as a concession to the constitutionalists and the educated classes.²⁰³ However, the supremacy of the Hanafi *Shari‘a* and the reversion of civil and criminal law back to the ‘*ulamā*’ guaranteed the power of the ‘*ulamā*’. The complex and inconsistent formulation of the 1931 Constitution reflected the fact that Nadir Shah was simultaneously trying to satisfy the modernists, the ‘*ulamā*’, and the tribal notables by evoking values and concepts from their respective, separate discourses.²⁰⁴ Thus, although the Constitution was vague and lacked textual consistency, it coordinated Afghanistan and maintained peace up to 1964 when new stakeholders emerged and demanded to be coordinated under a new order.

²⁰² HAFIZULLAH EMADI, DYNAMICS OF POLITICAL DEVELOPMENT IN AFGHANISTAN: THE BRITISH, RUSSIAN, AND AMERICAN INVASIONS 49-83 (2010).

²⁰³ OLESEN, *supra* note 26, at 177.

²⁰⁴ *Id.*

V. The Rise of Social and Political Movements 1950s-1960s: Complicating Coordination

The 1931 Constitution managed to coordinate Afghanistan for more than three decades. During that time, the role of the state in society had incrementally changed and the state apparatus had been greatly expanded, coming to exert control over previously independent social fields. One aspect of this was the buildup of the ideological state apparatus, the most important of which was the educational system, where the state simultaneously assumed the character of polity expansion (e.g. establishment of a secular educational system) and “polity dominance secularization” (e.g. establishment of government controlled educational institutions).²⁰⁵ While the 1931 Constitution had partly confirmed the influence of the traditional power groups, the general economic development and the expansion of the domains of the state led to the consolidation of new urban groups who ultimately asserted their claims to share political power through constitutional reforms.²⁰⁶ The ideological paradigm (“tribal and classic Islamic”) on which the Constitution of 1931 implicitly rested, was now challenged and the discourse on the future shape of the Afghan state and society was dominated by various sections of the new urban elite, culminating in the formulation of a new constitution in 1964.²⁰⁷

By the second quarter of the twentieth century, Afghanistan had a highly politicized urban intelligentsia and educated middle class who had hoped to influence the behavior of the state and coordinate Afghanistan through parliamentary politics. In the 1950s, national parties appeared and publicly debated questions of national policy and helped

²⁰⁵ *Id.* at 199.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

construct a democratically ratified set of national rules. Disagreement was no longer based on tribal or regional resistance to national policy, but rather on reasoned disagreement by the champions of one set of national policies against those of another set.²⁰⁸ Tribal disagreements had given way to ideological or class-based issues.

The major social and political movements that emerged in the 1950s can be broadly categorized as the “liberals” and the “nationalists.”²⁰⁹ Other movements, such as the communists and the “Islamists,” which would become stronger and more influential in the 1960s and 1970s had just begun to take root but were considered too powerless to disrupt a constitutional order. At the same time, the tribal elite and the traditional ‘*ulamā*’ remained powerful.

A. The Rise of the “Liberal Democrats” and the “Nationalists”

In the 1930s, the first generation of Afghan intellectuals (mostly Pashtuns) not linked to the royal aristocracy—a result of Amanullah’s educational reforms—embarked on a movement to promote the Pashtu language.²¹⁰ In the late 1940s, this movement evolved into a “reformist movement” with broader aims, also attracting non-Pashtun intellectuals.²¹¹ In 1947, this group launched an association called *Wikh Zālmīyān*

²⁰⁸ For a discussion of the debates on national policies in the 1960s and 1970s, see SABAHUDDIN KHUSHKAKI, DAHA-YE QĀNUN-I ASSĀSI, GHAFLAT-I ZINDĀGI AFGHĀN HA WA FURSAT TALĀBI RŪS HA [DECADE OF THE CONSTITUTION: NEGLECT OF THE LIVES OF THE AFGHANS AND THE OPPORTUNISM OF SOVIETS] (4th ed., 1384) [2005].

²⁰⁹ See generally, THOMAS RUTTING, ISLAMISTS, LEFTISTS – AND A VOID IN THE CENTER: AFGHANISTAN'S POLITICAL PARTIES AND WHERE THEY COME FROM 1902-2006 (2006); DUPREE, *supra* note 1, at 494-496.

²¹⁰ AMANULLAH SHEFAI, JERYĀN-I SHINĀSĀYI-YE TĀRĪKH-I AFGHANISTAN-I MA‘ĀSER: TAHLIL-I JERYĀN-I FIKRI-YE QARN-I BISTOM-I AFGHANISTAN [INTRODUCTION TO POLITICAL MOVEMENTS IN MODERN HISTORY OF AFGHANISTAN: ANALYSIS OF THE INTELLECTUAL AND POLITICAL MOVEMENTS OF THE 20TH CENTURY] 29 (1393) [2014].

²¹¹ For a complete discussion of this movement, see THOMAS RUTTING, ISLAMISTS, LEFTISTS – AND A VOID IN THE CENTER (2006); AMIN SAIKAL, AFGHANISTAN: A HISTORY

(Awakened Youth).²¹² This movement advocated a constitutional monarchy, the separation of powers, free elections, and civil liberties.²¹³ Later, some prominent members of the movement, such as Ghulam Mohammad Ghubar and Mohammad Seddiq Farhang, mainly urban-educated Tajiks, left the *Wikh Zālmīyān*.²¹⁴ They criticized the pro-government tone in the *Wikh Zālmīyān* manifesto.²¹⁵

From these developments, the first political movements in Afghan history emerged.²¹⁶ The first party to be formed was the *Wikh Zālmīyān* Party, set up by the younger and more radical Pashtun nationalists.²¹⁷ Its program, which concentrated on the Pashtu language and matters related to Pashtunistan,²¹⁸ cooperated with the national

OF STRUGGLE AND SURVIVAL (2004); BASIR AHMAD DAWLATABADI, SHINĀSNĀMA-YE AĤZĀB WA JIRYĀNĀT-I SIYĀSI-YE AFGHANISTAN [AN INTRODUCTION TO AFGHANISTAN'S POLITICAL MOVEMENTS AND PARTIES] (1371) [1992]; DUPREE, *supra* note 1, at 494-498.

²¹² RUTTING, *supra* note 209, at 4.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Afghanistan emerged as a political entity in 1747; however, it was not until the beginning of Amir Abdul Rahman Khan's reign in 1880 that a state with clearly defined boundaries emerged. The emergence of this unified state required the Amir to settle all territorial disputes between his state and the neighboring states. The most important and controversial boundary was the one with the British India settled in 1893 (the Durand Agreement), which separated the Pashtuns living on the border of the Afghan state and British India. Abdul Rahman's acquiescence in the British drawing of the Durand Line had long-term implications, which eventually led to the rise of the Pashtunistan issue in the aftermath of World War II when the state of Pakistan emerged. The formation of the Northwest Frontier Province in 1901 separated the Pashtun country from the Province of Punjab, and divided the area into the settled districts and the tribal agencies, sowing the seeds of independence movements among the Pashtuns of the regions. When Pakistan became an independent state, tensions over Pashtunistan between Afghanistan and Pakistan reached a fever pitch. When Mohammad Daud Khan became prime minister, he took a strong position over the issue of Pashtunistan, advocating for the right of self-determination of the Pashtuns living there. The result was the deterioration of relations between Afghanistan and Pakistan. Afghanistan suffered the most as the trade routes entering Afghanistan from Pakistan closed. The matter was resolved through the

government.²¹⁹

In 1951, two more “liberal” oriented parties joined the *Wikh Zālmīyān*.²²⁰ The *Nedā-ye Khālq* (Voice of the People) advocated “democracy, social justice, democratic rights, civil liberties, free parliamentary election, freedom of expression and association and separation of powers.”²²¹ It opposed the monopoly of power in the hands of the regional notables and the royal family and demanded broader public participation in government.²²² Another party followed in 1951, the *Hizb-ye Watān* (Fatherland Party). It advocated democracy, protection of liberal rights (including freedom of speech and freedom of press), socioeconomic reforms, and broader public participation in government.²²³

Members of these new movements were elected to the so-called “Liberal Parliament” of 1949, and they took their rules as parliamentarians seriously.²²⁴ They used the Parliament as a forum to express “democratic ideas, defend the rights of their constituencies, and supervise the affairs of the state.”²²⁵ More importantly, they helped pass laws on freedom of press, which helped the growth of newspapers that, in turn, enabled new movements and ideologies to express themselves.²²⁶ Deeply upsetting entrenched patterns, these “liberals” questioned individual government ministers about

mediation of the government of Iran and Daud resigned later. For a discussion of the issue of Pashtunistan, see OLAF CAROE, *THE PATHANS: 550 B.C.-A.D. 1957* (1957); DUPREE, *supra* note 1; LEON POUILLADA; LEILA D.J. POUILLADA, *THE KINGDOM OF AFGHANISTAN AND THE UNITED STATES 1828-1973* (1995).

²¹⁹ RUTTING, *supra* note 209, at 4.

²²⁰ DUPREE, *supra* note 1, at 495-96.

²²¹ EMADI (2010), *supra* note 202, at 51-52.

²²² *Id.* at 52.

²²³ *Id.* at 51.

²²⁴ DUPREE, *supra* note 1, at 494.

²²⁵ EMADI (2010), *supra* note 202, at 51-52.

²²⁶ *See generally, id.*

budgetary matters.²²⁷ Several ministers refused to reply to their inquiries, stating that although under Article 43 of the Constitution the national parliament had the right to question the national budget as prepared by the Ministry of Finance, it had no jurisdiction over the budgets of individual ministries.²²⁸ The actions of the parliament fomented debate over their constitutionality, particularly how and whether legislators had the authority to impeach members of government over budgetary issues.²²⁹

In 1953, Mohammad Daud Khan, cousin of King Zahir Shah and member of the *Wikh Zālmīyān* Movement,²³⁰ became Prime Minister. He introduced further reforms in an effort to secure the interests of the new groups of “liberals” and “nationalists.”²³¹ In particular, Daud called for wide constitutional reforms, maintaining that the 1931 Constitution could no longer respond to new developments in society, particularly as to the demands of the liberals and as to relations between the executive and the legislature. He, therefore, proposed a new constitution.²³² In theory, it looked like Daud’s draft was designed to secure the interests of the new educated elites who were challenging the 1931 Constitution’s success as a coordination device; however, in practice, Daud prepared the draft to entrench his de facto rule.²³³

²²⁷ DUPREE, *supra* note 1, at 494.

²²⁸ Article 55 of the 1931 Constitution stated that a bill introduced by a minister and rejected by the legislature would be returned with the latter’s observation. The Minister had the right to accept or reject the observation. Article 61 stated that if the National Council asked a minister for information, the minister was obliged to reply without any unreasonable delay.

²²⁹ DUPREE, *supra* note 1, at 494-95.

²³⁰ SHEFAI, *supra* note 210, at 127.

²³¹ *See generally*, ABDUL HAMEED MUBAREZ, TAHLIL-I WAQIYĀT-I SĪYĀSI-YE AFGHANISTAN 1919-1997 [ANALYSIS OF POLITICAL EVENTS OF AFGHANISTAN] (1377) [1998].

²³² *Id.* at 209.

²³³ *Id.* at 213.

Daud's draft constitution suggested concentrating power in the royal government,²³⁴ thus altering the *modus vivendi* with the tribes achieved under the 1931 Constitution.²³⁵ He wanted a strong single-party regime in which the king would have a largely ceremonial role.²³⁶ The members of the educated elite shared the fear that Daud wanted to entrench his rule.²³⁷ While Daud had introduced the socioeconomic reforms the educated elites had long favored, their political goal had always been representative parliamentary democracy within the framework of a constitutional monarchy, not a single party system.²³⁸ Before Daud could implement his reforms, however, he was forced to resign as prime minister due his policies regarding Pashtunistan, as well as his disagreements with the King on how to govern Afghanistan.²³⁹ At this time, the educated middle class shared Daud's complaints about reforming the 1931 Constitution, although they disagreed with Daud on what should replace it. By the time Daud resigned, the King had also realized that the growing and assertive new groups no longer accepted the 1931

²³⁴ Daud Khan specifically described the system under the 1931 Constitution as a "feudal monarchy" and wanted to replace it with a constitutional monarchy. *Id.* at 213. Specifically, Daud presented two alternatives: first, holding a general referendum in which the people would vote for what type of political system the country should have, but the King would have the final say. Second, creating a committee of legal experts to amend the 1931 Constitution. The amended constitution would create a constitutional monarchy. A committee would also draft a law on elections and other important laws pertinent to the constitution. A *loya jirga* would then be convened to approve the draft, and upon the draft's approval, preparations would be made for holding parliamentary elections based on the new election laws. Once a parliament was elected, Daud's government would resign and a new government would be appointed based on the new constitution and new laws. However, King Zahir did not respond positively to Daud's reforms. *Id.* at 209-215.

²³⁵ Bahar Jalali, *Afghanistan: 1963-1973*, unpublished PhD dissertation, University of California, Berkeley, 107 (Spring, 2005).

²³⁶ MUBAREZ, *supra* note 231, at 213.

²³⁷ *Id.* at 209.

²³⁸ Jalali, *supra* note 235, at 107.

²³⁹ MUBAREZ, *supra* note 231, at 209.

Constitutional order, and he began to prepare to draft a new constitution.

B. The Drafting of the 1964 Constitution: Attempts to Coordinate Old and New Groups

The drafting of the 1964 Constitution appears to have been an attempt at coordination by the regime to give the new elites a sense of ownership. It attempted to accommodate the Afghan state and the constitution to the changing socioeconomic structure of the society and intending to provide a legal framework for the government in accordance with notions of legitimacy of power among the new educated middle class.²⁴⁰ King Zahir Shah initiated the process of the drafting of the 1964 Constitution in part based on the demands of the new educated elites.²⁴¹ The goal was to draft a “modern all-embracing and harmonious constitution, based on sound Afghan traditions and [Afghan] national values that appear acceptable to everyone.”²⁴²

King Zahir Shah first appointed a committee of seven experts in March 1963 to draft amendments to the 1931 Constitution, but the committee believed that a new constitution was necessary to secure the interests of all parties.²⁴³ The appointment of the members of the Constitutional Drafting Committee took place under the proposal of Prime Minister Mohammad Yousuf, a Western-educated liberal, and the approval of the King through a royal decree.²⁴⁴ This Committee was then mandated to write a new “liberalized

²⁴⁰ OLESEN, *supra* note 26, at 206.

²⁴¹ FARHANG, *supra* note 12, at 486.

²⁴² SAYED QASSEM RESHTYA, AFGHANISTAN-THE MAKING OF THE 1964 CONSTITUTION: MEMOIRS OF SAYED QASSEM RISHTYA, FORMER SENIOR GOVERNMENT MINISTER 11 (2005).

²⁴³ *Id.* at 10.

²⁴⁴ *Id.*; *see also* FARHANG, *supra* note 12, at 486.

Constitution,”²⁴⁵ with a view on the separation of powers and fundamental rights.²⁴⁶ All of the members of the Committee were known to be “reform-oriented,”²⁴⁷ members of the educated middle class, individuals who advocated reforms, such as the creation of political and social organizations.²⁴⁸ The Committee did not include representatives of Daud, members of the traditional ‘*ulamā*’ or the tribal elite.

The King directed the Committee to draft a constitution that would be “acceptable to the ‘*ulamā*’, the tribal notables, the emerging intellectuals, and to the liberals.”²⁴⁹ French constitutional law expert, Louis Faugère served as an advisor to the Drafting Committee.²⁵⁰ Faugère was brought in because the Committee had identified the need for advisors, and when the government turned to France for help, France introduced Faugère.²⁵¹

When the Drafting Committee began its work, it believed that three major fundamental and divisive issues needed to be resolved in the new constitution. The first

²⁴⁵ DUPREE, *supra* note 1, at 566; *see also* RESHTYA, *supra* note 242, at 10.

²⁴⁶ RESHTYA, *supra* note 242, at 12-13.

²⁴⁷ DUPREE, *supra* note 1, at 566.

²⁴⁸ The Constitutional Drafting Commission included Sayyid Shamsuddin Majrooh (Minister of Justice), Chairman; Said Qassim Rishtya (Minister of Press and Information); Mir Najmuddin Ansari (Adviser to Ministry of Education); Mohammad Musa Shafiq (Director of Law Department, Ministry of Justice); Abdul Samad Hamed (Chief of Secondary Education, Ministry of Education); Hamidullah (Professor of Law and Political Science, Kabul University); Mir Mohammad Siddiq Farhang (Chief of Planning, Ministry of Mines and Industries).

²⁴⁹ MUBAREZ, *supra* note 231, at 220.

²⁵⁰ DUPREE, *supra* note 1, at 566.

²⁵¹ FARHANG, *supra* note 12, at 487. The Committee also sought Daud’s opinion (who showed concern about the King’s powers in the draft by stating that the King’s powers were extensive and needed to be limited). Daud proposed that the king should be the head of the armed forces instead of the supreme commander of the armed forces, “symbol of the army.” In other places the powers of the King should be conditional on prior agreement by the government, such as the right to declare war and peace. RESHTYA, *supra* note 242, at 13.

was the position of Islam in the constitution, including identifying what form of Islam the state should follow, a key issue to the traditional elites.²⁵² The second, identified by the educated liberal elites, was economic and social issues and the structure of the government.²⁵³ The third issue for resolution was the role of the royal family, a matter of concern for the King.²⁵⁴

The Committee completed a draft in February 1964. The King then appointed a 29-member Constitutional Advisory Commission to review the draft and make suggestions before the convention of a loya jirga to adopt the Constitution.²⁵⁵ The Advisory Commission was a diverse entity, including members from various ethnic and occupational groups, but was dominated by the educated elite²⁵⁶ The Commission specifically included five groups of people whose interests needed to be secured. The first group was the “liberals” who demanded a constitutional monarchy.²⁵⁷ The second group included Daud Khan’s supporters who rejected the idea of limiting the role of the members of the royal family in politics.²⁵⁸ The third group was the “Pashtun nationalists”

²⁵² DUPREE, *supra* note 1, at 573, 579-580; *see also* Ralph Magnus, *The Constitution of 1964: A Decade of Political Experimentation*, in AFGHANISTAN IN THE 1970S, 57 (1970).

²⁵³ Ralph Magnus, *The Constitution of 1964: A Decade of Political Experimentation*, in AFGHANISTAN IN THE 1970S, 57 (1970).

²⁵⁴ *Id.*

²⁵⁵ FARHANG, *supra* note 12, at 488; DUPREE, *supra* note 1, at 566; RASOOLI, *supra* note 132, at 82-83.

²⁵⁶ Important individuals appointed to the Constitutional Advisory Commission included, Nur Ahmad Etimadi, Qayum Rasol, Ghulam Nabi Kamawi, Akhunzada Abdul Ra Mujahidzada, Mohammad Sohail, Ghulam Mohammad Ghoubar, Salauddin Saljuki, Abdul Majid Zabuli, Masoma Wardak, Kubra Noorzai, Mohammad Hashim Mojaddid, Professor Mohammad Asghar, Khalilullah Khalili, Ahmad Ali Kohzad, Amiruddin Shansab, Siddiqullah Rishteen, Lal Mohammad Kakar, and Abdul Karim Ehrari.

²⁵⁷ FARHANG, *supra* note 12, at 721.

²⁵⁸ *Id.*

who rejected the recognition of other official languages.²⁵⁹ The fourth group included landowners who rejected the role of the state in the economic system.²⁶⁰ Finally, the fifth group was the traditional ‘*ulamā*’ who demanded that Hanafi *Shari‘a* should have the primary role in the judiciary and the legislation as under the 1931 Constitution.²⁶¹

However, because of differences with the King, supporters of Daud Khan refused to join the Commission. They feared the process was designed to marginalize Daud.²⁶² The absence of Daud and his allies in the constitutional negotiations meant that Daud remained an “outsider” to the constitutional bargain and that he would not acquiesce. As a result, the 1964 Constitution faced problems in coordinating every group in the country.

After the Commission revised the draft, in the spring of 1964, Zahir Shah issued a decree that defined the composition of the Constitutional Loya Jirga. Again, Daud requested participation in the Loya Jirga, but the King refused his request and Daud continued to remain an “outsider.”²⁶³ In September 1964, the Loya Jirga adopted the Constitution.

C. The So-Called “Finest” Constitution of Afghanistan

Through a strategy of constitutional deferral, the 1964 Constitution arguably coordinated the “insiders” to the constitutional negotiations. The government tried to sideline the traditional power groups, the tribes and the traditional ‘*ulamā*’, who by the 1960s had lost their power,²⁶⁴ and connect directly with the new groups of intellectuals,

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² MUBAREZ, *supra* note 231, at 220-227.

²⁶³ DUPREE, *supra* note 1, at 570.

²⁶⁴ DONALD N. WILBER, *AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 145 (1962).

whose inclinations were more democratic, liberal, and forward-looking. Responding to demands of the liberal elites, the 1964 Constitution established a constitutional monarchy that, in effect, resembled a structure that looked like a semi-presidential system, with the King acting as the head of the state, a prime minister heading the government, and a parliament checking the activities of government. With this structure, the parliament acquired, for the first time, the power to vote out a minister, a prime minister, or a government as a whole.

The role of Islam in the 1964 Constitution became an important and divisive issue during the drafting of the Constitution. The debates in the Loya Jirga over the role of Islam became an issue of contest among the traditional ‘*ulamā*’ and the liberals.²⁶⁵ It appears that the liberals came out victorious in this debate.²⁶⁶ The Constitution established Islam as the state religion and merely directed the state to conduct its rituals in accordance with Hanafi *Sharī‘a* (not making the Hanafi *Sharī‘a* the official madhhab). Similarly, the Constitution guaranteed freedom of worship to non-Muslims within the limits provided by law, decency and public peace.²⁶⁷ The only non-Muslim Loya Jirga member, a Hindu from Kabul, showed satisfaction with this provision, but hoped that laws dealing with minority groups would keep the spirit of the Constitution.²⁶⁸

State legislation was vaguely required not to be repugnant to the “basics of Islam.”²⁶⁹

A groundbreaking provision in the Constitution was Article 69. It defined a law as

²⁶⁵ FARHANG, *supra* note 12, at 492.

²⁶⁶ DUPREE, *supra* note 1, at 579.

²⁶⁷ QĀNUN-I ASSĀSI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] art. 2, OFFICIAL GAZETTE NO. 12 (1964).

²⁶⁸ DUPREE, *supra* note 1, at 574.

²⁶⁹ QĀNUN-I ASSĀSI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] art. 64, OFFICIAL GAZETTE NO. 12 (1964).

something passed by two houses of the National Assembly and signed by the King. In areas for which there were no existing laws, the provisions of the Hanafī school of *Sharī‘a* would be considered law to fill the gaps. Notably, “conservative” members of the ‘*ulamā*’ rejected this provision, because it prioritized state law over Hanafī *Sharī‘a*.²⁷⁰ The secretary of the Loya Jirga responded that the repugnancy clause protected against “repugnancy to Islam for all time” and that no state law would be repugnant to the basics of Islam,²⁷¹ but not necessarily Hanafī Islam.²⁷²

Article 69 was an important provision. In essence, it seems that the traditionalist ‘*ulamā*’ realized that the Constitution was saying that the state would rule according to its interpretation of Islam. Hanafī law only filled in the gaps where the state had not chosen an alternative rule. The ‘*ulamā*’ protested, as they had done during the reign of Amanullah Khan, but by the 1960’s a majority of Afghans in the Loya Jirga were comfortable with that rule.

The most serious debate over Article 69 took place between a father and a son. Mawlawi Ghulam Nabi Kamawi, a respected member of the traditional ‘*ulamā*’ and a member of the Advisory Commission, rejected the idea that Hanafī *Sharī‘a* should fill in the gaps, while his son, Mohamad Musa Shafiq, a member of the Constitutional Drafting Committee, supported this provision (it was a debate between a traditionalist and a modernist).²⁷³ Musa Shafiq argued against his father that the state legislation would be based on every school of fiqh, not only Hanafī fiqh, because a large number of Afghans were followers of other schools and had the right to have a role in state

²⁷⁰ FARHANG, *supra* note 87, at 492; DUPREE, *supra* note 1, at 579.

²⁷¹ DUPREE, *supra* note 1, at 579.

²⁷² FARHANG, *supra* note 12, at 492.

²⁷³ *Id.*

legislation.²⁷⁴ Ultimately, the Article was passed by a considerable majority with a few “traditionalist Mullahs” voting against it.²⁷⁵ The passage of this article was a “great triumph for the new breed of liberal religious thinkers in Afghanistan.”²⁷⁶

The structure of the judiciary became a matter of interest to the traditional ‘*ulamā*’ and the new intelligentsia. Three different visions competed on how to design the judiciary. One group—the “conservative religious leaders”—defended the old system of administering justice under *Sharī‘a*.²⁷⁷ The second group—“the tame mullahs,” under the influence of the government—defended the idea of independent judiciary.²⁷⁸ The third group, “the liberals,” attacked the old system and its inequities, and advocated for a new system with additional guarantees for individual rights.²⁷⁹ The issue was ultimately resolved with a massive deferral through use of a by-law clause: the legislature was required to pass a law that would define the jurisdiction and organization of the court. Competing groups in the constitutional negotiations apparently agreed in hopes that the question would remain open and that they could influence its final resolution through the ordinary political process.

²⁷⁴ *Id.*

²⁷⁵ *Id.* In some ways, this provision is consistent with Abdul Rahman Khan’s approach and that of Amanullah Khan. Amanullah Khan interfered considerably with the “official” interpretation of Hanafi Islam and made people follow his version. This gave him significant discretion to impose whatever rule he wanted and to displace the religious scholar’s alternative rule. Here the rule says that whatever rule the state applies is “Islamic” (rather than Hanafi) and can displace the religious scholar’s traditional “Islamic” rule. During the reign of Amanullah, the ‘*ulamā*’ refused to acquiesce; they succeeded in amending this provision in the 1923 Constitution as the ‘*ulamā*’ were effectively the main pressure groups and were powerful enough to influence change. In 1964 society had changed. New groups appeared who had not been powerful before and demanded to secure their interests and serve as a better coordination device.

²⁷⁶ DUPREE, *supra* note 1, at 575.

²⁷⁷ *Id.* at 580.

²⁷⁸ *Id.* at 580-581.

²⁷⁹ *Id.* at 580-581.

The 1964 Constitution further stated that courts were obliged to apply the provisions of the Constitution and the laws of the state. In cases where no provision existed, courts were bound to apply the general principles of Hanafi *fiqh*. Thus, *Sharī‘a* courts applied Islamic *fiqh* as interpreted and codified by the state. Conservative religious leaders were opposed to this order of precedence—state law first and Hanafi *fiqh* second.²⁸⁰ This provision stripped them of their power to administer justice under *Sharī‘a*. As a result of hostility to their concerns, they insisted that they merely had doubts about the wording, not about the concept of precedence, and that they wanted further clarification.²⁸¹ Eventually, they agreed to operate under the Constitution by opting to work within the system to influence these provisions rather than by rebelling against the Constitution or the government. They elected to defend their interest by constitutional means, through the parliament, local elections, mass demonstration and the press,²⁸² leading to coordination and the survival of the 1964 Constitution. However, the challenge to coordination under the 1964 Constitution would come from a group of different elites—Daud and his allies who had never agreed to operate under the rules of the 1964 Constitution.

²⁸⁰ *Id.* at 583.

²⁸¹ *Id.*

²⁸² Magnus, *supra* note 232, at 61; SAIKAL, *supra* note 10, at 149.

Chapter Two:

New Challenges in Coordination, 1964-2001: The Rise of Powerful, Mutually Incompatible Ideological Movements

During the 1950s, two developments threatened to destabilize politics within the country. These were the rise of the “liberal” and the “nationalist” movements and an internal struggle within the royal family. These developments upended the balance of power that had been carefully negotiated among Afghanistan’s early twentieth-century elites, and had been facilitated by rules established under the 1931 Constitution. To grapple with the rise of these movements, King Zahir Shah decided to adopt a new constitution that could coordinate the new, far more complex constellation of powerful political factions. This 1964 Constitution alienated the King’s powerful cousin, Daud Khan.¹ The adoption of the 1964 Constitution shaped Afghans’ political behavior in unanticipated ways, ones that would eventually lead to the fall of the monarchy and the abrogation of the Constitution that the King had hoped would coordinate Afghans. Among the developments were the growth of the Communist Movement and the rise of an internally diverse group of Islamic intellectuals known as the “Islamists” alongside other movements. As these new political groups became ever more active, the government was faced with a variety of unprecedented demands that it was unable to accommodate or suppress. At the same time, Daud Khan, who felt aggrieved by political rules established under the 1964 Constitution, found sympathizers in the military. The King had no intention of resolving certain constitutional deferrals, such as the one on the

¹ *See supra* Chapter One.

structure and organization of political parties, despite the demands of a majority of political elites. Ultimately, unable to coordinate figures with the power to destabilize the country, the monarchy fell and the 1964 Constitution was abrogated.

The collapse of the 1964 Constitution ushered in thirty-five years of political crisis and civil war. During this period, ideologically incompatible Afghan political groups resisted coordination; many of these groups were supported by foreign countries. A series of groups succeeded each other as the rulers of Kabul, and the faction holding Kabul invariably claimed to be the rightful rulers of all Afghanistan. This claim was always hard to justify.

While holding Kabul, factions consistently sought, unsuccessfully, to impose upon the country an economic and political system that strongly reflected its own ideology. Each drafted a constitution that would, in theory, establish a political system under which it could impose its ideology on the entire country. Constitutions during this period tended to lionize the ideological values of the faction that held Kabul. These short-lived factions generally established a unitary state with an authoritarian government whose chief executive would have significant discretion to establish government policies. The chief executives who claimed to govern Afghanistan under these constitutions generally exercised their discretion in a way that did, in fact, reflect the ideological values trumpeted by the constitution. Because the leaders of rival factions wished for more guarantees of influence, and they resented the actual policies pursued by the government, they refused to acquiesce in the constitutional scheme. The ruling political faction and its opponents were each well-armed, and each enjoyed the support of foreign powers. None

was willing to give up its own vision for the state. At the same time, however, none was willing or able to compel a crucial mass of rivals into obedience.

From 1975 until 2001, Afghan politics appeared to be a zero sum game. A series of regimes succeeded each other—each trying to rule under a constitution that enshrined its vision of the state. Each failed to coordinate a critical mass of Afghanistan’s powerful, armed factions. Each fell and saw its constitution replaced by a constitution that reflected the ideology of its opponents, a constitution that proved to be equally ineffective as a coordination device.

I. The Failure of the 1964 Constitution as a Coordination Device

At the time it was drafted, observers in the West glorified Afghanistan’s 1964 Constitution as the “finest in the Muslim world.”² Even today, Western academics and Westernized Afghans are often heard praising it as Afghanistan’s “liberal constitution.”³ If the measure of a successful constitution is its liberality, then the 1964 Constitution may deserve the praise that is heaped upon it from these quarters. Viewed from the paradigm of coordination theory, however, the 1964 Constitution was a failure. In the end, a significant number of Afghanistan’s power brokers were not satisfied by the political rules that it established and were aggrieved by the way that the government exercised its legislative and executive power.⁴ Within a decade, regime opponents decided to change

² LOUIS DUPREE, *AFGHANISTAN* 565 (1973).

³ MEREDITH L. RUNION, *THE HISTORY OF AFGHANISTAN* 99 (2007); Barnett R. Rubin Helena Malikiyar, *The Politics of Center-Periphery Relations in Afghanistan*, Center on International Cooperation, New York University 2 (2003); Said Amir Arjomand, *Constitutional Development in Afghanistan: A Comparative and Historical Perspective*, 53 *DRAKE L. R.* 943, 945 (2005).

⁴ AMIN SAIKAL, *AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL* 148-149 (2004).

government policy, not according to the political rules established by the Constitution, but rather by a coup that ushered in a period of disastrous civil war.

Initially, the makers of the 1964 Constitution seemed willing to create one dangerous group of “outsiders”—the King’s ambitious cousin, Daud, and a faction of nationalists whose policies he had promoted. In the 1950s, Daud had articulated a nationalist vision for the state. After he resigned as prime minister, he made no secret of his desire to return to politics. The 1964 Constitution established a parliamentary democracy, and he planned to serve as prime minister again under it.⁵ Other members of the royal family, including the King, wished to limit his influence. They exercised their influence over the Drafting Committee to ensure that the 1964 Constitution included a provision barring any member of the royal family from participating in politics.⁶ It was predictable, however, that Daud and his supporters would not voluntarily acquiesce in such a constitutional regime. The question was whether they would have the political influence to get the Constitution amended or the military strength to openly try to overthrow the regime.

The drafters of the Constitution made more effort to appeal to the other power brokers: the assertive leaders of the new liberal and nationalist political movements that were appearing in the capital and other large cities. More specifically, the text of the Constitution expressly secured the interests of three major groups: the ruling branch of the royal family; senior government officials—in particular those close to the King; and the politically active segments of the liberal intellectuals.⁷ On more controversial issues,

⁵ ABDUL HAMEED MUBAREZ, TAHLIL-I WAQIYĀT-I SĪYĀSI-YE AFGHANISTAN 1919-1997, 74-75 [ANALYSIS OF POLITICAL EVENTS OF AFGHANISTAN 1919-1997] (1375) [1996].

⁶ QĀNUN-I ASSĀSI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] art. 24, OFFICIAL GAZETTE NO. 12 (1964).

⁷ SAIKAL, *supra* note 4, at 149.

following the pattern established by the 1931 Constitution, the drafters of the 1964 Constitution tried to broaden its appeal, at least in the short term, by using the tool of strategic constitutional deferral. Notably, it included provisions that it thought would be sufficient to satisfy, if not delight, both traditional interest groups and new urban ones. These, they hoped, would buy the state time to develop policies in which all would acquiesce.

For instance, the Constitution paradoxically stated that principles of liberal democracy and Islam would guide the state.⁸ However, it left it to the ordinary legal and political institutions to determine how these principles could be reconciled in practical form. The Constitution also guaranteed a long list of fundamental liberal rights and liberties, but left it to the legislature to define their scope. Similarly, while the Constitution legalized the formation of political parties, it did not provide further details requiring the adoption of a sub-constitutional law on political parties, a law that was never promulgated.⁹

Liberals might have also preferred to include provisions that were less ambiguous about the ideological orientation of the state. Under the impression in 1964 that their power was growing, they saw the deferrals as ones that might, eventually, be resolved in their favor. Furthermore, they had not developed any alliances with the military that would have allowed them to demand a more explicit commitment to liberal and modernist Islamic values or, conversely, to overthrow the monarchy.

⁸ See generally, QĀNUN-I ASSĀSI-YE AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] art. 24, OFFICIAL GAZETTE NO. 12 (1964).

⁹ J. Alexander Thier, *Big Tent, Small Tent: the Making of a Constitution in Afghanistan*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, 537 (Laurel E. Miller & Louis Aucion eds., 2010).

Tribal leaders and traditional '*ulamā*' were unhappy with the government's retreat from its previous, explicit commitments to traditional Islamic values. Nevertheless, they were mollified by the ambiguity of the retreat. Like the liberals, they found that at this point, they had no choice but to acquiesce. Society had changed over the course of the twentieth century. The state military had grown strong and the power of the traditional tribal and religious elites was being sapped by new economic and religious figures. For the first time since 1747, the Pashtun tribes and their allies among the traditional '*ulamā*' lacked the capacity to overthrow the central government.¹⁰ Like the liberals, the traditional institutions of power seemed ready to acquiesce in the constitution simply because the extent of their loss was ambiguous and because they did not have the strength they once did to militarily resist the constitution.¹¹

Against this backdrop, the 1964 Constitution tried to coordinate the increasingly complex Afghan polity by deferring on crucial questions of national values and by establishing a parliamentary system that would, hopefully, resolve the ambiguities and contestations in a manner that was acceptable to most, if not all of Afghanistan's powerful factions. Whether or not these hopes were ever realistic, they ceased to be tenable as the 1960s dragged on.

By the 1970s, two powerful movements, the communists and Islamist modernists, had grown and were challenging the monarchy's monopoly on power and wealth. These groups had not been powerful during the drafting of the 1964 Constitution, and the drafters had made little effort to write a constitution that accommodated their desires or

¹⁰ DONALD N. WILBER, *AFGHANISTAN: ITS PEOPLE, ITS SOCIETY, ITS CULTURE* 145 (1962).

¹¹ *Id.*

even created ambiguities that these groups felt that they could exploit to influence state behavior. The 1964 Constitution itself, however, created a situation in which these groups became more powerful. When the 1964 Constitution legalized political parties, these two groups emerged as the most powerful political organizations of the 1970s. And at that point, the failure to accommodate them created problems of coordination that brought down the monarchy. They indicated that they would not play by the rules set down in a 1964 Constitution in which they had played no role. Known as the opponents of the 1964 constitutional order,¹² some of them were cultivated by Daud and some by nationalists. Ultimately, an alliance of Daud, nationalists, and communists overthrew the monarchy.¹³ They sought uncompromisingly to impose authoritarian regimes that pursued ideological policies that were unacceptable to both traditional Afghan power brokers and the new Islamist movement. Strong, but not strong enough to cow their opponents, civil war erupted.

II. The Communist Movement

The Afghan Communist Movement started in the 1950s, but it did not become powerful until after the 1964 Constitution was adopted. The Communist Movement was slower to emerge than other movements in Afghanistan. This was probably attributable to Afghanistan's isolation from Europe and the mainstream of European "radical thought."¹⁴ The Communist Movement did not really appear until after Marxist-Leninist materials

¹² MIR MOHAMMAD SEDIQ FARHANG, *AFGHANISTAN DAR PANJ QARN-E AKIR* 515-518 [AFGHANISTAN IN THE LAST FIVE CENTURIES] (1367) [1988].

¹³ *See generally*, Mohammad Hasan Kakar, *The Fall of the Afghan Monarchy in 1973*, 9 INT'L J. OF MIDDLE EAST STUD. 195 (1978).

¹⁴ BEVERLEY MALE, *REVOLUTIONARY AFGHANISTAN: A REAPPRAISAL* 36 (1982).

were translated into Dari and Pashtu.¹⁵

During the premiership of Daud Khan (1953-1963), the Communists expanded their activities and created their first Committee in Kabul and established smaller cells in other major cities.¹⁶ They viewed the problems of the country as a class struggle, where the so-called upper class exploited the working class.¹⁷ They believed that unless the authority of the upper class was abolished, true social justice could not be established in society.¹⁸

When the 1964 Constitution legalized political parties, on January 1, 1965, the prominent leaders of the Communist Movement formed the People's Democratic Party of Afghanistan (PDPA) under the leadership of Nur Mohammad Taraki.¹⁹ At that time, it was widely believed that King Zahir Shah would approve the law permitting the formation of political parties. In anticipation of that law, a wide array of political groups emerged; nevertheless, the PDPA was the single most important party at that time.²⁰

¹⁵ FARHANG, *supra* note 12, at 496-497.

¹⁶ *Id.* at 515-518.

¹⁷ *See generally*, ANTHONY ARNOLD, AFGHANISTAN'S TWO-PARTY COMMUNISM: PARCHAM AND KHALQ (1983).

¹⁸ *Id.*

¹⁹ Marxism came to Afghanistan by many routes beginning in the 1950s and accelerating in pace through the liberalization of politics in the 1960s. The broadest path, and ultimately the most important one, lay not in the ideological appeal to the discontented intellectuals that created the PDPA, but rather through economic, educational and military modernization. *See*, RALPH H. MAGNUS; EDEN NABY, AFGHANISTAN: MULLAH, MARX, AND MUJAHID 106 [2002].

²⁰ Although the Soviets do not appear to have been directly involved in the establishment of the PDPA, Taraki's analysis of Afghanistan's historical development and of the international situations reveals his intellectual debt to Soviet theorists. In one of his speeches, Taraki stated, "in the last two years we have fully understood the ideology of each other and our path is explicitly clear. We know that we are struggling for some classes against some classes and that we are going to build such a society on the basis of social principles in the interest of the toilers and void of individual exploiters." Taraki had made it clear that "[o]ur party will be among the world's proletariat parties and we will firmly maintain our fraternal ties with them." Although its ideology could be characterized as national democratic and progressive." Later, after 1978, the PDPA

The *Wikh Zālmiyān* period had provided an important foundation for the participants in the founding congress of the PDPA in the 1950s.²¹ That founding congress agreed that the goal of the Party should be the construction of a “socialist society” based on “Marxist-Leninist” principles.²² The PDPA, like other parties, demanded radical changes in the way Afghanistan had been governed for decades. But it distinguished itself from other parties, such as the Social Democratic Party of Afghanistan and the *Shula-ye Jāwed* (Eternal Light), which saw a solution to Afghanistan’s problems in free elections, a free press, legal reforms, and reform of the bureaucracy.²³ While the PDPA acknowledged the need for such measures, it saw these measures on their own as merely tinkering with the system; in contrast, the PDPA posited that the system itself needed to be changed.²⁴ It proposed not merely to limit the power of the ruling class, which was an unacceptable proposition in itself, but to destroy it altogether.²⁵

In 1967, the PDPA split into two factions, the *Khālq* (masses) and *Parchām* (flag), each associated with the name of its newspaper: the *Khālq* faction, led by Nur Mohammad Taraki and Hafizullah Amin; and the *Parchām* faction, led by Babrak Karmal.²⁶ The *Khālq* was dominated by Pashtu-speaking Afghans from outside of Kabul

became openly Marxist, with strong Leninist tendencies. *See generally*, TARIQ-UL-SHAAB, *DEMOCRATIC KHALQ PARTY OF AFGHANISTAN: PIONEERS OF WORKING CLASS* (1976); *see also* BEVERLEY MALE, *REVOLUTIONARY AFGHANISTAN: A REAPPRAISAL* 36 (1982).

²¹ MALE, *supra* note 14, at 36.

²² ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* 228 (1995).

²³ MALE, *supra* note 14, at 42.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* 52-53.

and had strong ties to the military thanks to Hafizullah Amin's hard work in that regard,²⁷ whereas Dari-speaking Afghans from Kabul dominated the Parchām faction. The Khālq and Parchām split took place not only because of identity politics. The Khālq faction preached the primacy of the class struggle, but the Parchām leaders wanted to form an anti-government united front to oppose the monarchy.²⁸ The two factions did not unite until the dawn of the 1978 communist coup.

III. The Islamist Movement

Until the modern era, Muslims looked for religious guidance to the 'ulamā'. When the modern Afghan state was forming, religious politics were controlled by members of this class. At the same time, however, social changes were leading some Muslims around the world, including Afghanistan, to turn away from the 'ulamā' and to follow instead the teaching of Islamic intellectuals trained in modern methods of Islamic interpretation.²⁹ During the time of Amanullah Khan, Islamic modernists had appeared in the cities and became politically important. After the fall of Amanullah, the impact of modernists diminished and Islamic politics were once again dominated by the 'ulamā'.³⁰ The retreat of modernism was, however, only temporary. Modernists re-appeared and grew particularly strong among Muslims educated in the monarchy's public schools and state universities. By the 1950s, religious opposition to the state could come from two different

²⁷ Louis Dupree, *The Marxist Regimes and the Soviet Presence in Afghanistan: An Ages-Old Cultural Responds to Late Twentieth Century Aggression* in REVOLUTIONS AND REBELLIONS IN AFGHANISTAN 58-75, 61 (Mohammad Nazif Shahrani & Robert L. Canfield eds., 1984); MALE, *supra* note 14, at 42 (1982).

²⁸ *Id.* at 52-53 (1982); LOUIS DUPREE, RED FLAG OVER HINDU KUSH, PART I: LEFTIST MOVEMENT IN AFGHANISTAN, AUFS REPORTS, ASIA No. 21 (1979).

²⁹ *See generally*, CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW (2006).

³⁰ *See supra*, Chapter One.

sides—from traditionalists led by members of the *‘ulamā’* and from *Roshan Fikrāns* (the “modernists”). The more radical criticisms tended to come from the latter.³¹

The Afghan Islamist Movement emerged in large part as a reaction to the process of “Westernization in Afghanistan and the growth of secular, liberal ideologies” among Afghan youth.³² The Islamists preached that only a radical Islamic government could solve society’s problems. They asserted that, as Muslims, Afghans had no other option but to jointly struggle for the establishment of a truly Islamic government, where all affairs of the state would be strictly dealt with according to their own narrow interpretation of Islam.³³ While the Marxists attempted to promote a Marxist form of Islam that would replace Hanafī *Sharī‘a*, the Islamists stuck strictly to an “Ikhwānī” version of Hanafi Islam inspired by the Egyptian Muslim Brotherhood.³⁴

Like the Marxists, Islamists took a political turn during the premiership of Daud Khan, and they continued to be politically active in the subsequent “liberal” period under the 1964 Constitution.³⁵ Islamists staged protests against policies that were central to the government’s traditional strategy of appeasing tribal elites and traditional *‘ulamā’* in order to ensure the monarchy’s monopoly on executive power. For example, they criticized the government’s policy of appointing tribal *Sardārs* (chieftains) to important positions in government, and the concentration of all economic and political power in one

³¹ OLESEN, *Supra* note 22, at 228.

³² LUDWIG ADAMEC, HISTORICAL DICTIONARY OF AFGHANISTAN 120 (1991).

³³ SABAHUDDIN KHUSHKAKI, DAHA-YE QĀNUN-YE ASSĀSI, GHAFLAT-YE ZINDĀGI AFGHĀN HA WA FURSAT TALĀBI RŪS HA, 175-177 [DECADE OF THE CONSTITUTION: NEGLECT OF THE LIVES OF THE AFGHANS AND THE OPPORTUNISM OF RUSSIANS] (4th ed. 1384) [2005].

³⁴ THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 213 (2010).

³⁵ *See generally*, OLIVER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN (1990); MOHAMMAD IKRAM ANDESHMAND, NOHĀT HAI ISLĀMI AFGHANISTAN [AFGHANISTAN’S ISLAMIST MOVEMENTS] (1392) [2013].

family, the monarchy.³⁶

Like the communists, the Islamists began to work to overthrow the 1964 constitutional order in which a monarchy was supported by a small number of liberal elites, and under which the government was exploiting constitutional ambiguity to entrench the executive. Unlike Marxists, however, the Islamists sought to replace the existing order with a modern parliamentary state enacted laws consistent with a modernist interpretation of the *Sharī'a*.³⁷

The common goal of the Afghan Islamists was the advancement of Islam, but theirs was not the same Islam as that of the traditional '*ulamā*'. The Islamists disagreed with traditionalists about who could interpret Islamic law and about what methods interpreters should use when they interpreted God's command.³⁸ Traditionalists believed that religious scholars trained in medieval methods had a monopoly on the interpretation of God's command.³⁹ By contrast, modernists believed that literate, pious Muslims had the ability to interpret God's commands using a far less formalistic methodology.⁴⁰ Inevitably, modernists developed different substantive understandings of Islamic law and of the nature of the state that should be established to apply it.

The Afghan "Islamist" Movement seems to have begun in 1957 with the return from Egypt of Professor Ghulam Mohammad Niazi, later Dean of the *Sharī'a* Faculty at Kabul

³⁶ GULBUDDIN HEKMATYAR, *ISLĀMI NUHẒAT* 48-49 [ISLAMIST MOVEMENT] (1388) [2009].

³⁷ *See generally, Id.*

³⁸ For a discussion of the evolution of modernism and of the difference between traditionalists and modernists in the Egyptian context, *see* CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT*, Chapters 4 through 6 (2006). The Egyptian modernists that he discusses would be studied by Afghans and would influence the Afghan Islamists.

³⁹ *See supra*, Introduction.

⁴⁰ *Id.*

University. Niazi had entered Egypt and obtained his master's degree from al-Azhar University.⁴¹ In Egypt, Niazi had been strongly influenced by the *Ikhwān al-Muṣlīmīn* (the Muslim Brotherhood).⁴² Upon return from Egypt, Niazi took initiative to establish a small cell at the Madrasa-ye Abu Hanifa in Paghman, in which a group of devoted Muslim lecturers, mostly from the Faculty of *Sharī'a*, presented lectures.⁴³ Most of these lectures were translations of works by famous Islamic thinkers, mainly of Sayyid Qutb and Maulana Abul al-Maududi.⁴⁴

The Islamist Movement benefited from the translation of works by Sayyid Qutb published in Tehran as well as translations of works by Maududi published in Peshawar.⁴⁵ But the Afghan Islamist Movement was influenced most by the Muslim

⁴¹ ADAMEC, *supra* note 32, at, 177.

⁴² *Id*; see also OLESEN, *supra* note 22, at 231.

⁴³ OLESEN, *supra* note 22, at 231.

⁴⁴ *Id*. Al Maududi and Sayyid Qutb are known as the ideologues who reestablished the foundation for modern Islamism. Maududi belonged to the *Jamā'āt-i Islami Pakistan*, while Sayyid Qutb belonged to the Egyptian Muslim Brotherhood. The writings of these two Muslim thinkers were influential upon senior figures in the Islamist movements around the world. Maududi and Qutb both supported the notion that it was every Muslim's duty to work towards the establishment of Islam on earth as a global political entity. Both saw Islam as a holistic ideology equipped to challenge Western ideologies. Specifically, both sought to supplant socialism and capitalism, which they viewed as responsible for the decline of Islam. Maududi and Qutb read Islam in terms of radical exegesis, seeing a clash between Islam and the West. Both saw this struggle ending in a revolution resulting in an ideal Islamic state. Maududi's revolution would be on social reform leading to the Islamization of society before the implementation of an Islamic state, but Qutb's would impose an Islamic state in order to achieve his ideal vision. Both called for an Islamic state founded on . They issued a *da'wah*, (missionary) call with this goal in mind. When the people failed to respond, Maududi used the political process to spur change, but Qutb, called for violent jihad—when Nasser came to power, to overthrow *jahili* (reference to pre-Islamic ignorant Arab world) governments. See generally, S. ABUL AL'A AL MAUDUDI, POLITICAL THEORY OF ISLAM (1976); ALBERT J. BERGESEN, THE SAYYID QUTB READER: SELECTED WRITINGS ON POLITICS, RELIGION, AND SOCIETY (2007).

⁴⁵ See generally, ROY, *supra* note 35; TOORYALAI OSMANI, ASRĀR-I PUSHT-I PARDAH: JAHĀD WA MOQAWOMAT-I MARDUM-I AFGHANISTAN, 354-358 [BEHIND THE CURTAIN

Brotherhood.⁴⁶ The translation into Dari and Pashtu of works by foreign Islamic scholars had a powerful influence on the thinking of many pious young Muslims, particularly those who were not being trained in the traditional madrassas but rather in the state educational institutions.⁴⁷

The rise of the Modernist Islamist Movement inspired by these works is notable for two reasons. First, it indicated that the field of gravity in politics had moved to the urban educated middle class, unlike former times where the opposition had been mobilized through the spoken word, and the direct propagation among the target group—the tribal and rural communities.⁴⁸ Second, it signaled a change in the ideological orientation of politically active Muslims. Ideological inspiration had once come almost exclusively from Hanafi regions of the Muslim world, particularly Muslim India, but also to some extent Turkey.⁴⁹ By the 1950s, however, that orientation had changed.⁵⁰ Afghan Muslims who were interested in getting a religious education had once gone to Deoband, India, and Aligarh for education. The constant interaction of tribesmen across the border easily channeled thoughts and ideas from the Indian subcontinent over to Afghanistan.⁵¹ In the 1960s, the Afghan government was eager to break the stronghold of the traditional ‘*ulamā*’ and encouraged pious Afghans to familiarize themselves with developments in

SECRETS: JIHAD AND RESISTANCE OF THE AFGHAN PEOPLE] (1393) [2014]; OLESEN, *supra* note 22, at 228.

⁴⁶ OLESEN, *supra* note 22, at 228; ROY, *supra* note 35, at 99; ADAMEC, *supra* note 32, at 120.

⁴⁷ OLESEN, *supra* note 22, at 228.

⁴⁸ P.D. Khattak, *The Impact of Islam, Islamic Fundamentalism and Marxist-Leninist Ideology in Afghanistan*, in *THE SOVIETIZATION OF AFGHANISTAN* 61-70 (S.B., Elmi, & Majrooh, eds., 1986); OLESEN, *supra* note 22, at 228.

⁴⁹ OLESEN, *supra* note 22, at 228.

⁵⁰ *Id*; see also ADAMEC, *supra* note 32, at 120.

⁵¹ OLESEN, *supra* note 22, at 228.

Egypt. Increasing numbers of *Shari‘a* students went to Egypt for education. At the same time, lecturers from al-Azhar University were employed in Afghanistan under a collaborative agreement with Kabul University.⁵² These endeavors brought the ideologies and thinking of the Muslim Brotherhood to Afghanistan.

It was at this point that the leaders of a nascent Afghan Islamist Movement began to translate the works of Sayyid Qutb, an ideologue of the Muslim Brotherhood who had not received a classical religious education and taught a distinctly modernist approach to legal reasoning—albeit one that was very conservative. Eventually, they included them into the official *Shari‘a* Faculty curricula at Kabul University.⁵³ For instance, Mawlawi Yunus Khalis, one of the most prominent leaders of the Islamist Movement and later leader of the *Hizb-i Islāmi Khalis* mujahideen party, translated and published Qutb’s book, *Islam and Social Justice*, in 1960. Burhanuddin Rabbani, another prominent leader of the Islamists, began a translation of Qutb’s later books: *In the Shade of the Qur’an* and the *Milestones*.⁵⁴

While urban, university-based, Afghan Islamists took inspiration primarily from thinkers associated with the Egyptian Muslim Brotherhood,⁵⁵ some students at traditional religious schools were also influenced by modernism—albeit modernism of a slightly

⁵² ROY, *supra* note 35, at 95-96.

⁵³ OSMANI, *supra* note 45, at 354-358; HAFIZULLAH EMADI, STATE, REVOLUTION, AND SUPERPOWERS IN AFGHANISTAN 97 (1990).

⁵⁴ ROY, *supra* note 35, at 70; OSMANI, *supra* note 45, at, 354-358.

⁵⁵ The Afghan Islamists differed from traditional Afghan Islam in that they carried the banner of modernist Islam and combated secularism and Western ideologies. They sought a contemporary political interpretation of Islam. Because the Afghan Islamists drew on the Brotherhood, they were able to form highly organized political parties. The traditional ‘*ulamā*’ in Afghanistan viewed the role of government and society differently from the Islamists. They did not see Islam in political terms, but rather in religious terms. They sought to return to the purity of the teachings of the Qur’an and the Sunnah.

different type than that of the Muslim Brotherhood. They drew inspiration from modern Islamist movements that tried to harmonize their Islamist ideology with classical Hanafi thought.⁵⁶ In particular, they were influenced by thinkers associated with Deoband and with the Deobandi Islamist political party, the *Jamā'at-i 'ulamā'-ye Pakistan*.⁵⁷ Deobandis developed a line of thinking that fused elements of traditional Hanafi thinking with elements of modernist Islamist ideology.⁵⁸ Some traditionally trained Afghan religious scholars even moved a bit in the Ikhwāni direction—largely by reading the Indian, Pakistani modernist, Maulana Maududi.⁵⁹ The rise of Hanafi-oriented Islamist parties such as the Servers of the Qur'an (*Khādim al-Qur'an*), the establishment of *Ḥarākāt-i Inquilāb-i Islāmi* (The Islamic Revolutionary Movement) by Mohammad Nabi

⁵⁶ ROY, *supra* note 35, at 70.

⁵⁷ *Id.*

⁵⁸ In India, under the British domination and oppression, one way the Muslim community chose to respond was to open a seminary in Deoband in 1866. The leadership of this seminary was composed of former students of the Delhi madrassa, a seminary that shunned everything foreign, Hindu, Western or British, and made a concerted effort to expose its students only to the rich spiritual and philosophical traditions of Islam. From its inception, the school at Deoband made a sharp distinction between 'revealed' or sacred knowledge, and 'human' or secular knowledge. The school excluded all learning that was not obviously Islamic by firmly rejecting other traditions (Hinduism of India, Christianity) and forbidding Western-style education and the study of any subjects not directly related to the study of the Qur'an. The school was also highly critical of Islam as it was practiced in the modern world, especially India. They felt the established religious order had made too many compromises with its foreign environment and therefore Islam needed to be purified of these foreign elements. To live out the pure Islamic tradition they embraced *taqlid* (acceptance of the old interpretations, traditionalist Islam) and rejected *ijtihād* (the process of making a legal decision by independent interpretation of Islamic precepts) to accommodate the changing times. It should also be noted that they are strict adherents to the Hanafi school of thought. *See generally*, MUHAMMAD MOJ, THE DEOBAND MADRASSAH MOVEMENT: COUNTERCULTURAL TRENDS AND TENDENCIES (Diversity and Plurality in South Asia) (2015) (discussing the Deobandi Islamic movement).

⁵⁹ They were inspired by the modernist Maulana Al Maududi, who was more similar to Sayyid Qutb, than to the Deobandis. ROY, *supra* note 35.

Mohammadi, and then the establishment of the Taliban movement in 1990s, were primarily inspired by the Islamic movements in India—particularly from Deoband.⁶⁰

By the 1970s, Ikhwāni Islamists were sufficiently strong within Kabul University that they changed their strategy from outreach to mobilization of pious students and strived to build cells of supporters in a variety of factions in society, and they began to embrace the goal of taking power.⁶¹ Unsurprisingly, as the monarchy became aware of this development, some Islamist leaders were arrested, and a number of important figures went to Pakistan.⁶² Islamist ideology, however, continued to attract Afghans, not only in the cities but also, increasingly, among younger students in traditionalist institutions of Islamic learning and, from there, into the countryside. The continuing growth of modernist Islamism would become apparent during the 1970s, particularly after the 1973 military coup that brought down the monarchy.

IV. The Republican Coup: Sham Coordination

The decade 1963-1973 is sometimes called the Decade of Democracy or the Decade of the Constitution.⁶³ As positive as these names might sound, this period was one of comparative instability for domestic politics and for the relations between Parliament and the government. Unlike the stable governments of the prior three decades, multiple successive governments and different prime ministers marked this period. Neither the

⁶⁰ See generally, ROY, *supra* note 35; ANGELO RASANAYAGAM, *AFGHANISTAN: A MODERN HISTORY, MONARCHY, DESPOTISM, OR DEMOCRACY? THE PROBLEMS OF GOVERNANCE IN THE MUSLIM TRADITION* 143-44 (2003).

⁶¹ ROY, *supra* note 35, at 99.

⁶² See generally, *id.*; see also GILES DORRONSORO, *REVOLUTIONS UNENDING: AFGHANISTAN, 1979 TO THE PRESENT* (2005).

⁶³ See generally, KHUSHKAKI, *supra* note 33.

King nor any of these prime ministers were able to dominate or direct domestic politics.⁶⁴ In the final days of the life of the 1964 Constitution, the relationship between the government and Parliament was at its lowest point. Afghanistan had had five prime ministers in ten years.⁶⁵ Conservative factions that remained from the reign of Nadir Shah did not allow constructive debate or articulation of views held by the legislators representing the educated class.⁶⁶

Moreover, in anticipation of the law on political parties under the 1964 Constitution, a wide array of political parties had emerged,⁶⁷ but Zahir Shah, fearing the growing strength of these political parties, refused to sign that law.⁶⁸ Initially, the emerging social and political groups acquiesced to the 1964 Constitution because they believed that the political parties' law would pave the way for their broader political representation in the state institutions, and as result these political groups operated under the rules of the Constitution. But inertia, combined with vested interests within monarchical circles and the lack of an effective parliament, destroyed the democratic experiment.⁶⁹

In this situation of political instability, the “Republican Nationalists” were the first to assert power in the ideological struggle with the monarchy.⁷⁰ The monarchy had succeeded, to some extent, in establishing a modern state, and portrayed it as a national institution that served the interests of all classes. The Republican Nationalists, however,

⁶⁴ JYOTINDRA NATH DIXIT, *AN AFGHAN DIARY: ZAHIR SHAH TO TALIBAN* 9 (2000).

⁶⁵ These prime ministers were Mohammad Yusuf, Miwandal, Etemadi, Dr. Zahir, and Mohammad Musa Shafiq.

⁶⁶ Bahar Jalali, *Afghanistan: 1963-1973*, 203-04 (Spring, 2005) (unpublished PhD dissertation, University of California, Berkeley).

⁶⁷ DIXIT, *supra* note 64, at 11.

⁶⁸ Jalali, *supra* note 66, at 203-204.

⁶⁹ DIXIT, *supra* note 64, at 11.

⁷⁰ OLESEN, *supra* note 22, at 219; BARFIELD, *supra* note 34, at 211.

argued that, notwithstanding the changes that had taken place, the monarchy continued to be an “instrument of class oppression.”⁷¹ They accurately pointed out that the development strategies implemented by those in leadership positions tended to promote the interests of a small sector of Afghan society.⁷² They failed to permit members of the middle and lower classes to assume leadership positions in the state apparatus,⁷³ and they allowed a narrow class of elites to monopolize key economic and industrial enterprises, as well as import-export activities.⁷⁴ The monarchy’s development model approach alienated the government from the lower classes. Now faced with withering criticism from Republican Nationalists, including important dissident members of the elite, the monarchy began to lose popularity.⁷⁵ In this environment, some members of the military began to question the judgment and bona fides of the palace and its allies.

The national army had been built up by the monarchy to counteract the power of the tribal militias that had historically resisted monarchical control. Up to 1970, the army had never been powerful enough to play an active role on its own in Afghan politics. With a growing number of Afghans questioning the monarchy and the traditional tribal and religious elites that had supported it, and with new political groups championing the interests of those disaffected groups, some progressive members of the military saw an opportunity to play king-maker—or, more accurately, president-maker—shaping Afghanistan’s direction going forward.

With the support of urban and semi-urban political groups—the leftists and

⁷¹ EMADI, *supra* note 53, at 11.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

progressive members of the military, Daud Khan and his allies overthrew King Zahir Shah in a bloodless coup on July 17, 1973.⁷⁶ The following day, Daud declared Afghanistan a republic and named himself the founding president.⁷⁷ Daud represented a nationalist faction within the old political elite. His coup brought two groups into the policy-making elite that had previously been excluded from political influence.⁷⁸ The first was the military. The second was a small group of urban, educated leftists, mostly from the Parchām faction of the Marxist Party.⁷⁹

A. The Republican (1977) Constitution of Afghanistan: Establishing a Single-Party Authoritarian Regime

Daud Khan did not immediately adopt a constitution. To fill the constitutional vacuum, he enacted three fundamental presidential decrees of a constitutional nature.⁸⁰ Notably, Decree No. 1, nullifying the 1964 Constitution, contained the following provisions: (1) “Afghanistan is a republican state and in harmony with the “spirit of Islam”; (2) “the Constitution of 1964 is annulled unless its provisions are declared valid by a presidential decree”; (3) “the provisions of the 1964 Constitution that deal with the rights and duties of the King are annulled”; (4) “the powers embodied in Article 9 of the 1964 Constitution are transferred to the new President”;⁸¹ (5) “the provisions related to the Parliament are annulled”; and (6) “the powers embodied in Article 4 of the 1964

⁷⁶ See generally, Kakar (1978), *supra* note 13.

⁷⁷ DIXIT, *supra* note 64, at 11.

⁷⁸ OLESEN, *supra* note 22, at 220.

⁷⁹ *Id.*

⁸⁰ NIGHAT MEHROZE CHISHTI, CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN 124 (1998).

⁸¹ Article 9 of the 1964 Constitution articulates all 17 powers given to the King.

Constitution are transferred to the president.”⁸²

Over time, Daud believed his administration needed its own constitution, and he appointed a 20-member commission to prepare the first draft.⁸³ Mohammad Musa Shafiq, who had been a drafter of the 1964 Constitution and had been serving as prime minister when the republican coup took place, headed this committee.⁸⁴ Notwithstanding his ties to the ousted regime, Shafiq supervised the drafting of a new constitution that reflected Daud’s Nationalist Republican vision for Afghanistan. Daud then appointed a Constitutional Review Commission to review the draft. Like the Drafting Commission, the Review Commission was staffed exclusively by government and military officials.⁸⁵

Daud’s Constitution provided for ratification by a *loya jirga*, which would then elect a President of the Republic to serve a renewable six-year term. At the end of this term, the *loya jirga* would either re-elect the president, or elect another president. This constitutionalized *loya jirga* would be composed of the following: members of the Milli Jirga (legislature), the president, his cabinet, members of the Central Committee of the National Revolutionary Party, the Supreme Court, the High Council of the Armed Forces, five to eight representatives from each province, based on population, and an additional 30 members appointed by the President. Almost all of these institutions were under the direct control of the President. As a result, the *loya jirga* was, effectively an organ of the

⁸² Presidential Decree No. 1 of the Republic of Afghanistan, Official Gazette No. 245 (1973).

⁸³ CHISHTI, *supra* note 80, at 124.

⁸⁴ Mohammad Musa Shafiq was arrested and jailed after the Coup. But Daud Khan freed him and arranged hospital treatment to recover from an illness he contracted in prison. Musa Shafiq prepared a draft that was inspired by the political interests of Daud Khan—a single party political system.

⁸⁵ MOHAMMAD ASHRAF RASOOLI, *MÜRÜR-I BAR QĀWĀNĪN-I ASSĀSI AFGHANISTAN [REVIEW OF THE CONSTITUTIONS OF AFGHANISTAN]* 97-99 (2nd ed. 1392) [2013].

President. To all eyes, it seemed that Daud would remain president as long as he desired. The Constitution gave the president enormous discretionary power.

Daud arguably hoped that approval by an institution representing the leading power brokers in Afghanistan would help inspire general acquiescence in the new regime. The *loya jirga* was supposed to be an elected body that represented a critical mass of Afghanistan's influential political factions.⁸⁶ With this in mind, President Daud publicly called for all political groups to put up candidates, including religious factions and the leftist *Parchām* and *Shula-ye Jawed* representatives.⁸⁷ The 1977 *Loya Jirga* did not, however, represent some of the most important factions. Daud had barred the important *Khālq* faction of the PDPA from the constitutional drafting process and also from the *Loya Jirga*.⁸⁸ Even outside the *Khālq* faction, some important leftists were unhappy about the constitutionalization of a single-party system and about the government's clear intent to centralize policy-making decisions within a small faction of Daud's confidants.⁸⁹ They were afraid of future repercussions if they were associated with a mode of governance that proved ineffective and unpopular.⁹⁰ Important Islamist leaders were also absent because Daud had suppressed them and had forced their leaders to seek refuge in

⁸⁶ The procedure of the elections was as follows: on specific days, candidates put themselves forward in each of the rural administrative districts and in the urban wards, a total of 219 constituencies. The people voted for their candidates with show of hands and shouts till the overwhelming majority of the crowd supported one candidate.

⁸⁷ LOUIS DUPREE, *TOWARDS REPRESENTATIVE GOVERNMENT IN AFGHANISTAN, PART II, STEPS SIX THROUGH NINE—AND BEYOND?* AMERICAN UNIVERSITY FIELD STAFF REPORT 22.14, SOUTH ASIAN SERIES (1978).

⁸⁸ RALPH H. MAGNUS & EDEN NABY, *AFGHANISTAN: MULLAH, MARX, AND MUJAHID* 118 (2002).

⁸⁹ DUPREE (1978), *supra* note 87.

⁹⁰ *Id.*

Pakistan.⁹¹ The elected Loya Jirga members thus did not represent a broad cross-section of the country's political actors. To supplement them, President Daud unilaterally appointed 130 members to the Loya Jirga, including military officers, factory workers, small farmers, urban intellectuals and women.⁹²

To no one's surprise, this non-representative Loya Jirga approved the essentially authoritarian new constitution. Although it amended 34 articles and wrote six new articles that defined and enhanced the role of the judiciary, none of these amendments changed the essentially authoritarian nature of the new constitution.⁹³ The question that remained was whether the Afghan people would acquiesce in the rules that were established by this constitution, a constitution that offered absolutely nothing to other important factions and ideologies.

B. The Failure of the 1977 Constitution as a Coordination Device

President Daud had criticized the 1964 Constitution as pseudo-democratic, but the alternative he offered was drafted in a non-representative fashion and was explicitly autocratic.⁹⁴ It transplanted into Afghanistan an authoritarian model of governance that provided for a presidential system of government within the framework of a single-party system. It ignored the interests of important political groups, including those of his previous communist allies, because it failed to include institutions that they could realistically hope to control. It did not contain ambiguous provisions that the communists (or other groups) believed they could leverage to influence governance. Not only did the

⁹¹ OLESEN, *supra* note 22, at 234.

⁹² DUPREE (1978), *supra* note 87.

⁹³ *Id.*

⁹⁴ M. S. Agwami, *The Saur Revolution and after*, in AFGHANISTAN IN CRISIS 1-18, 3 (K. P. Misra ed., 1981).

Constitution give the government powers that it could, in theory, abuse—but Daud’s actions after he took power strongly suggested that he was inclined to abuse them and to suppress anyone who criticized his policies.

Not surprisingly, a broad cross-section of Afghan society concluded that they had little incentive to play by the rules of the Constitution. The Constitution was, of course, resented by the ousted traditional elites who had also been excluded from sharing power in the new system. Islamist groups whose leaders were in exile in Peshawar were doomed to be excluded from power in Daud’s one-party state. Expectedly, they also refused to acquiesce in the system that it established. Worse for Daud, his relations with his coup allies, the communists, had gone sour by the time he adopted his Constitution. Fearing that they would be marginalized in the single-party authoritarian system, the communists were disinclined to acquiesce in the new political rules.

Recognizing the precariousness of his position, Daud tried to suppress all of his opponents. Among other things, he tried to remove the communists from positions of power within the civil and military bureaucracies.⁹⁵ By this time, however, the communists had already embedded themselves too deeply to be easily removed. When Daud arrested Nur Mohammad Taraki and Hafizullah Amin, the communist leaders’ sympathizers within the military led a coup on their behalf, overthrowing President Daud, killing him and all members of his family.⁹⁶ The 1977 Constitution, which survived for

⁹⁵ LARRY P. GOODSON, *AFGHANISTAN’S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN* 52 (2001); MAGNUS & NABY, *supra* note 88, at 121.

⁹⁶ BARFIELD, *supra* note 34, at 255; GOODSON, *supra* note 95, at 52 (2001); MAGNUS & NABY, *supra* note 88, at 122-23.

less than a year, was abrogated and thus became the shortest-lived constitution in Afghanistan's history.

V. Civil Wars of 1980-2001: Short-lived Regimes and Coordination Failures

From 1978 to 2001, Afghanistan suffered over twenty years of civil war. During this period, a succession of ideologically motivated governments succeeded in taking power in Kabul. Each was committed to imposing by force its ideology; none tried to draft a constitution that could realistically serve as a coordination device for Afghanistan's increasingly polarized and well-armed people. Indeed, the regimes that came to power during this period did not have any regard for coordination. This was reflected in the constitutions each prepared. During this period, only the faction that held Kabul drafted constitutions, and they did not utilize deferral as a strategy to inspire popular consent, or at least avoid sufficient opposition to any of these constitutions.

After ousting Daud, doctrinaire Marxists struggled to develop a constitution to which Afghans would acquiesce, ultimately drafting several different constitutions—each of which was violently resisted by significant numbers of Afghans. Marxists were succeeded by a series of Islamist governments, including one headed by a coalition of Sunni and Shi'ite mujahideen parties and another headed by the so-called Taliban movement. Different Islamists proposed different versions of supposedly "Islamic" constitutions. Sunni mujahideen parties prepared a draft constitution with a highly centralized model of Islamic governance. Shi'ite mujahideen parties put forward one with a de-centralized, federalist model of Islamic governance. The Taliban proposed a centralized Hanafi Islam-governed "Islamic Emirate."

All of these constitutions failed to take hold because the processes did not include sufficient elite bargaining, and the constitutional texts were drafted in a way that offended powerful stakeholders. Constitutions from the period between 1980 and 2000 were all ideological documents, which unambiguously reflected the values and promoted the interests of their authors. None left any hope for the people who opposed the ideological orientation of the state—that they might share power or that they would be able to influence government and steer Afghanistan, over the long term, in a direction that they found attractive. Many communities and political factions concluded that the costs of playing by the constitutional rules far outweighed the benefits.

A. The Communists' Constitutions: Single Party Authoritarian Constitutions

While the PDPA initially sided with Daud to overthrow the monarchy,⁹⁷ Daud did not allow its leaders much influence in his authoritarian state. Restrictions on political activity prevented them from actively participating in political discourse. Having been rejected as partners by the Daud regime, one faction within the PDPA, the Khālqis, set about strengthening its organization, and its ties to the military—with the goal of ultimately taking power.⁹⁸ Members of this faction began to fear that another PDPA faction, the Parchām faction, was conspiring with Daud to wipe out the Khālq faction. As early as 1976, one member of the Khālq faction, Hafizullah Amin, began to plan a coup,⁹⁹ but Taraki, and other PDPA leaders, convinced him that the time was not ripe.¹⁰⁰

⁹⁷ MALE, *supra* note 14, at 55.

⁹⁸ 18 LOUIS DUPREE, A NOTE ON AFGHANISTAN, AMERICAN UNIVERSITY FIELD STAFF REPORT, SOUTH ASIAN SERIES NO.8, 4-74, 11 (1974).

⁹⁹ MALE, *supra* note 14, at 55.

¹⁰⁰ *Id.*

Between 1976 and 1978, though, the PDPA felt compelled to act.¹⁰¹ During this period, the Parchāmites made peace with Daud's government, and were in a position to eliminate their rivals.¹⁰² In 1978, the PDPA carried out a coup that killed Daud and his family.¹⁰³ Nur Mohammad Taraki became the new president of the country.

During the presidency of Nur Mohammad Taraki, the PDPA ran the country through presidential decrees of a constitutional nature. As time passed, discontent with the regime grew, and frequent rebellions weakened the PDPA government. Desperate, Taraki turned increasingly to the Soviet Union for support. In 1979, however, Taraki was replaced by Hafizullah Amin, who indicated that under him the PDPA government might begin to distance itself from the Soviets.¹⁰⁴ Hafizullah Amin also initiated a plan to draft a constitution for the country, one that was never realized.

The Soviet Union, however, invaded Afghanistan in December 1979, removing Amin, and bringing the Parchām faction of the PDPA to power.¹⁰⁵ In 1980, with the support of the Soviet army, which continued to occupy the country, Parchām leader Babrak Karmal promulgated an interim constitution based on Marxist principles.¹⁰⁶ The expressed aim of the Constitution was to guide the Afghans in the creation of a society of human beings free from exploitation by one another.¹⁰⁷ The PDPA, which represented

¹⁰¹ *Id.* at 59.

¹⁰² *Id.*

¹⁰³ *See generally*, THOMAS TAYLOR HAMMOND, RED FLAG OVER AFGHANISTAN (1984).

¹⁰⁴ BARFIELD, *supra* note 34, at 233-234

¹⁰⁵ HAMMOND, *supra* note 103, at 49-53.

¹⁰⁶ Mohammad Hasan Kakar, *Constitutional History of Afghanistan*, ENCYCLOPEDIA IRANICA (1992).

¹⁰⁷ HAMMOND, *supra* note 103, at 49-53.

itself as the party of the working class, was recognized as the guiding and driving force of society and of the state.¹⁰⁸

The Soviet invasion led many Islamic leaders—both modernist Islamists and traditionalists—to flee the country and to organize a large-scale armed opposition against the PDPA government.¹⁰⁹ Formal resistance organizations outside the country, particularly in Pakistan and Iran, expanded and became known as the mujahideen, the holy warriors.¹¹⁰

Most of these groups were organized by educated youth.¹¹¹ Not surprisingly, many of these groups grew out of the Sunni Islamist Movement that existed in Kabul during the 1960s and 1970s, as a continuation or reorganization of those groups or as new factions.¹¹² These parties included the *Jamīyy‘āt-i Islāmi Afghanistan* founded by Burhanuddin Rabbani, the *Hizb-i Islāmi* founded by Gulbuddin Hikmatyar, *Itteḥād-i Islāmi* founded by Rasool Syyaf and the *Ḥarakāt-i Inquilāb-i Islāmi* founded by Mohammad Nabi Mohammadi—all parties that had been influenced by the Egyptian Muslim Brotherhood. A few new organizations were also formed, primarily from among the old aristocracy, and some attempts were made at organizing people along ethno-

¹⁰⁸ See generally, Oṣūl-i Assāsi-ye Jamhūri-ye Demokrātik-i Afghanistan, Official Gazette 450, 1359 [Fundamental Principles of the Democratic Republic of Afghanistan/ Interim Constitution of 1980].

¹⁰⁹ See, e.g., ROY, *supra* note 35; DORRONSORO, *supra* note 62.

¹¹⁰ For a complete and thorough discussion of all these parties and how they were established and organized and how they recruited their members, see DORRONSORO, *supra* note 62; ROY, *supra* note 35.

¹¹¹ Mohammad Nazif Shahrani, *Introduction: Marxist “Revolution” and Islamic Resistance* in REVOLUTIONS & REBELLIONS IN AFGHANISTAN: ANTHROPOLOGICAL PERSPECTIVES 44-45 (Nazif Shahrani & Robert L. Canfield, eds., 1984).

¹¹² *Id.*

linguistic lines.¹¹³ These parties included the *Maḥāz-i Milli-ye Islāmi* founded by Sayed Ahmad Gillani and the *Jabhā-i Nejat-i Milli-ye Islāmi* founded by Sebghatullah Mojaddidi.¹¹⁴ At the same time, the Afghan Shi'ites created several other parties. These parties included the *Ḥarakāt-i Islāmi Afghanistan* led by Shaykh Asef Mohsini; *-ye Inquilāb-i Ittifāq-i Afghanistan* led by Sayyid Behishti; and the *Sazmān-i Nasr-i Islāmi* led by young educated Islamists “enjoying direct financial and logistical support from Iran.”¹¹⁵ Each of these parties had its own militias and led the fight against the Soviets and their installed regime in Kabul.

1. The Interim 1980 Constitution of Afghanistan

In 1980, when Karmal adopted the Interim Constitution, the Soviets had already been occupying Afghanistan for almost a year. Under Soviet influence, the Revolutionary Council of the PDPA prepared a first draft of the Interim Constitution with no input from other groups. This draft was then submitted to the Council of Ministers and the Revolutionary Council for adoption.¹¹⁶ After approval, the Revolutionary Council publicized the Constitution through a declaration, in which it appealed for the protection of the rights and interests of workers, farmers, and professionals.¹¹⁷ The Declaration claimed that the Constitution had been prepared with “strict adherence to the sacred religion of Islam.”¹¹⁸ Islam, however, never appeared in the Constitution.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ OLESEN, *supra* note 22, at 285.

¹¹⁶ Decision No. 3 of Revolutionary Council on the Fundamental Principles of the Democratic Republic of Afghanistan, Official Gazette 450 (1980).

¹¹⁷ Historical Declaration of Revolutionary Council of the Democratic Republic of Afghanistan about the Adoption of the Fundamental Principles of the Democratic Republic of Afghanistan, Official Gazette 450 (1980).

¹¹⁸ *Id.*

The Interim Constitution described Afghanistan as a unitary “democratic republic.” A strong president, supported by a weak prime minister, headed the highly centralized state structure. The Constitution elaborated a list of Marxist values that the government would pursue.¹¹⁹ While the Declaration publicizing the Constitution appealed to religious justifications, the Constitution itself excluded most provisions dealing with Islam. Only one article stated that in the democratic republic of Afghanistan, the respect, preservation and protection of the holy religion of Islam should be maintained, and the freedom to perform religious rites should be provided to all Muslims. For the first time in a Constitution, however, Islam was not declared the religion of the state, and the state was not constitutionally obliged to legislate in accordance with Islamic values.

By the time it was promulgated, the Islamists and many traditional religious leaders had already declared *jihād* (holy war) against the Soviets. Islamic militias (Islamist and traditionalist) had taken control of many rural areas.¹²⁰ The leaders of these militias criticized the PDPA government as un-Islamic and the Constitution as one that ran against Islam and the *Sharī‘a*, and they continued their resistance against the Soviet backed government that had promulgated it.¹²¹

To counter the argument that it was un-Islamic, the PDPA government tried to reach out, as best as it could, to Islamic sensibilities. Its leaders formally denied being communists and declared that they would respect the principles of Islam.¹²² Indeed, the PDPA began to present itself as the “Defender of Islam” and thereby tried to acquire

¹¹⁹ See generally, MOHAMMAD TAHIR BORGAI, *DA AFGHANISTAN DA KHĀLQ AW PARCHĀM DA DAWRI ASSĀSI QAWĀNĪNO TA YAWA KATANAH* [AN ANALYSIS OF THE KHALQ AND PARCHAM CONSTITUTIONS OF AFGHANISTAN] (1369) [1990].

¹²⁰ See, e.g., MABAREZ, *supra* note 5; see also SAIKAL, *supra* note 4.

¹²¹ See Kakar (1992), *supra* note 106.

¹²² OLESEN, *supra* note 22, at 257.

religious legitimacy.¹²³ The version of Islam that they tried to “defend,” however, was not the one that most Afghans wanted to see. To ensure that a turn to Islam did not force them to compromise on their commitment to Marxist principles, the PDPA tried to develop and promote an official version of Islam that harmonized Islamic and Marxist values. To this end, the PDPA began to promote the organization of state controlled ‘*ulamā*’ in the country. Initially, a general Department of Religious Affairs was created within the office of the President to serve as a central organ of the country’s religious organization and institutions.¹²⁴ The Department was obliged to direct its activities towards the respect and protection of Islam. Within the Department, a Council of ‘*Ulamā*’ was established as a consultative body that presumably sanctioned PDPA’s policies as being in accordance with *Sharī‘a*. In 1985, the Department of Religious Affairs was turned into a Ministry.¹²⁵ Apparently, the PDPA believed that the people could be weaned from traditional Hanafi Islam and accept a form of Islam that might be termed “Islamic Marxism.”¹²⁶ The experiment failed.

As resistance from the Islamic militias increased, the PDPA tried to make further concessions. In 1986, Babrak Karmal initiated a plan to draft a permanent constitution. The Revolutionary Council of the PDPA enacted a decree that appointed a constitutional

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 258-59.

¹²⁶ Islamic Marxism attempts to apply Marxist economic, political, and social teachings within an Islamic framework. Traditional forms of Marxism are anti-religious and promote state atheism, which has led many Muslims to reject it. However, the affinity between Marxist and Islamic ideals of social justice has led some Muslims to embrace their own forms of Marxism since the 1940s. Islamic Marxists believe that Islam meets the needs of society and can accommodate or guide social change. For more discussion of “Islamic Marxism.” see Assef Bayat, *ti and Marx: A Critique of An “Islamic” Critique of Marxism* (1990). See also, MUAMMAR AL QADHAFI, *THE GREEN BOOK* (1992).

drafting commission to prepare a first draft of a permanent constitution.¹²⁷ The Council appointed all the members of the Drafting Commission, with Karmal as its head.¹²⁸ The assumption was that it would be based on the existing Interim Constitution.¹²⁹ By 1987, however, some in the PDPA arguably began to fear that the constitution taking shape in the Drafting Commission did not contain sufficient concessions to save the regime.

There was no sign that coordination was a priority for the makers of the Interim Constitution of 1980. This was clearly reflected in the way the Constitution was drafted. Only a small number of PDPA notables prepared the Interim Constitution, with no input from other parties. In fact, other important parties of the time, such as the Islamists, had already refused to come to terms with the Marxists through political means. The only path they could see was military resistance. Worse for the regime, the Constitution was riddled with Marxist values. Marxist values were not only unknown to the majority of Afghans, but they were reviled by most who understood them. Finally, the Constitution did not utilize deferral as a tool to avoid popular resistance to its provisions.

2. The 1987 Constitution: Attempts at Coordination

In 1987, before Karmal's constitutional drafting commission could finish its work, the Soviet Union announced that it would withdraw its army from Afghanistan.¹³⁰ At this point, Najibullah Ahmadzai replaced Karmal as the president of the state. He decided to make a desperate ditch effort to renegotiate with Afghanistan's power brokers the terms under which he would govern.

¹²⁷ Decree of the Revolutionary Council of the Democratic Republic of Afghanistan on the formation of the Constitutional Drafting Commission of the Democratic Republic of Afghanistan, Official Gazette No. 615 (1985).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ GOODSON, *supra* note 95, at 67-70.

Najibullah began a process of national reconciliation, calling on the leaders of the resistance to join the government. The Revolutionary Council also introduced significant amendments to the Interim Constitution, designed to gain the acquiescence of at least some Afghans who had hitherto refused to play by its rules. In one major amendment, the *loya jirga* was recognized in its traditional form (comprised of tribal chieftains) as a major organ that represented the will of the entire population.¹³¹ This amendment suggested that traditional tribal elites would have a say in reshaping the Afghan government. Reinforcing that impression, President Najibullah also added thirteen new members to the Constitutional Drafting Commission. The reconstituted Commission tried to draft a new constitution that would establish revised economic and political rules that the majority of Afghans, including the armed opposition, might be willing to accept.

The 1987 Constitution that they produced ultimately made concessions to a number of groups that had rejected the Interim Constitution. Najibullah apparently heeded the lessons of past Afghan constitutions and concluded that the 1987 Constitution should make efforts to bring the warring factions to the negotiating table. When these factions refuse to join, the text of the 1987 Constitution utilized deferral by leaving key constitutional issues open in hopes that they would incentivize the regime's opponents to come to terms with the government. For instance, the Constitution provided for a bicameral legislature in which members of the two houses were to be popularly elected.¹³² Both Parliament and the government were to be dominated by men and women who had no affiliation with the PDPA. The word "democratic" was dropped from

¹³¹ Decree of the Revolutionary Council of Democratic Republic of Afghanistan on the Amendment of the Fundamental Principles of the Democratic Republic of Afghanistan, Official Gazette No. 656 (1987).

¹³² See Kakar (1992), *supra* note 106.

the name of the country, which was then known as simply the Republic of Afghanistan. The single-party system was abandoned in favor of political pluralism, and the PDPA was renamed *Ḥizb-ye Waṭān* (Fatherland Party).¹³³ The 1987 Constitution also eased the authoritarian nature of the state. It established a theoretically stronger parliament and strengthened the position of the prime minister by giving them powers that the 1987 Constitution had failed to provide.¹³⁴ It also established a constitutional council that checked, in surprising ways, the activities of the government and performed abstract constitutional review;¹³⁵ no institution in previous Afghan constitutions had such a power.

The 1987 Constitution also implicitly recognized that a constitution that paid only lip service to Islam was not going to be a successful coordination device, and that a regime that governed without respecting Islam would likely fail. As such, the Constitution reinstated all the provisions of the previous constitutions that dealt with Islam. Islam was declared the official religion of the state;¹³⁶ only Muslim citizens could become presidents.¹³⁷ No law could contradict the basics of Islam. A Council of ‘*Ulamā*’ was created as a symbolic gesture that the state would respect Islam. In addition, judges were to apply the provisions of the Constitution and laws of the state, but in cases where such laws did not exist, judges were required to apply the provisions of Islamic *Sharī‘a*.¹³⁸ This was not traditional Hanafī *Sharī‘a*, as in other Afghan constitutions. Some of the

¹³³ *Id.*

¹³⁴ Qānun-i Assāsi-ye Jamhūri-ye Afghanistan [Constitution of the Republic of Afghanistan], Afghan Official Gazette No. 360 (1367) [1987].

¹³⁵ *Id.*

¹³⁶ *Id.* art. 2.

¹³⁷ *Id.* art. 73.

¹³⁸ *Id.* art. 112.

Islamic resistance was led by Shi'ite militias who had long resented the Hanafi-centric policies of previous governments, and even some Sunni Islamist mujahideen favored a Muslim Brotherhood form of modernist Islam that diverged from traditional Hanafi doctrine. The turn from Hanafi Islam was not necessarily a problem, therefore; indeed, it might have been an advantage.

Notwithstanding the concessions to Islam, the Shi'ite and Sunni mujahideen parties refused to lay down their arms and acquiesce in the proposed constitutional order. The Shi'ites were controlling large areas of territory and had no desire to relinquish control of these areas to the central government. The Sunni parties had already created an interim government in exile in Peshawar, and they were winning significant battles in the Sunni majority areas of the countryside.¹³⁹ Hoping for total victory and a chance to install a pious Sunni government in Kabul, they too were in no mood to compromise. They thus continued to insist that Najibullah's government lacked political and religious legitimacy and considered themselves to be the legitimate government.

In 1990, President Najibullah made one final effort at coordination. He promulgated a Decree creating a constitutional amendment commission. The President instructed the Commission to draft amendments to the 1987 Constitution with the goal of protecting the interests of the nation, the basics of Islam, and peace and national reconciliation.¹⁴⁰ The changes that they proposed, however, proved to be cosmetic. No representatives of the mujahideen served on the Amendment Commission, although representatives from a

¹³⁹ GOODSON, *supra* note 95, at 71.

¹⁴⁰ Presidential Decree No. 314 on the Formation of the Constitutional Amendment Commission, Official Gazette No. 719 (1990).

number of political parties did.¹⁴¹ The Amendment Commission also included representatives of the official religious establishment, including the head of the National Association of ‘*Ulamā*’, and the President of the Islamic Sciences Research University.¹⁴² However, the leaders of the Islamic resistance held these figures in contempt. When the Amendment Commission finished its work, the draft revealed that it had not changed much. The only important amendment was to declare Afghanistan an “Islamic Republic.” Najibullah convened a Loya Jirga to approve this change. Despite this, the Islamic resistance did not stop fighting.

Finally, in February 1992, Najibullah agreed to step aside under a U.N.-sponsored plan that would replace him with a multiparty interim mujahideen government.¹⁴³ In April 1992, after fourteen years of war, the mujahideen moved into Kabul with a surprisingly bloodless victory.¹⁴⁴ When they finally toppled the regime, the leaders of this government in exile took power. They discovered for themselves how hard it was to come up with a set of political rules which all of Afghanistan’s disparate peoples were willing to accept, and by extension, the challenge to draft a constitution able to serve as an effective coordination device for the country.

B. The Islamists and their Draft Constitutions

Islamic resistance to PDPA rule had been led by a number of different parties, each with their own militia. The initial splits reflected, in some cases, sectarian or ideological differences. Others came about because of disagreements about leadership and obtaining

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ GOODSON, *supra* note 95, at 73.

¹⁴⁴ *Id.*

foreign support.¹⁴⁵ Seven Sunni parties and three Shi'ite parties managed to gain recognition both inside Afghanistan and outside.¹⁴⁶ The Afghan Sunni parties all gathered in Peshawar, Pakistan, and became known as the Peshawar Parties.¹⁴⁷ The Shi'ite parties had established bases in Quetta, Pakistan, and then gathered in Mashhad, Iran.¹⁴⁸

These two coalitions had different visions of the Afghan state and government, visions that were then reflected in the draft constitutions they prepared. The Afghan Shi'ite parties had been among the first to offer resistance to the PDPA government, and since the autumn of 1978, when the PDPA took power, had taken control of majority Shi'ite territory in Afghanistan, and their areas became virtually independent of the central government.¹⁴⁹ They envisioned Afghanistan as a federal state with powerful independent republics—an arrangement that would allow them to control the areas that they had won by force of arms and had been administering for a decade.

The Sunni mujahideen parties had different aspirations; they knew that Afghanistan had traditionally been a unitary state dominated by Sunnis and governed by a Sunni influenced body of law. They wished to re-establish this kind of a state. Even if they agreed to adopt a unitary, ideologically Sunni state, it did not mean that they agreed on all of the details about how that state was to be structured.

¹⁴⁵ See generally, ANDESHMAND, *supra* note 35.

¹⁴⁶ OLESEN, *supra* note 22, at 284-85.

¹⁴⁷ The seven Sunni parties that got recognition in Peshawar included the *Jamīyy'āt-i Islāmi Afghanistan*, the *Hizb-i Islāmi*, *Itteḥād-i Islāmi* the *Ḥarakāt-i Inquilāb-i Islāmi*, the *Maḥāz-i Milli-ye Islāmi* founded by Sayed Ahmad Gillani and the *Jabhā-ye Nejāt-i Milli-ye Islāmi* founded by Sebghatullah Mojaddidi.

¹⁴⁸ These parties included the *Ḥarakāt-i Islāmi Afghanistan*, *Shura-ye Inquilāb-i Ittifāq-i Afghanistan*, and the *Sazmān-i Nasr-ye Islāmi*.

¹⁴⁹ ROY, *supra* note 35, at 139-148; OLESEN, *supra* note 22, at 291.

In 1987, seven of the most powerful Sunni mujahideen parties established a government in exile in Peshawar with help from Pakistan and Saudi Arabia.¹⁵⁰ The Seven Sunni Peshawar Parties reached an agreement on a charter for a joint council for *Itteḥād-i Islāmi Mujahideen-i Afghanistan* (Islamic Unity of the Afghan Mujahideen) with a view to forming an interim government.¹⁵¹ One of the tasks of the interim government was to draft a constitution and pave the way for elections leading to the formation of a permanent government.¹⁵² The charter of the interim mujahideen government also provided for the establishment of a revolutionary council that would represent the will of the Muslim and mujāhid people of Afghanistan.¹⁵³ It was the highest organ of the interim government. But differences over the composition of this Council factionalized the Peshawar Parties.¹⁵⁴ After further attempts at unification, in April 1992, the Peshawar Parties finally announced the formation of another interim Sunni mujahideen government in exile. The cabinet posts of the interim government were carefully divided among the member parties.¹⁵⁵

Nazif Shahrani divides the Sunni mujahideen groups into categories of “Traditionalists and Islamic Revolutionaries.”¹⁵⁶ The *Jabhā-ye Nijāt-i Milli, Maḥāz-i*

¹⁵⁰ OLESEN, *supra* note 22, at 291.

¹⁵¹ Parties to this Agreement included all of the Seven Peshawar Parties.

¹⁵² OLESEN, *supra* note 22, at 291.

¹⁵³ *Id.*

¹⁵⁴ The disagreement appeared because five parties agreed that the Council should be selected on the basis of equality among the seven constituent parties, but Hikmatyar and Gillani proposed that the mujahideen and the refugees should select the members of the Council through elections. The other parties argued that it was impossible to hold elections and that a Council had to be formed. Later, disagreements emerged as to whether Islam prescribes elections or not. These disagreements led to the failure of the implementation of the Charter of the Interim Government. *Id.*

¹⁵⁵ ANDESHMAND, *supra* note 35, at 163.

¹⁵⁶ Shahrani, *supra* note 111, at 45.

Milli-ye Islāmi and *Ḥarakāt-i Inquilāb-i Islāmi* were the three traditionalist parties.¹⁵⁷ The Islamic Revolutionaries, who were the continuation of the Islamist Movement of 1960s, included the *Jamīyy'āt-i Islāmi*, the two *Hizb-i Islāmi* parties and the *Itteḥād-i Islāmi*. The two groups differed on what the purpose of their *jihād* was: the Traditionalists viewed *jihād* as the defense of Islam, the independence of Afghanistan, and the return to monarchy.¹⁵⁸ The Islamic Revolutionaries, in contrast, viewed *jihād* not only as the defense of Islam and the country's independence, but also an armed struggle to establish an Islamic social and political order in the country.¹⁵⁹ The Revolutionaries considered the return to monarchy unthinkable, maintaining that the monarchy was directly responsible for Afghanistan's tragedies.¹⁶⁰ Eventually, the Revolutionaries and the Traditionalists came together and formed the post-communist, Sunni-led mujahideen governments. Despite their differences, these two groups also cooperated in the drafting of a new constitution for Afghanistan in 1993.

1. The Victory of the Mujahideen Parties and the Failure to Form a Government

After the collapse of the Najibullah government, a Sunni dominated interim government was established in Kabul on the basis of the April 1992 Peshawar Agreement; it was headed by Sibghatullah Mojaddidi, but the government was really based on a fifty-man leadership *Shura* (Council) with members from all the ten major

¹⁵⁷ *Id.* at 46.

¹⁵⁸ Almost all the people who followed traditionalist ideology were in favor of the monarchy, arguably because under the monarchy they would regain the power and privileged position they had previously enjoyed.

¹⁵⁹ Shahrani, *supra* note 111, at 46-47.

¹⁶⁰ *Id.*

parties then existing (seven Sunni and three Shi'ite parties).¹⁶¹ This government held power in Kabul for two months, until late June 1992. Mojaddidi reluctantly but peacefully turned power over to Rabbani, whose interim government was to rule until October 1992.¹⁶² But Rabbani refused to step aside in October and was elected president by an assembly dominated by his supporters in December 1992.¹⁶³ His chief rival, Gulbuddin Hikmatyar, leader of the Pashtun dominated *Hezb-i Islāmi* Party, rejected this government.¹⁶⁴ In March 1993, eight major parties reached an agreement in Islamabad, Pakistan, to allow Rabbani to finish an eighteen-month term of office, but with Hikmatyar as prime minister.¹⁶⁵ In addition, the government had to appoint a commission to draft a new constitution within eight months.¹⁶⁶

Despite the Islamabad accord, the rival mujahideen groups and militias could never settle on an acceptable power-sharing arrangement, and fighting flared repeatedly between groups who allied with each other in various and constantly shifting combinations.¹⁶⁷ Continued violence between various fighting organizations, tribal militias, and former government forces, especially in and around Kabul, underscored the deep divisions between the groups competing for power. Although Hikmatyar and a cabinet were finally sworn in on June 17, 1993, his forces shelled the capital later that month, and he did not settle in the city or convene a full cabinet meeting.¹⁶⁸

¹⁶¹ OLESEN, *supra* note 22, at 291-292.

¹⁶² GOODSON, *supra* note 95, at 73.

¹⁶³ OLESEN, *supra* note 22, at 291-292-293.

¹⁶⁴ *Id.*; see also GOODSON, *supra* note 95, at 74.

¹⁶⁵ GOODSON, *supra* note 95, at 74.

¹⁶⁶ *Id.*; see also OLESEN, *supra* note 22, at 293.

¹⁶⁷ GOODSON, *supra* note 95, at 74.

¹⁶⁸ *Id.*

Notwithstanding continual negotiations between representatives of various elements within Afghan society, on January 1, 1994 heavy fighting erupted around Kabul yet again between the forces of Hikmatyar and Rabbani.¹⁶⁹ Temporary ceasefires in Kabul failed to hold. Efforts by the international community to settle the war failed.¹⁷⁰ In this fractious situation, the Sunni and the Shi'ite parties both attempted to draft constitutions that they hoped would coordinate the powerful groups and stabilize the situations, but both failed.

2. The Mujahideen Draft Constitutions: Failed Attempts at Coordination under a Sunni Constitutional Model

In order to give his new government legitimacy and try to coordinate at least the powerful Sunni parties, Rabbani started to draft a constitution. He appointed a 44 member constitutional drafting commission to prepare a first draft.¹⁷¹ The Drafting Commission included influential members and representatives from the seven major Peshawar Parties. Nabi Mohammadi headed this Commission. Rasool Sayyaf, head of the *Itteḥād-i Islami* Party, served as the deputy commissioner.¹⁷² The government did not bother to consult the powerful Shi'ite parties. The Commission prepared a draft of the new constitution, and President Rabbani signed it and sent it to a loya jirga to be ratified. The ratification never occurred.

The mujahideen draft constitution established a highly centralized “Islamic State” governed only by Hanafi *Sharī‘a* (as understood by the leaders of the most powerful Islamist militias). The draft defined Afghanistan as an “Islamic State” rather than a

¹⁶⁹ *Id.* at 76.

¹⁷⁰ *See generally*, BARNETT RUBIN, THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM (1995).

¹⁷¹ ANDESHMAND, *supra* note 35, at 199.

¹⁷² *Id.* Interview with Abdul Rab Rasool Sayyaf, Vice-Chairman, Mujahideen Constitution Drafting Committee, in Kabul, Afghanistan (March 26, 2015).

“republic.”¹⁷³ Article 2 of the draft stated that the order of the Islamic state of Afghanistan is erected on the basis of the Qur’anic text—there is no command except for God.¹⁷⁴ This provision effectively stated that there is no law and no rule but God’s law and rule implemented on earth by the Islamic State. Article 3 declared Islam the religion of the state. It recognized the Hanafi school of *Shari’a* as the official madhhab of the state.¹⁷⁵ Also, the president of the Islamic State had to be male and the follower of the Hanafi school.¹⁷⁶ Furthermore, under Article 5, the Hanafi *fiqh* was considered to be the only (*Yagāna*) source of legislation.¹⁷⁷ These provisions completely disregarded the interests and ideologies of the Shi’ites. The draft, as prepared, denied recognition to the Shi’ites.

One of the main issues that the mujahideen draft had to grapple with was dividing the power among the major mujahideen factions and trying to include them in power sharing. For this purpose, it looked like the draft had predicted a semi-presidential system. It contained provisions about a prime minister as the head of the government who was considerably stronger than prime ministers in previous constitutions.¹⁷⁸ Gulbuddin Hikmatyar, who thought he would be prime minister, demanded a stronger prime

¹⁷³ Sunni Mujahideen Draft Constitution, art 1, *in* 1 DA AFGHANISTAN NAWAI ASSĀSI QĀNUN: LA TASWĪDA TAR TAWSHĪH [1 THE NEW CONSTITUTION OF AFGHANISTAN: FROM DRAFTING TO PROMULGATION] THE SECRETARIAT OF THE CONSTITUTIONAL COMMISSION] (1382) [2004].

¹⁷⁴ *Id.* art 2.

¹⁷⁵ *Id.* art 3.

¹⁷⁶ *Id.* art 52.

¹⁷⁷ For a complete discussion of the role of Islam and the in the Sunni draft constitution, *see* Shamshad Pasarlay, *Islam and the in the 1993 Mujahideen Draft Constitution of Afghanistan: A Comparative Perspective*, 3 *INDON. J. INT’L. & COMP. L.* 183 (2016).

¹⁷⁸ Still Gulbuddin Hikmatyar and his party refused to acquiesce to the draft. He stated that the position of the prime minister reserved for his party should not be subordinated to the President, and that the position of the ministry of defense should fall under the control of the prime minister

minister—one who was equal and not subordinate to the president.¹⁷⁹ This prime minister would head a strong government and the cabinet.

While it made compromises that satisfied a number of powerful Sunni Islamist parties, the draft constitution of the Sunni mujahideen was ill-suited for gaining the acquiescence of important players in post PDPA Afghanistan—even important Islamic players. Its establishment of the Sunni Hanafi madhhab as the official madhhab of the state was humiliating to Shi'ites.¹⁸⁰ And its failure to guarantee Shi'ite political control over majority Shi'ite territory was also unacceptable. Representatives of the Afghan Shi'ites approached the Drafting Commission to request revisions to the draft, proposing that the constitution include the *Ja'farī* school of fiqh along with the Hanafi school as the official madhhabs. Shi'ites also demanded that Afghanistan should be a federal state with power devolved to autonomous regions. The Commission refused. It stated that only the *loya jirga* could make any necessary changes because the President of the State had signed the draft.¹⁸¹ In response, Shi'ites made clear that they would never acquiesce in the rules of governance established by that constitution.

Not only were Shi'ites unwilling to be coordinated by the proposed constitution, but there were also questions about how effective the constitution would be at coordinating Sunni communities. Among the Sunni parties that had drafted the Constitution, there were disagreements about who should be president pending the holding of presidential elections. There had also been conflicting interpretations of the powers that were to be wielded by the president and by the prime minister. With powerful armed forces refusing

¹⁷⁹ RASANAYAGAM, *supra* note 60, at 142.

¹⁸⁰ *See generally*, Pasarlay, *supra* note 177.

¹⁸¹ Interview with Abdul Rab Rasool Sayyaf, Vice-Chairman, Mujahideen Constitution Drafting Committee, in Kabul, Afghanistan (March 26, 2015).

in advance to acquiesce to the proposed constitutional order, because it established a system that did not offer other groups any benefits, and with latent disputes threatening to impede its ability to coordinate some of the other powerful groups, the draft constitution was never ratified.

A rival constitution, drafted by leaders of the Shi'ite parties, also failed to be ratified. The Shi'ite draft constitution created a federal republic comprised of independent provinces and thus, for all practical purposes, constitutionalized the status quo—Afghanistan was a de facto decentralized state in that period, with independent mujahideen commanders controlling different areas of the country.¹⁸² Similarly, the Shi'ite draft declared Islam as the religion of the Federal Republic and recognized two official madhhabs, the *Ja'fārī* and Hanafi. Article 8 of the draft stated that laws and regulations of the Federal Republic should contradict neither Hanafi nor *Ja'fārī* fiqh.¹⁸³ The Federal Republic was obliged to prepare the grounds for religious education on the basis of the official madhhabs of the state.

As noted, many of the leading Sunni mujahideen parties were dominated by modernists who were influenced by the thinking of the Muslim Brotherhood and who believed that legal interpretation could be carried out by Muslims with no training in the medieval Islamic methods of legal reasoning. They had an awkward alliance with groups who believed that scholars trained in the medieval Islamic sciences had a monopoly on legitimate interpretation. The Shi'ite draft constitution was designed to be appealing to this second group. Clearly envisioning a state that was constrained to respect and promote

¹⁸² See generally, RUBIN, *supra* note 170; RASANAYAGAM, *supra* note 60, at 129-41.

¹⁸³ Shi'ite Draft Constitution, art. 8, *Dari text available in SARWAR DANISH, MOTON-I KĀMIL-I QAWĀNĪN-I ASSĀSI AFGHANISTAN* [COMPLETE TEXTS OF THE CONSTITUTIONS OF AFGHANISTAN] (1374) [1995].

traditionalist rather than modernist forms of Islamic reasoning, it not only paid lip service to madhhab-based forms of Islamic law, but it vested considerable power in the hands of Sunni and Shi'ite scholars with traditional Islamic training.

The Shi'ite draft included some institutions dominated by traditionally trained clerics. For instance, the Council of Jurists (*Majlis-i Fuqahā*) resembled the Council of Guardians that had been established in Iran after the Iranian revolution. This Council of Jurists was arguably the most powerful institution under the Shi'ite draft, one entrusted to maintain the legitimacy of the system, protect Islamic values and principles and maintain the observance of Islamic justice.¹⁸⁴

Thus, the draft represented a completely different model of Islamic political legitimacy—one that had never been formed in Afghanistan, and set it at odds with ideologies of the modernist-dominated Sunni parties. The power and the authorities given to the Council of Jurists seemed to be based loosely on the doctrine of the “Guardianship of the Jurist” (*Velāyāt-i Faqih*) that Ayatollah Khomeini had created, and which had served as the justification for the establishment of a clerical government after the fall of the Shah of Iran.¹⁸⁵ Unlike the Iranian doctrine, which called for a government led by traditionally trained Shi'ite jurists, the doctrine here envisioned the establishment of a government that vested considerable power in a Council that included Shi'ite and Sunni ‘*ulamā*’ as well as lawyers (presumably those trained in law schools). Each province (republic) elected six qualified jurists who were the followers of either the *Ja'fārī* or Hanafī schools.

¹⁸⁴ *Id.* art. 147.

¹⁸⁵ See, e.g., Bahman Bakhtiari, *Iran, Sharia Politics and the Transformation of Islamic Law*, in *POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD* 121-146 (Robert Henfer ed., 2011).

Creative as it was, the Shi'ite constitution did not attract much support. By 1994, it was clear that the Sunni and Shi'ite militias had been able to topple the PDPA government, but they were unable to create a constitution that could serve as the basis for coordinating Afghanistan. Then in 1994, the Taliban toppled the mujahideen government.

In short, both the Sunni and the Shi'ite draft constitutions failed because they ignored the need for elite bargaining or elite inclusion in the drafting process. The Sunnis were unwilling to compromise with the Shi'ites, while the Shi'ites were unwilling to sacrifice their gains for a constitution in which they played no role.

VI. The Taliban Movement: Ruling by an Iron Fist, No Attempts at Coordination

During the 1990s, Pakistan and Saudi Arabia had begun to support a new Islamist movement known as the Taliban (literally “religious students”).¹⁸⁶ The Taliban grew out of communities of Afghan refugees and mujahideen war veterans who had studied in Pakistani Hanafi madrassas that taught a radical form of Hanafi Islam.¹⁸⁷

The Soviet war and the civil war in Afghanistan lasted for almost three decades and the refugee flow into neighboring countries, particularly into Pakistan, was so great that they created a new class of people.¹⁸⁸ The refugee camps in Pakistan were notorious hotbeds for radical movements of all types because the refugees were poor, had few opportunities, and lived under the control of political factions that manipulated their people.¹⁸⁹ The mujahideen parties were the first to exert influence on them and recruit

¹⁸⁶ BARFIELD, *supra* note 34, at 255-257; GOODSON, *supra* note 95, at 76.

¹⁸⁷ BARFIELD, *supra* note 34, at 255; GOODSON, *supra* note 95, at 77.

¹⁸⁸ BARFIELD, *supra* note 34, at 255-257.

¹⁸⁹ *Id.*

fighters. Most of these refugees proved effective warriors.¹⁹⁰ They experienced a tactical victory when the Soviets withdrew, and they thought they could return to their homeland.¹⁹¹ But the fighting among the mujahideen groups foreclosed that option for most.¹⁹² The mujahideen, who had been heroes in the anti-Soviet *jihād*, lost respect when they began fighting to promote their own power and economic interest and, in the process, were now harming the very people that they had fought to free.¹⁹³ The mujahideen's loss of prestige created space for a new Sunni Islamist militia to appear.

The leaders of most Sunni mujahideen parties had been influenced by modernist religious movements in Egypt, movements that taught a form of Sunni Islam that rejected the medieval tradition and its different madhhabs. By contrast, the students who formed the Taliban had studied under teachers who were associated with the so-called Deobandi religious movement.¹⁹⁴ This movement, associated with a famous Indian madrasa devoted to a reformed version of medieval Hanafi law, was characterized by its “fundamentalist interpretation of [Hanafi] Islam,” its opposition to *ijtihād*, modernist departures from Medieval interpretations of God's law, its injunctions against any role for women in society, and its “opposition to feudal and tribal structures.”¹⁹⁵ Many of these teachers were highly politicized and connected to institutions that could fund the political and even military activities of their students. Some were associated with the Deobandi Pakistani political party, the *Jamā'at-i 'Ulamā'-ye Islāmi* Pakistan (JUI).

¹⁹⁰ *Id.* at 256.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See e.g., BARFIELD, *supra* note 34, at 259-64.

¹⁹⁵ RASANAYAGAM, *supra* note 60, at 143-44.

Others were associated with the modernist Islamist party the *Jamīyy'āt-i Islāmi* Pakistan.¹⁹⁶

With support from the governments of Pakistan and Saudi Arabia, the Taliban exploded out of Kandahar in the 1990s and proceeded to occupy most of Afghanistan.¹⁹⁷ With remarkable speed, they established in large parts of Afghanistan a theocratic state governed by their own distinct version of Deobandi-inspired Hanafī *Sharī'a* law. Seeing this as the only correct form of Islam,¹⁹⁸ they criticized not only the secularists, but also Islamic modernists and Shi'ites.¹⁹⁹ Indeed, they were particularly hostile to Shi'ites,²⁰⁰ and persecuted them to the point that they, along with other minority groups, fled the country en masse.²⁰¹

¹⁹⁶ *Id.* at 143.

¹⁹⁷ From a religious vantage point, the defeat of the mujahideen by the Taliban was a clash between two different visions of Islam held by two distinct Islamic fundamentalist groups. The mujahideen were Islamists who carried the banner of Islam and combated secularism and then communism in Afghanistan. *Id.* Islamists were modernists who sought a contemporary political interpretation of Islam. Educationally they tilted towards al-Azhar University in Egypt where they have been strongly influenced by the political orientation of the Muslim Brotherhood. *Id.* The Taliban are traditionalists who did not enter the political stream in Afghanistan until 1994.. Each viewed the role of government and society very differently; The Taliban do not see Islam in political terms but rather in religious terms. The Taliban seek to return to the purity of the teachings of the Qur'an and the Sunnah.. They Taliban are the products of religious madrassas in Pakistan whose roots go back to the seminary in Deoband, India. *Id.* at 143-145.

¹⁹⁸ AHMAD RASHID, *TALIBAN, MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* 83 (2010).

¹⁹⁹ *See, e.g.*, MOHAMMAD MUSA, *THE TALIBAN MOVEMENT AND THEIR GOALS* (1998).

²⁰⁰ RASHID, *supra* note 198, at 83.

²⁰¹ Traditionally, Islam in Afghanistan has been immensely tolerant of other Muslim sects and other religions: "Afghan Mullahs were never known to push Islam down peoples' throats and sectarianism was not a political issue until recently. *Id.* Until 1992, the Hindus, Sikhs and Jews played a significant role in the country's economy. *Id.* They controlled the money market and the urban centers. The civil war, however, destroyed this age-old tolerance. It divided Islamic sects and ethnic groups in way that was unimaginable to ordinary Afghans. *Id.* at 83.

As the first government run by clerics, the Taliban further marked a sharp break with the Afghan political tradition.²⁰² Religion had always played a significant role in Afghan politics, but Muslim clerics had always been advisers to the state and judges in its courts. They had never headed the executive and legislative branches.²⁰³ Under the Taliban, however, clerics became members of so-called “*shuras*” that made law, ministers of the government that enforced them, as well as judges who adjudicated the law.²⁰⁴

A. The Taliban Constitution

On taking power, the Taliban did not adopt and promulgate a constitution, claiming that the Qur’an was all the constitution they needed.²⁰⁵ Nevertheless, their government functioned in accordance with some fundamental principles. The Taliban movement’s attempt at state formation was based on their idiosyncratic interpretation of the Islamic principle of *Khelāfat* (Caliphate).²⁰⁶ Mullah Omar, the Supreme Leader of the Taliban, took the title of *Amīr al-Momīnīn* (the Commander of the Faithful), and served as the authoritarian ruler of a highly centralized Islamic Emirate. In the areas under Taliban control, his discretionary authority was absolute. Obeying his commands was considered to be morally required. The state was obliged to execute those who disobeyed them.²⁰⁷

Mullah Omar’s government was structured in a way that reflected the Taliban’s understanding of the medieval Islamic doctrine of *Shura* (consultation).²⁰⁸ At first, ultimate control over policy was vested in a six-member Inner *Shura* (council) led by

²⁰² BARFIELD, *supra* note 34, at 263.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *See generally*, NEMAT NAJUMI, THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION (2002).

²⁰⁶ BARFIELD, *supra* note 34, at 260.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 261.

Mullah Omar. Day-to-day administration and foreign relations were in the hands of a nine-member Central *Shura*, which reported to Mullah Omar.²⁰⁹ This simplistic structure proved ill-suited to ruling the country or running a bureaucracy.²¹⁰ Thus, in 1999, the Taliban redesigned their administrative structure.²¹¹ The Inner *Shura* remained dominant, but the government in Kabul adopted the old offices previously employed by Daud Khan.²¹² The two *Shuras* in fact controlled all the state and the government power. The Inner *Shura* also functioned as the Taliban legislative organ. Many of the laws and the regulations during the Taliban regime were the result of executive decrees enacted by Mullah Omar and the Inner *Shura*. The decrees and laws that the Taliban leader passed were influenced by Hanafi *Shari`a* and had to be in line with it.²¹³

The Taliban's judiciary was not a distinct branch of government, but a loosely governed organ of the state bureaucracy that operated under the control of Mullah Omar. Apparently, there were two sets of courts during the Taliban rule: the *Shari`a* courts and military courts. All courts applied *Shari`a* law as interpreted by the Hanafi school.²¹⁴ The Taliban Supreme Court had a Council of '*Ulamā*' within its structure and organization. The Inner *Shura* appointed all the members of the Supreme Court and the members of the Council of '*Ulamā*' inside the Supreme Court. One of Mullah Omar's decrees (Decree

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Decree No. 12 of the Islamic Emirate of Afghanistan on Revisiting the Structure of the State Administration and Bringing it in Line with Administration of State under Daud Khan, Official Gazette No. 788 (1997).

²¹³ Decree No. 18 of the Islamic Emirate of Afghanistan on Reviewing State law's compliance with *Shari`a* by the '*Ulamā*' of the Supreme Court, Official Gazette No. 788 (1998).

²¹⁴ Decree No. 70 of the Islamic Emirates of Afghanistan on the separation of duties between the Military Court and the Supreme Court, Official Gazette No. 788 (1998).

No. 18) directed courts, including the Supreme Court, not to apply any law that contradicted Islamic *Sharī‘a* and the Hanafi fiqh. The Council of ‘*Ulamā*’ within the Supreme Court was empowered to review all legislation for its compliance with Islam and Hanafi *Sharī‘a*.²¹⁵ These ideals in the Taliban government, though not new in Afghan governance, were not accepted during the negotiations of the 2004 Constitution.

In 1998, however, the Taliban began drafting a constitution. Under Mullah Omar’s Decree No. 18, a number of religious scholars gathered to draft a constitution.²¹⁶ Together they reviewed constitutions of previous governments and drafted the Taliban Constitution—Order of the Islamic Emirate of Afghanistan—which is, according to the Order itself, in complete compliance with *Sharī‘a* and the Hanafi fiqh.²¹⁷ Apparently, only traditional ‘*ulamā*’ were involved in the drafting of the Taliban Order.²¹⁸ The procedure for its adoption was also based on the Taliban’s interpretation of *Sharī‘a*, where only the ‘*ulamā*’ can make, adopt, and interpret laws. But before the Taliban could adopt this Order, they were ousted from power. The approval of the Order came in July 2005 (four years after the Taliban’s collapse in Afghanistan) at a meeting of the Supreme Council of the Islamic Emirate, the Taliban’s executive branch.²¹⁹

The Taliban Order declares Islam as the state religion,²²⁰ and the Hanafi *Sharī‘a* as its official madhhab.²²¹ It also establishes a unified Islamic “Emirate” based on God’s orders—sovereignty thus belongs to God and the state is responsible for implementing

²¹⁵ Decree No. 18, *supra* note 213.

²¹⁶ Dāstor-i Emārat-i Islāmi-ye Afghanistan, 1383, Preamble (Orders of the Islamic Emirate of Afghanistan/ Taliban Constitution 2005).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* art. 3.

²²¹ *Id.* art. 4.

God's orders.²²² Article 5 stated that the *Sharī'a* of Islam is the only source of legislation.²²³ The *Amīr al-Momīnīn* heads this Emirate; however, the Order makes no mention of how the *Amīr al-Momīnīn* is to be elected, and it does not specify how long an individual may serve as *Amīr al-Momīnīn*. The *Amīr* has to be born to Afghan parents, a male Muslim, and a follower of the Hanafi madhhab.²²⁴ The Taliban Order envisions a government consisting of ministers, led by a prime minister.²²⁵ The prime minister also has to be a male Hanafi Muslim.²²⁶ And the Order designates an Islamic Council as the legislative organ of the Islamic Emirate, comprised of Hanafi *fuqahā*.

B. The Fall of the Taliban

Although the Taliban were able to occupy large parts of Afghanistan during the 1990s, commanders of the former mujahideen parties fought vigorously to resist their expansion. Some areas, particularly in the North, thus remained outside Taliban control. Beginning in 1998, the presence of Osama bin Laden in Afghanistan became a major source of conflict between the Taliban and the international community. Saudi Arabia and the United States both wanted to extradite bin Laden for the various terrorist attacks that he had mounted on U.S. interests and personnel.²²⁷ But Mullah Omar was unwilling to do this, citing the *Pashtunwali* obligation of hospitality,²²⁸ which required a host to

²²² *Id.* art. 1.

²²³ *Id.* art. 5.

²²⁴ *Id.* art. 53.

²²⁵ *Id.* art. 61.

²²⁶ *Id.* art. 62.

²²⁷ BARFIELD, *supra* note 34, at 268.

²²⁸ *Pashtunwali* is a collection of local customs that most Pashtun Afghans rely on while resolving disputes or to regulate their social conduct.

protect his guest even at the risk of his own life.²²⁹ The Taliban, however, had not weighed the real cost of giving protection to these foreign terrorists.

By giving protection to foreign terrorists, like bin Laden, the Taliban had given the world's military superpowers incentive to change the balance of power in the battle between the Taliban and its rivals.²³⁰ On September 11, 2001, an act of bin Laden's made such intervention inevitable. On that day, Al Qaeda operatives struck New York and Washington, DC, in a series of airline suicide attacks. When Mullah Omar rejected a U.S. ultimatum to expel bin Laden immediately, the U.S. teamed up with the international community and a coalition of mujahideen and tribal militias. Within one month, the Taliban had been violently removed from power and had melted into the countryside to nurse their wounds.

Thereafter, the international community and the leaders of Afghanistan's most powerful political factions set themselves to the task of doing what no government had been able to do for at least half a century, which was to draft a constitution that would establish rules that could peacefully and effectively coordinate Afghanistan's deeply divided and heavily armed people. To do that, they gathered together, in Bonn, Germany, some of the people who had in the recent past tried (and failed) to make an effective constitution for Afghanistan. They tried to develop a procedure by which those figures, along with some other key stakeholders in the new Afghanistan, might negotiate with each other. These people were tasked with establishing political rules in which

²²⁹ BARFIELD, *supra* note 34, at 268.

²³⁰ This was a situation that more experienced Afghan rulers had always been keen to avoid, even if it meant betraying old allies. Afghan rulers who often encouraged resistance movements against the British in the nineteenth century and the Soviets in the twentieth century dropped that support when events reached the point of endangering Afghanistan itself. *Id.*

Afghanistan's competing political factions—or at least a critical mass of them—would be willing to follow. These rules would set the terms under which a new government would be elected and the terms under which it would govern them.

Part II: The Drafting and Reception of the 2004 Constitution

Chapter Three:

The Bonn Process: The Veterans of Failed Constitution-Making Exercises

Reassemble

[The toughest challenge] at the Bonn conference was brokering a deal between the four main Afghan opposition factions—the Northern Alliance, Rome Group, Cyprus Group, and Peshawar Group. Of the four, the Northern Alliance and the Rome Group were the most important. The Northern Alliance had a large number of forces on the ground and represented the Tajiks, Uzbeks, and Hazaras. The Rome Group spoke for the Pashtuns, the largest ethnic Group.

Zalmay Khalilzad¹

This chapter focuses on the Bonn process. It argues that in 2001, an external military invasion brought into Afghan politics an international coalition that filled the power vacuum left by the fall of the Taliban government. The international community assembled many people who had been associated with failed experiments of coordinating Afghanistan in the past and who, when ousted from power, had resisted the attempts of their successors to coordinate in a different way. Those who initiated the process, and those who participated in it, committed themselves to try again to develop a new constitution for Afghanistan, one that could coordinate the powerful political groups. The Bonn process sought to identify these groups, as well as protect their interests; those became the “insiders” in the 2002-2004 constitutional negotiations. At the same time, the Bonn process made a risky bet that it could treat the Taliban as a faction that would be too powerless to disrupt the political order, and thus, excluded them from this process of coordination. As is discussed later, this decision would create serious problems under the

¹ ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* 120-121 (2016).

2004 Constitution.

I. Filling the Post-Taliban Power Vacuum: Laying Down the Process to Coordinate Afghanistan

The attacks on the World Trade Center and the Pentagon on September 11, 2001, marked the start of a new political era for Afghanistan. The subsequent U.S.-led military campaign in the country led to the collapse of the Taliban regime in late 2001,² leaving Afghanistan without a functioning government. Soon thereafter, the U.S. and its allies began the task of negotiating a post-Taliban political compact among Afghanistan's most influential power-brokers.³ Then the pressure was on to cobble together a successor regime to the ousted Taliban government.⁴ The task, however, was not easy. It required negotiating compromises in a short time frame among groups that had fought each other over the previous decade.

Afghanistan's greatest problem after the fall of the Taliban regime, therefore, was overcoming the deep divisions that had led to three decades of war and political turmoil.⁵ These divisions split along urban-rural and modern-traditional lines, as well as over ethnicity and the role of Islam in politics.⁶ These cleavages were further exacerbated by conflicts in the 1990s. Over the course of thirty years, Afghanistan went from being a constitutional monarchy, to a republic, to a communist dictatorship under Soviet

² CHRIS JOHNSON, WILLIAM MALEY, ALEXANDER THIER & ALI WARDAK, *AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT*, OVERSEAS DEV. INST. 3 (Jan. 2003).

³ KHALILZAD, *supra* note 1, at 117.

⁴ Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, 15 J. OF DEMOCRACY 5, 6 (2004).

⁵ J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557, 559 (2007).

⁶ *Id.* at 559.

occupation, to a failed and fractured state engaged in a devastating civil war, to the home of a fundamentalist and reactionary theocracy.⁷ Elites from these various failed regimes retained their commitments to very different ideologies (e.g. Islamists and traditionalists), and to different types of governments (unitary and federal; presidential and semi-presidential). Then suddenly many of these formerly mutually hostile figures were brought together to devise a new constitution and try once again to coordinate Afghanistan.

In order to draw the foundation for a post-Taliban Afghanistan, Afghanistan's mutually antagonistic key power-brokers and the international community convened a conference in Bonn, Germany in December, 2001.⁸ All national and international groups, including Afghan elites of the past, the United Nations Special Representative to Afghanistan, Lakhdar Brahimi, and delegations from the U.S., India, Russia, Iran and Pakistan attended the Conference.⁹ The outcome of the Bonn Conference was the signing of the "Agreement on Provisional Arrangements in Afghanistan Pending the Reestablishment of Permanent Government Institutions," commonly known as the Bonn Agreement.¹⁰

In 2001, the international community, particularly the U.S. and the U.N., assembled many of the same Afghan people who were responsible for or associated with failed experiments of government formation in the past, and asked them to work together to

⁷ *Id.* at 559; *see also supra*, Chapters One and Two.

⁸ AHMAD RASHID, *DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* 100 (2007); THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 283 (2010); WILLIAM MALEY, *THE AFGHANISTAN WARS* 224 (2d ed. 2009).

⁹ *See generally*, JAMES DOBBINS, *AFTER THE TALIBAN: NATION-BUILDING IN AFGHANISTAN* (2008).

¹⁰ WILLIAM MALEY, *RESCUING AFGHANISTAN* 30 (2007).

form a functioning temporary government and to draft a new constitution that was acceptable to Afghanistan's powerful political groups. These figures included the Islamists, the mujahideen regional commanders—both Sunni and Shi'ite, Pashtun and Tajik nationalists, and some of the “liberal” figures associated with the former King, Zahir Shah. When brought together, not surprisingly each of these groups tried to advocate its own vision of the state and resisted domination by other groups. Tajiks feared Pashtun domination, Shi'ites feared Sunni domination, liberals feared the traditionalists domination, and vice versa. Each of these factions stood firm on their individual and group interests. At times, members associated with these groups would leave discussions in protest over the domination of the process by other groups. For instance, Haji Qadir, an ethnic Pashtun notable, walked out of the Conference protesting the inadequate representation of the Pashtuns in Bonn.¹¹

The figures who assembled in Bonn therefore disagreed on key issues of governance, as they had done during the 1990s, including the structure of the government, the relationship between the center and the regions, and the role of Islam. Different Bonn participants demanded different solutions.¹² In short, the Bonn process highlighted the political fragmentation and disagreements of the 1990s.¹³ Failing to resolve their differences through military might a decade ago, these groups for the first time assembled together to politically resolve their differences.

¹¹ GILES DORRONSORO, *REVOLUTIONS UNENDING: AFGHANISTAN, 1979 TO THE PRESENT* 329 (2005).

¹² *Id.* at 329.

¹³ *Id.*

II. The Bonn Participants-Elites: Who Were They? Where Did They Come From?

The Bonn Conference identified four Afghan groups that needed to be coordinated. The two most important groups were the Northern Alliance Group and the Rome Group. The Northern Alliance Group was the coalition of the former Islamists who had been hostile to the Taliban and who eventually helped the U.S.-led coalition to oust the Taliban regime.¹⁴ It represented diverse interests and ideologies, including a mixture of ethnic groups, each of whom wished to secure a role in governance and protect its group's interests. The Northern Alliance Group's commitment to ethnic loyalties was complicated by its alliances with Islamic ideologies, both Sunni and Shi'ite.¹⁵ Figuring prominently in the Northern Alliance ranks were members of northern and central ethnic groups such as the Tajiks, the Uzbeks, and the Hazaras,¹⁶ all of which had armed and mobilized themselves during the decades of the civil war and the war against the Taliban. Most of the Northern Alliance members were individuals who had fought against the Soviets as members of the mujahideen, although the main Uzbek group in the Northern Alliance, the *Junbish-i Islami*, under the control of General Abdul Rashid Dostum, had begun as a tribal militia under the communist regime and was not Islamist.¹⁷

Mohammad Yunus Qanooni led the twenty-six-member Northern Alliance Group in the Bonn negotiations.¹⁸ The most influential members of the Group included Burhanuddin Rabbani, Abdul Rab Rasool Sayyaf, Mohammad Qasim Fahim and

¹⁴ MALEY (2009), *supra* note 8, at 217.

¹⁵ Rubin, *supra* note 4, at 5, 6.

¹⁶ KHALILZAD, *supra* note 1, at 120-121.

¹⁷ Rubin, *supra* note 4, at 5, 6.

¹⁸ KHALILZAD, *supra* note 1, at 121.

Abdullah Abdullah; none of these leaders were at Bonn, but they closely monitored the process from Kabul.¹⁹ The Group also included members from the Afghan Shi'ite parties that emerged in 1990s including Karim Khalili and Mohammad Mohaqiq.²⁰ Members of the Northern Alliance Group were all individuals who had been involved in failed state building and constitution drafting projects in the 1990s. For instance, Rasool Sayyaf had been the deputy chairman of the commission that drafted the Sunni mujahideen constitution in 1993, while Rabbani had been the President of the Islamic State in 1992 who had appointed the 1993 Constitutional Drafting Commission. Karim Khalili and Mohammad Mohaqiq, from the Afghan Shi'ite Hazaras, were individuals who were arguably involved in drafting the Shi'ite version of the Afghan constitution in 1993.

The Rome Group, headed by Abdul Satar Sirat, Minister of Justice under Zahir Shah,²¹ consisted mostly of exiles living in the West, individuals associated with King Zahir Shah and ideologically linked to the 1964 Constitution of Afghanistan.²² Prominent among them were individuals residing in Rome, Italy, who had met with U.S. officials after the September 11, 2001 attacks, to discuss the post-Taliban transition in Afghanistan.²³ That meeting established the Afghan National Unity Council, which

¹⁹ MOHAMMAD IKRAM ANDESHMAND, *AMREKA DAR AFGHANISTAN* [UNITED STATES IN AFGHANISTAN] 283-84 (Maiwand, 1394) [2015].

²⁰ Kenneth Katzman, *Afghanistan: Current Issues and U.S. Policy Concerns*, in *AFGHANISTAN REVISITED* 26-27 (Carey Gladstone ed., 2001).

²¹ The Rome Group included Abdul Satar Sirat (adviser to the former King), Azizullah Wasefi, Hedayat Amin Arsala, Mohammad Ishaq Nadiri, Sima Wali, Zalmay Rassoul, Rona Mansuri, Mohammad Amin Farhang, Mustafa Zahir, Abdul Rahim Wardak, Pacha Khan Zadran, Mohammad Qasim Fazelly, Abdul Rahman, Mohammad Yailaqi, Sayed Makhdom Raheen, Abdul Khaleq Fazel, Hamid Sidiq, Daud Yaqub and Ishaq Shahryar.

²² See e.g., MALEY (2009), *supra* note 8, at 224; see also, KHALILZAD, *supra* note 1, at 121.

²³ ANDESHMAND (2015), *supra* note 19, at 281.

included 100 individuals.²⁴ The members of the Rome Group brought the legitimacy of the former King to Bonn, whose forty-year reign (1933–1973) marked the last time that Afghanistan enjoyed any substantial degree of peace or stability. They did not, however, bring any compelling proposals for how to structure a government in a country that had fallen apart under their watch and had changed dramatically in the intervening decades. While long-suffering Afghans felt great sympathy for their former monarch, he had no political or military organization and nothing resembling a concrete program.²⁵

Two smaller groups also attended the Bonn Conference. One of the groups was the Cyprus Group, which was supported by Iran.²⁶ The fourth group was the Pakistan-supported Peshawar Group, which was comprised of Afghan Pashtuns (members of the Afghan Millat, or the Social Democratic Party that rose in the 1970s), who had supported the former King in the 1990s and had links with the Mahaz-i Islāmi Mujahideen Party.²⁷

Houmayoun Jareer led the Cyprus Group,²⁸ which consisted primarily of Afghan Shi'ite Hazaras who had a history of clashing with their Sunni counterparts in the rest of Afghanistan in the past.²⁹ Fearing Sunni domination in Bonn, the Cyprus Group demanded equal recognition. The Group represented the Cyprus Process—otherwise known as the Cyprus Meeting for Peace in Afghanistan—initiated in 1999, primarily as

²⁴ ANDESHMAND (2015), *supra* note 19, at 281.

²⁵ *See generally*, KHALILZAD, *supra* note 1; DOBBINS, *supra* note 9.

²⁶ Rubin, *supra* note 4, at 7.

²⁷ The Peshawar Group included Sayed Hamed Gillani, Anwar al-Haq Ahadi, Hafizullah, Rahmatullah Musa Ghazi, Haji Ataullah Alkozai, Fatima Gillani and Abdul Karim Khuram.

²⁸ The Cyprus Group included Houmayoun Jareer, Mohammad Jalil Shams, Azizullah Ludin, Abdul Qadir Amiryar, Sayed Ishaq Gillani, Seddiqa Balkhi, Abdul Haq Shafaq, Ehsanullah Mayar, Abdul Basir, and Najibi.

²⁹ *See e.g.*, MALEY (2009), *supra* note 8.

an Iranian counter to the Rome Process.³⁰ Active throughout the later years of 1990s, the Cyprus Group was a loosely structured alliance of politically heterogeneous members, who claimed membership of other political groups at the same time.³¹

Nevertheless, at Bonn, there were no Pashtun delegates from the south of the country, nor were there any from Kandahar, raising fears among the Pashtun notables that the Bonn process would endorse a Tajik-dominated government, particularly members of the Northern Alliance.³² Hamid Karzai and other notable Pashtuns of the south were busy fighting the Taliban in their last hideout in Kandahar and were not represented in Bonn.

At the same time, moreover, organizers of the Bonn Conference did not invite all of the interested parties to the negotiations. They only brought together the winners of the U.S.-led operation, not the warring parties. They did not attempt to draw members from the defeated group—the Taliban—into the process of government formation,³³ a group that was still putting up a determined fight.³⁴ Nevertheless, the Bonn organizers considered the Taliban a group too powerless to disrupt stability, and the international community excluded them from the negotiating table because their leadership had not broken with Al Qaeda, even at latest stages of their rule when they barely held

³⁰ RADIO FREE EUROPE, IRANIAN REPORT (2001), *available at* <http://www.rferl.org/content/article/1342856.html>

³¹ HAMID WAHED ALIKUZAI, *A CONCISE HISTORY OF AFGHANISTAN, CENTRAL ASIA AND INDIA* 973 (2015).

³² RASHID, *supra* note 8, at 103.

³³ Thomas H. Johnson, *Afghanistan's Post-Taliban Transition: State Building after War*, in *CONFLICT, IDENTITY, AND REFORM IN THE MUSLIM WORLD: CHALLENGES FOR U.S. ENGAGEMENT* 175 (Daniel Brumberg & Dina Shehata, eds., 2009).

³⁴ KHALILZAD, *supra* note 1, at 121.

Kandahar.³⁵ As a result, the Taliban remained outsiders to the entire process and refused to accept any outcomes of the negotiations.

From 2001-2004, representatives of these mutually distrustful groups struggled to work together to form a government and to draft yet another version of a constitution, something that could affect the coordination they failed to achieve in the past.

III. The Bonn Negotiations and the Formation of an Interim Government: Deep Division Among Groups

The toughest challenge at the Bonn conference was brokering a deal between the four main, mutually mistrustful, Afghan groups. When the four groups headed to the Bonn negotiations, distrust and disagreements loomed within and between them. The Northern Alliance Group, which had tenuous military control over most of Afghanistan, was perhaps the most powerful group at Bonn; nevertheless, the group was far from united. There were deep disagreements and mistrust among its rival wings.³⁶ The death of Ahmad Shah Massoud, the uncontested head of the Northern Alliance Group, shortly before the U.S. operation in Afghanistan, left the Group without a leader.³⁷ Rabbani, Dostum, Sayyaf, Ismail Khan, Haji Qadir and the Afghan Shi'ites each had their own representatives in Bonn.³⁸ Each was committed to working for its own group's interests. Rabbani, Qanooni, Fahim and Abdullah each considered themselves as the head of the Northern Alliance.³⁹ Each wanted to use the Bonn negotiations to solidify their position

³⁵ *Id.*

³⁶ ANDESHMAND (2015), *supra* note 19, at 281-86.

³⁷ Ahmad Shah Massoud, who was the head of the anti-Taliban Northern Alliance Group, was assassinated on September 9, 2001 by the affiliates of Al-Qaeda.

³⁸ ANDESHMAND (2015), *supra* note 19, at 282.

³⁹ *Id.* at 281-85.

vis-à-vis other group members.⁴⁰

Members of the Northern Alliance Group fought not only with each other, but also with members of other groups. Many of these disputes simply repeated past battles. For instance, both Rabbani and Sayyaf maintained their opposition, dating back to the 1990s, to any plan placing the former King in a position of power in the interim or transitional administrations.⁴¹ Some of the most influential members of the Northern Alliance, such as Sayyaf, advised Qanooni “to do anything but bring the former King back to power.”⁴² The members of the Northern Alliance Group were furious when they arrived in Bonn and found out a transitional government had already been established, with the former King as the president, and Samad Hamid, a supporter of the former King, as the prime minister.⁴³ Inevitably, the Northern Alliance Group rejected this government,⁴⁴ and discussions for another structure and leadership began.

Then, it was agreed that first an interim government should be established, and then a transitional government would follow: a government that would ultimately appoint the commission for the drafting of the new constitution.⁴⁵ But disagreements at Bonn continued.⁴⁶ The major obstinate block was the former King’s role. While the royal family did not intend to re-impose the monarchy, it had announced that the King would

⁴⁰ *Id.*

⁴¹ Apparently, the Islamists, as they had done in the 1990s, considered the King and his government the cause of all the crises and coups Afghanistan experienced over the last decades. That feud appeared to be unabated and became obvious in the Bonn negotiations.

⁴² ANDESHMAND (2015), *supra* note 19, at 281-85.

⁴³ Samad Hamid was the Chief of the Secondary Education of the Ministry of Education during the reign of King Zahir Shah and a member of the 1964 Constitutional Drafting Commission.

⁴⁴ ANDESHMAND (2015), *supra* note 19, at 282.

⁴⁵ KHALILZAD, *supra* note 1, at 122.

⁴⁶ ANDESHMAND (2015), *supra* note 19, at 282.

return to Afghanistan from Rome to take part in the new government. This was unacceptable to the Northern Alliance.⁴⁷ The royal family stepped back, following the Northern Alliance's opposition and the international community's interference, to accept a compromise.⁴⁸ The King apparently indicated that he had no ambitions to return as the ruler of the country, but would be happy with an honorary title.⁴⁹

After the dispute over the King's role was settled, participants held an election at Bonn to choose the head of the interim government. The Rome Group nominated Abdul Satar Sirat, while the Northern Alliance put forward Hamid Karzai. Sirat won the election with nine votes to Karzai's two votes.⁵⁰ The Northern Alliance Group again made it clear, however, that they would not accept the leadership of the Zahir Shah supporter, Sirat.⁵¹ The international community did not fight hard for Sirat either.⁵² It believed that being an Uzbek, Sirat would not be acceptable to the Pashtun population of the country, and thus, would lack popular legitimacy.⁵³ As a result, the United States and other allies involved in the Bonn negotiations proposed Karzai, believing that, as a Pashtun, Karzai would enjoy popular legitimacy. They pressured Rabbani, who had been in Kabul after the Taliban's fall and was hoping to be reinstated as the president of the Islamic state, to drop

⁴⁷ KHALILZAD, *supra* note 1, at 122.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 123. For other sources reporting the result of the election as 12 to 2, see ANDESHMAND (2015), *supra* note 19, at 283. Still, some sources mention no voting at Bonn to appoint the head of the interim government. See DOBBINS, *supra* note 9.

⁵¹ Hamid Karzai is from the Popalzai Durrani tribe in Kandahar. He was a member of the National Salvation Front (*Jabha-ye Nejat-i Milli*) Party. During the mujahideen war, Karzai migrated to Quetta, Pakistan, and returned after the fall of the Taliban.

⁵² For more details on why the international community preferred Karzai over Sirat, see DOBBINS, *supra* note 9, at 89-91.

⁵³ DORRONSORO, *supra* note 11, at 329; see also, ANDESHMAND (2015), *supra* note 19, at 285.

his resistance and accept Karzai as the head of the interim government.⁵⁴ In this way, although contrary to the results of the election, Karzai was appointed the head of the interim government.⁵⁵

After the head of the interim government was elected, the allocation of ministries became another contested issue. Each of the four main groups wanted to get their share—but the Northern Alliance demanded the lion's share.⁵⁶ Although the Northern Alliance conceded on the head of the interim government (not to be one of their own), they were not willing to concede on the very important ministries—those of defense, interior affairs and foreign affairs—among others.⁵⁷

Initially, Lakhdar Brahimi brokered a compromise in which each participating group was asked to submit a list of individuals for consideration for the interim government cabinet.⁵⁸ Rabbani, however, refused to send a list, and the Cyprus Group refused to accept the cabinet posts assigned to them.⁵⁹ Rabbani demanded that the remaining discussions should be conducted in Kabul, while Abdullah and Fahim wanted a decision

⁵⁴ RASHID, *supra* note 8, at 104.

⁵⁵ Zalmay Khalilzad, a major figure who made the appointment of Karzai possible, tells this story of Karzai's appointment: after delegates elected Sirat as the head of the interim government, "Northern Alliance representatives insisted that I do whatever I could to block Sirat's candidacy. Qanooni explained that even if they did not object at Bonn, the Northern Alliance commanders were unlikely to respect Sirat's authority on the ground. Besides, [Qanooni] did not think that Rabbani would step down for Sirat. And since Sirat was ethnically Uzbek, he could not claim much of a following from the Pashtuns and would not be able to unite the country." See KHALILZAD, *supra* note 1, at 123.

⁵⁶ See, *id.*, at 124-28; see also, DOBBINS, *supra* note 9.

⁵⁷ DOBBINS, *supra* note 9, at 95.

⁵⁸ *Id.*

⁵⁹ In the Cabinet of the Interim Government, the Northern Alliance Group received seventeen posts including the important ministries of defense, interior and foreign affairs. The Rome Group received nine posts and the Peshawar Group received four cabinet seats. RASHID, *supra* note 8, at 105. The Cyprus Group claimed that it would not contest for cabinet positions because their mission was peace; the group felt the announcement would keep them focused as well as help the Bonn meetings run more smoothly.

to be reached at Bonn.⁶⁰ This desire was coupled with pressure from the international community to reach a compromise in Bonn.⁶¹ Rabbani believed that he was in a better position in Kabul to influence debates in his favor.⁶² He had implicitly declared himself the president of the state notwithstanding Karzai's election at Bonn. Nevertheless, Rabbani lacked military power, and the Northern Alliance Group, which had military power, did not support him.⁶³ Despite Rabbani's resistance, pressure from the U.S. prevailed and the government was formed in Bonn under the Bonn Agreement.⁶⁴

A. The Final Compromise: Setting out the Process for Coordinating
Afghanistan

With disagreements and distrust looming in Bonn, especially among Afghan groups, and pressure rising from the international community, the Afghan representatives signed the Bonn Agreement.⁶⁵ With this Agreement, Afghan representatives agreed to several fundamental steps in order to lead the post-Taliban political transformation. First, they agreed that the Afghan system of government would temporarily be based on the Constitution of 1964, with the exception of a king or a legislature.⁶⁶ The cabinet of the interim and later transitional administrations would function as the legislatures until the

⁶⁰ RASHID, *supra* note 8, at 73.

⁶¹ KHALILZAD, *supra* note 1, at 126.

⁶² RASHID, *supra* note 8, at 102-103.

⁶³ While negotiations were ongoing in Bonn, Rabbani secretly met with Pakistani ISI chief General Ehsan al-Haq to gain Pakistan's support. This move infuriated Qanooni and the Northern Alliance delegates, and as a result, Rabbani fell out of favor in the Northern Alliance ranks. RASHID, *supra* note 8, at 103.

⁶⁴ *Id.*, at 103-104.

⁶⁵ JOHNSON ET AL, *supra* note 2, at 3.

⁶⁶ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Legal Framework and Judicial System 1 (i), transmitted to the Security Council by the Secretary-General, U.N. DOC. S/2001/1154, 1155 (Dec. 5, 2001).

election of the permanent legislature under the new constitution.⁶⁷ Second, the delegates chose an interim government, which would function for a period of six months.⁶⁸ During this period, the interim government would organize an emergency loya jirga to choose a transitional government.⁶⁹ Third, once the transitional government was formed, it would be responsible for appointing a commission to draft a new constitution and organizing a second loya jirga to approve the new constitution after eighteen months of the Transitional Administration.⁷⁰ Fourth, the Transitional Administration would also be responsible for organizing elections after twenty-four months to elect a new government according to the requirements of the new constitution.⁷¹

Instead of a detailed settlement of major political issues, the Bonn Agreement simply laid out the process for reform; most issues were left to be resolved by the new constitution. This choice reflected the pressure under which the Agreement was signed, which “set a speed record as such things go.”⁷² Afghanistan had been through twenty-three years of multi-dimensional civil strife marked by the overt and covert involvement of regional and global powers;⁷³ it required more time and discussions to design a functioning government, a government that could turn a failed state into a consolidated democracy.⁷⁴

After establishing the interim government in Bonn, representatives of the Bonn groups occupied ministries in the interim government and later in the transitional

⁶⁷ *Id.*

⁶⁸ *Id.*, General Provisions, at 4.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Rubin, *supra* note 4, at 5, 6.

⁷³ *Id.*

⁷⁴ *Id.*

administration of Afghanistan. More importantly, they would serve on the constitutional drafting and review commissions. Other representatives of these groups were involved in the constitution-making process, either through their posts in the Cabinet of the Transitional Administration, or as members of the Constitutional Loya Jirga. For instance, Qanooni, Abdullah, Khalili and Fahim from the Northern Alliance Group and Hidayat Amin Arsala and Anwar al-Haq Ahadi from the Peshawar group became influential in the process through their posts at the Cabinet and the National Security Council. Sayyaf, Rabbani, and Shaykh Asif Mohsini (who was involved in the drafting of the Shi'ite constitution of 1993), were active participants in the constitutional negotiations as members of the Constitutional Loya Jirga pressing for the adoption of a constitution that would reflect their views as closely as their draft constitution had done in the 1990s.

B. The Transitional Administration—the Emergency Loya Jirga

The second stage of the Bonn process began on January 27, 2002, when President Karzai established a nineteen-member commission for the convention of the Emergency Loya Jirga (ELJ) to appoint a transitional government.⁷⁵ The ELJ was elected and

⁷⁵ The Commission included Ismail Qasimyar, Mahbooba Hoquqmal, Professor at Kabul University; Abdul Aziz Aziz, Dean of the School, Kabul University; Mohammad Kazim Ahang; Dean of the School of Journalism, Kabul University; Mohammad Essa Ameer, teacher by profession; Mohammad Tahir Borgai, Lecturer at the Law School, Kabul University; Zahir Khan Jabarkhel, director of a refugee camp in Pakistan; Mohammad Farid Hamidi, Lecturer at the Law School, Kabul University; Nur Mohammad Qarkin, civil servant; Sadiq Mudaber, former Deputy Minister of Labor; Sayid Amin Mujahid, Professor of History, Kabul University; Humaira Neamati, Professor at the Law School, Balkh University; Mohammad Mahfooz Nedai, deputy head of the Academy of Sciences; Soraya Parika, Women's Rights Activist; Abdul Salam Rahimy, Director of CHA; Sayid Musa, Professor at the Economics School, Kabul University; Sebghatullah Sanjar, former Army officer; Rashid Saljuqi, Religious Scholar; Sayed Musa Tawana; and Asadullah Walwalji, former military officer.

convened in June 2002.⁷⁶ While many wary Afghans expected the ELJ to make far-reaching progress towards security, national unity, and democracy, the actual mandate and purpose of the ELJ was decidedly less ambitious.⁷⁷ Its main task was to appoint a new government that would preside over the drafting of a new national constitution and hold elections in 2004.⁷⁸

During the debates at the ELJ, the role of the former King and the allocation of ministries once again became the main contested issues. Unlike at Bonn, at the ELJ negotiations, Hamid Karzai remained one of the leading contenders for the presidency in the Transitional Administration. This time, King Zahir Shah and the Northern Alliance leaders, such as Fahim and Abdullah, both supported Karzai.⁷⁹ The Northern Alliance's support for Karzai came as a counter to the former King; their members feared that the King might still want to run for the election of the head of the transitional administration and might be elected. In fact, the Northern Alliance's support and even reluctant agreement to abandon a key ministry came after Karzai and his allies made sure that they could convince the former King not to run for the head of the transitional government.⁸⁰ Prior to the ELJ negotiations, Karzai invited King Zahir Shah from Rome and gave him an office and residence in the Presidential Palace.⁸¹ At the ELJ, Karzai asked the

⁷⁶ Election to the ELJ was basically election through delegates. District representatives first elected individuals at the district level. These elected district representatives then travelled to the center of the province. At the center of the province another election took place in which district representatives elected individuals who then travelled to the capital as the members of the ELJ.

⁷⁷ KHALILZAD, *supra* note 1, at 142.

⁷⁸ *Id.*

⁷⁹ DORRONSORO, *supra* note 11, at 330; ANDESHMAND (2015), *supra* note 19, at 303.

⁸⁰ KHALILZAD, *supra* note 1, at 144.

⁸¹ ANDESHMAND (2015), *supra* note 19, at 305.

delegates to bestow the title of “Father of the Nation” upon the ex-King.⁸² The King in turn arguably supported Karzai.

Delegates at the ELJ elected Karzai as the President of the Transitional Administration with 1295 votes out of 1575 in favor, defeating rivals Massouda Jalal and Sayed Ahmad Gillani.⁸³ Massouda Jalal arguably represented the “liberals” in the ELJ, especially women.⁸⁴ Although she had a little chance of winning, her candidacy was symbolically powerful. Karzai and Fahim had offered her a cabinet post in exchange for not running.⁸⁵ This would have prevented a clash with Islamist factions within the ELJ, who threatened to disqualify her on the grounds that as a woman, her candidacy violated Islam.⁸⁶

In addition to electing a cabinet and a president, delegates at the ELJ debated some of the foundational aspects of the new Afghan state and the direction that it would take. One of the most contentious debates concerned the role of Islam. A Shi’ite cleric, Shaykh Asif Mohsini, wanted Karzai to abide strictly by *Shari’a* law and proposed that the transitional administration should be named the “Islamic Transitional Government of Afghanistan.”⁸⁷ However, the Kandahar governor, Gul Agha Sherzai, resisted, proposing that the “Islamic name should be omitted from the government because in the past Islam has been

⁸² *Id.* at 301.

⁸³ MOHAMMAD IKRAM ANDESHMAND, NOHĀT HAI ISLĀMI AFGHANISTAN [AFGHANISTAN’S ISLAMIST MOVEMENTS] 260 (1392) [2013]. Khalilzad, however, reports the other two candidates as Massouda Jalal and Mir Mohammad Mahfooz, a lesser-known physician. KHALILZAD, *supra* note 1, at 147.

⁸⁴ *See generally*, MASSOUDA JALAL; MARIO SILVA, HANGING BY A THREAD: AFGHAN WOMEN’S RIGHTS AND SECURITY THREATS (2014).

⁸⁵ KHALILZAD, *supra* note 1, at 146.

⁸⁶ *Id.*

⁸⁷ *Id.* at, 147.

misused.”⁸⁸ Sherzai’s proposal created a crisis in the ELJ, and the motion was passed in favor of adding “Islamic” in the definition of the state and the name of the transitional government.⁸⁹

The relationship between *Sharī‘a* and basic rights—particularly rights of women and minorities—became contested as well. Foreign diplomats had warned the Afghan leadership that the international community, particularly the U.S., would find it difficult to support Afghanistan if *Sharī‘a* were imposed and basic rights were not protected.⁹⁰ After extensive deliberation, the ELJ managed to strike a compromise. Afghan chief justice, Fazal Hadi Shinwary, a member of the traditional ‘*ulamā*’, announced that the basic principles of *Sharī‘a* would help guide the judiciary’s decisions. He clarified, however, that the new government would ensure basic liberties also.⁹¹ How these ideals would be reconciled remained an open question.

These debates indicated that Afghans were deeply divided on some basic questions of governance—as they had been during most of the twentieth century.⁹² They showed that the task of the drafters of the new constitution was not an easy one. They would have to reconcile these opinions in a way that satisfied Afghanistan’s powerful stakeholders.

C. *Competing Constitutional Visions*

Once elected as the president of the Transitional Administration, Hamid Karzai began to act more independently. First, he reconstructed his cabinet.⁹³ One of the most important powers that Karzai obtained as the president of the Transitional Administration

⁸⁸ Gul Agha Sherzai, *quoted in id.*, at 147.

⁸⁹ *Id.* at 147.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See supra*, Chapters One and Two.

⁹³ ANDESHMAND (2015), *supra* note 19, at 302.

was his power to appoint ministers. Because the cabinet of the interim government was elected at Bonn, Karzai did not have any say in who had been appointed. But after the ELJ, Karzai was able to use his authority to appoint ministers to limit the influence of the Northern Alliance members, who had been important ministers in the cabinet of the interim government.

In order to consolidate his power, Karzai first removed Qanooni from the Ministry of Interior and appointed him to the Ministry of Education. The shift was significant because the Minister of the Interior was a member of the National Security Council, which made important decisions, while the Minister of Education was not a member. But Qanooni made sure he remained in the National Security Council as advisor to the Council. Karzai appointed Taj Mohammad Wardak as the new Minister of the Interior. After a short while, however, Karzai appointed Ali Ahmad Jalali, a U.S. educated individual, to this post.⁹⁴ In addition, he appointed Ashraf Ghani Ahmadzai, advisor to Lakhdar Brahimi, as the Minister of Finance. Ashraf Ghani, according to some views, was a staunch supporter of a presidential system and a centralized government.⁹⁵ As discussed in chapter four, this revised Cabinet would be instrumental in discussions and debates with the Constitutional Review Commission and at the Constitutional Loya Jirga.

Karzai and the leaders of the Northern Alliance Group apparently had different constitutional visions of the state. The majority of the Northern Alliance leaders preferred a semi-presidential system, with a strong prime minister that would be equal to the president, and a more decentralized structure of governance in which regional provinces

⁹⁴ *Id.*

⁹⁵ BARNETT RUBIN & HELENA MALIKYAR, THE POLITICS OF CENTER-PERIPHERY RELATIONS IN AFGHANISTAN, CENTER FOR INTERNATIONAL COOPERATION 17 (2003).

would have some independence.⁹⁶ Qanooni and his supporters complained about Karzai's extensive powers and demanded a parliamentary system that would check the powers of the president.⁹⁷ But Karzai and his supporters, mostly Western-educated technocrats, preferred that a presidential system or a weak prime minister be adopted in the future constitution of the country. They also sought a more centralized structure of governance, in which the central government exercised considerable power over the regions.⁹⁸ Therefore, all the reshuffling of the cabinet arguably took place with this goal in mind.

Over the next two years, as the head of the Transitional Administration, Karzai strengthened his presidency. As president, Karzai had power vis-à-vis other groups, especially the Northern Alliance, which helped him shape and influence several key constitutional issues during the constitutional negotiations. For example, while in the ELJ Karzai relied heavily on the support of the Northern Alliance leaders;⁹⁹ in the Constitutional Loya Jirga, the situation was quite the opposite. Karzai and his team were in the lead and adopted the 2004 Constitution according to their own vision. As Chapter Four will discuss in more details, in the CLJ, a four-member team known as the "specialist team" (*Teem-i Mutakhāsis*), which included Ashraf Ghani, Haneef Atmar, Anwar al-Haq Ahady, and Amin Arsala (all from Karzai's Cabinet and supporters of a presidential and a unitary state),¹⁰⁰ interfered in the constitutional negotiations in favor of

⁹⁶ *Id.* at 16-19.

⁹⁷ KHALILZAD, *supra* note 1, at 195.

⁹⁸ Rubin & Malikiyar, *supra* note 95, at 16-19.

⁹⁹ Qayom Karzai, Hamid Karzai's brother, and Ashraf Ghani sought support from the Northern Alliance leaders in order to collect ten percent of the signatures to enable Karzai to run for the presidency at the ELJ.

¹⁰⁰ Rubin & Malikiyar, *supra* note 95, at 16-19.

Karzai.¹⁰¹

In sum, stakeholders represented in the Bonn Conference, and later in the transitional administration, put forth different constitutional visions: a presidential system, semi-presidential system, unitary state, or a federal system. The Bonn Conference succeeded in identifying stakeholders and planning for future discussions that would hope to reconcile these competing constitutional structures. Since the Taliban were not represented, however, the Bonn Conference and the 2004 Constitution only attempted to avoid offending the victors of the U.S. led operation in Afghanistan. The Taliban thus remained outsiders to these processes and as a result did not accept any of these outcomes.

¹⁰¹ Interview with Abdul Hafeez Mansoor, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (July 28, 2015).

Chapter Four:

Drafting a Coordination Device: The Making of the 2004 Constitution

Afghanistan was emerging from decades of conflict and turmoil when the constitution-making process began. The process began smoothly, but as it progressed disagreements emerged both within the Constitutional Drafting Commission [CDC] and among the powerful political groups which demanded securing their interests. The [CDC] included individuals ideologically committed to different constitutional visions of the new Afghan state. The [CDC] members failed to reach agreement on key questions. Then, it decided that some controversial questions should be resolved at the constitutional review stage.

--Mohammad Ashraf Rasooli¹

This chapter explores the history of the drafting of the 2004 Constitution through the paradigm of coordination and deferral theories. It argues that an analysis of the work of the Constitutional Drafting and Constitutional Review Commissions suggests that although they did not speak in the language of comparative constitutional theorists, and did not use terms like “coordination,” the makers of the 2004 Constitution clearly understood their task as one of creating a constitution to which their constituents could acquiesce. The makers of the 2004 Constitution had a lot of experience with failed constitution-making exercises. They identified key stakeholders who needed to acquiesce to the constitutional order. By 2004, the drafters knew that they needed to identify the foundational principles of Afghan governance that needed to be resolved in the new constitution. While each would gladly have drafted a constitution modeled on one of the ideologically-informed constitutions of the past, they knew that they disagreed about

¹ Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015).

which of those previous constitutions was preferable. They also realized that to avoid offending key stakeholders, it was useful to engage in both explicit and implicit constitutional deferral.

The process for the making of the 2004 Constitution began in 2002, when President Karzai appointed the Constitutional Drafting Commission (CDC). It ended in January 2004 when Karzai promulgated a final version of the Constitution. The 2002-2004 constitution-making process proceeded in five stages: stage one included the appointment of the CDC, which prepared a first draft of the new constitution in March 2003. Stage two included the appointment of the Constitutional Review Commission (CRC), which revised the CDC draft, proposed changes, and prepared a draft of its own in September 2003. Stage three related to the appointment of a government review committee, which discussed, debated, and revised the CRC draft, finally publicizing a draft in November 2003. In stage four, Karzai convened the Constitutional Loya Jirga (CLJ), which revised and adopted the constitution on January 4, 2004. In stage five, a final committee polished the CLJ draft, and Karzai promulgated the Constitution on January 26, 2004. Each stage of the process gave birth to a new and revised draft of the constitution. Appendix B shows the changes at each of these stages.

2002-2004 Constitution-Making Timeline

<p>Stage I: Drafting October 2002: The President appoints the Constitutional Drafting Commission. March 2003: The Constitutional Drafting Commission prepares a first draft.</p>
<p>Stage II: Review April 2003: The President appoints the Constitutional Review Commission to review the CDC draft. October 2003: The CRC finishes reviewing the draft and submits it to the President and his Cabinet. The CRC's work ends.</p>
<p>Stage III: Review by the Executive October 2003: President Karzai appoints a smaller Committee to review the CRC draft. November 2003: The revised draft released to the public.</p>
<p>Stage IV: Adoption by the Constitutional Loya Jirga (CLJ) December 2003: The President issues a decree to convene the CLJ to adopt the Constitution. The CLJ considers the executive's revised draft. January 4, 2004: The CLJ adopts the Constitution.</p>
<p>Stage V: Promulgation January 7-January 26, 2004: Individuals from the CRC, the CLJ, the Cabinet and UNAMA revise the Constitution one more time to polish the text. January 26, 2004: The President signs and promulgates the Constitution</p>

I. The Appointment of the Constitutional Drafting Commission (CDC)

One of the few specific requirements of the Bonn Agreement was the creation of a commission to prepare a first draft of a new constitution “within two months” of the establishment of the Transitional Administration.² In October 2002, President Karzai appointed the nine-member CDC by decree.³ The selection of the CDC members occurred through a series of negotiations between the United Nations Assistance Mission

² Special Representative of the Secretary-General for Afghanistan, Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 6 (6) transmitted to the Security Council by the Secretary-General, U.N. DOC. S/2001/1154, 1155 (Dec. 5, 2001).

³ Presidential Decree No. 141 on the Appointment of the Constitutional Drafting Commission (2002).

in Afghanistan (UNAMA) and the Afghan Transitional Administration.⁴ One of the most important factors in the selection of the CDC was that every powerful group at that time, including the Northern Alliance Group members, the former mujahideen associates, and Karzai's representatives, should be represented in the CDC; however, in the final compromise, the CDC was created as a "technical" body, including only the "technicians" (lawyers).⁵ Then, the UNAMA recommended to Karzai a list of individuals to be considered for appointment to the CDC. Karzai finally selected nine individuals from this list.⁶ In selecting the CDC members, Karzai wanted to maintain a balance between the "legal experts" and those with training in "Islamic law."⁷

The CDC members included Nematullah Shahrani, then Vice-President of the Transitional Administration, as the Chairman; and Abdul Salam Azimi as Vice-Chairman. Other members were: Musa Ashari; Musa Maroofi; Mohammad Qasim Fazelly; Mohammad Rahim Sherzoy; Sarwar Danish; Mohammad Ashraf Rasooli; Asifa Kakar; and Mukrama Akrami.⁸ (Appendix A provides short biographies of these members). This formation represented two ideological groups. The first, were Kabul University *Shari'a* School and al-Azhar University trained scholars, who had links with former Islamists.⁹

⁴ INTERNATIONAL CRISIS GROUP, AFGHANISTAN'S FLAWED CONSTITUTIONAL PROCESS, ICG, ASIAN REPORT No. 56, 13 (June 2003), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/056%20Afghanistans%20Flawed%20Constitutional%20Process.pdf>.

⁵ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

⁶ Interview with (A), Member, Constitutional Drafting Commission, in Kabul, Afghanistan (July 2, 2015).

⁷ Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (April 7, 2015); Interview with (A), *supra* note 6.

⁸ Presidential Decree No. 141, *supra* note 3.

⁹ This group included Shahrani, Ashari, Danish and Azimi.

The second were Kabul University Law School graduates, who held higher educational degrees from the U.S. and Europe,¹⁰ and were appointed for their “liberal” orientations.¹¹

Although the UNAMA and President Karzai claimed that the CDC was a “technical” commission, it heavily tilted towards certain ideologies—most of the members were committed to a different model of Afghan constitutions from past versions. Apparently, the UNAMA had picked these individuals based on their commitments to certain values—arguably “liberal” values.¹² For instance, Maroofi and Fazelly were committed to Afghanistan’s 1964 Constitution—a considerably “liberal” document among Afghan constitutions. The religious scholars on the CDC were relatively moderate—a quality that played a key role in their selection.¹³ Similarly, Karzai picked individuals, such as Shahrani, because they supported a presidential system, or a weak prime minister. With these deliberate appointments, the CDC became more than merely a “technical” body. Rather, it represented certain ideologies—political and religious.

Once the CDC was commissioned, the international community attempted to provide expert and technical assistance to the constitution-making process. The CDC began receiving visits from American, German, and Swiss constitutional law experts.¹⁴ The European Union offered to organize a conference for the CDC that would bring various constitutional law experts to Kabul, but the UNAMA and President Karzai blocked technical assistance, expressing concerns that in the Afghans’ eyes, the constitution

¹⁰ This group included Maroofi, Sherzoy and Fazelly.

¹¹ Interview with Mohammad Amin Ahmady, Member, Constitutional Review Commissions, in Kabul, Afghanistan (April 9, 2015); INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

¹² INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

¹³ Interview with (A), *supra* note 6; INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 15.

¹⁴ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 15.

would appear to be written by non-Afghans.¹⁵ In addition, at the end of 2001, President Jacques Chirac of France met with Karzai to again offer “technical assistance.”¹⁶ At Karzai’s request and after private meetings with him, a French constitutional law expert, Guy Carcassonne, drafted a version of the constitution.¹⁷ This draft apparently failed to meet President Karzai’s satisfaction because it did not accord sufficient power to the president.¹⁸ Carcassonne later prepared two other drafts that accentuated presidential powers, but the drafters rejected both versions.

A. Division in the CDC Membership

While Presidential Decree 141 laid down an ostensibly clear framework for the CDC to prepare a first draft of the new constitution, the discussions about preparing a first draft did not go as smoothly as anticipated. Because their views were well known, the CDC members suffered from a lack of unity and trust. Not surprisingly, they struggled to agree upon leadership or the requisite qualifications for service. At the beginning of the work of the CDC, one member, Qasim Fazelly, a member of the Rome Group at the Bonn negotiations and a supporter of King Zahir Shah, criticized the decision to appoint Nematullah Shahrani as the head of the CDC.¹⁹ Fazelly consistently asked Karzai to remove Shahrani from the leadership of the CDC and appoint him as the head instead.²⁰ Fazelly complained that Shahrani did not have “legal” expertise or the expertise in

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Carcassonne had also served as an advisor for the drafting of the 1964 Constitution.

¹⁸ *Id.*

¹⁹ Interview with Mohammad Amin Ahmady, *supra* note 11.

²⁰ Interview with Nematullah Shahrani, *supra* note 7.

constitutional law.²¹ Fazelly further pointed to the presence of individuals in the CDC who held higher degrees in Islamic law, rather than constitutional or secular law. He made it clear that he would “never work under a person [pointing to Shahrani] who does not have the legal background which constitution-making required.”²² He continued to insist that only those with “legal expertise” should make constitutions.²³ Fazelly complained that the formation of the CDC was to benefit the former mujahideen leaders.²⁴ He opposed Shahrani because of his affiliation with the mujahideen, particularly with Sayyaf’s *Itteḥād-i Islāmi* Party.²⁵ President Karzai did not agree. Ultimately, Fazelly left the CDC in protest.²⁶

According to some CDC members, Fazelly believed that including the *Sharī‘a* alongside state law could create irreconcilable conflicts. He was concerned that Shahrani would try and include the views of “his Islamist allies” on Islam and the *Sharī‘a* that would closely resemble the mujahideen draft constitution.²⁷ This outcome would be unacceptable. Instead, he wanted a draft that would make only moderate references to

²¹ A Constitutional Review Commission member stated that Qasim Fazelly considered those members of the CDC who were trained in *Sharī‘a* law as “Mullahs” lacking legal knowledge and expertise. According to Fazelly, drafting a constitution was not the task of the Mullahs but of the people (like him) who were trained in legal studies. Interview with Mohammad Amin Ahmady, *supra* note 11.

²² *Id.*

²³ Interview with Nematullah Shahrani, *supra* note 7.

²⁴ Interview with (X), Member, Constitutional Drafting Commission, in Kabul, Afghanistan (June 29, 2015). This view is implicitly stated in Qasim Fazelly’s Book also. *See*, MOHAMMAD QASIM FAZELLY, QĀNUN-I ASSĀSI JAMHŪRI ISLĀMI AFGHANISTAN: YAK HASHA NAWĪS-I ḤUQUQI SIYĀSI [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN: A LEGAL AND POLITICAL COMMENTARY] (1387) [2008].

²⁵ *See generally, Id.*

²⁶ Interview with Nematullah Shahrani, *supra* note 7.

²⁷ Interview with (A), *supra* note 6.

Islam.²⁸ But according to Shahrani, “Karzai knew that only those who had expertise in law and the *Sharī‘a* [fiqh] could draft a constitution that would appear acceptable to the people and to the religious establishments.”²⁹ The people would not accept a constitution in which their representatives played no role.³⁰

Before leaving the CDC, Fazelly had prepared a draft by himself and gave it to the CDC to consider.³¹ Musa Maroofi had also contributed to Fazelly’s draft.³² Refusing to adopt this draft, the CDC members began to prepare a draft of their own, to which the majority of the other CDC members contributed.

Some observers believed that Shahrani would be effective in communicating to the ‘*ulamā*’ and the mullahs (clerics).³³ Shahrani is known for his religious knowledge and the amount of influence and support he enjoys in this regard is considerably important. The UNAMA and Karzai believed that Shahrani could deliver a significant portion of the religious community through his connections with mullahs and with former *jihadi* leaders like Sebghatullah Mojaddidi, Rasool Sayyaf and Burhanuddin Rabbani.³⁴ This alliance was the main reason why Karzai retained Shahrani as the chairman of the CDC and refused to yield to Fazelly’s demands to replace him. The CDC needed to draft a constitution that could get “buy-in” in the broader religious community, and Shahrani’s

²⁸ Interview with Mohammad Amin Ahmady, *supra* note 11; Interview with (X), Member, Constitutional Drafting Commission, in Kabul, Afghanistan (June 29, 2015).

²⁹ Interview with Nematullah Shahrani, *supra* note 7.

³⁰ *Id.*

³¹ *Id.*, see also Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Mohammad Amin Ahmady, *supra* note 11; Interview with (X), *supra* note 24.

³² Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Mohammad Amin Ahmady, *supra* note 11.

³³ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

³⁴ *Id.*

presence could theoretically guarantee it.³⁵

Shahrani also possessed additional qualifications. He was viewed as a “moderate Muslim” and had a law degree from Georgetown University in the United States. He could effectively communicate with Western donors.³⁶ Perhaps most importantly, Shahrani viewed Islam and international human rights as complementary, stating (in 2003) that “Afghanistan is a Muslim society, and so we will respect Muslim values. But we are also a member of the international community, and want to end our isolation. The values and standards of the international community will be reflected in the constitution.”³⁷ How Islam was to be reconciled with international human rights norms was a contested issue the CDC would face. Shahrani’s presence helped persuade Afghan civil society and international donors in the direction that the new constitution was taking.³⁸

Although Fazelly left the CDC, it continued to struggle. The CDC members agreed on the leadership of Shahrani, but they disagreed on the content of the new constitution—specifically on the foundational questions such as the role of Islam; the structure of the government; fundamental rights; and judicial (and Islamic) review. The CDC members differed on whether to select a presidential system, a parliamentary, or a semi-presidential system. In this respect, new struggles arose between Musa Maroofi and Salam Azimi, who were given the task of preparing and presenting suggestions for the first draft of the

³⁵ Interview with Mohammad Amin Ahmady, *supra* note 11.

³⁶ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

³⁷ AHMAD RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 211-212 (2007); *see also*, INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

³⁸ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

new constitution to the CDC.³⁹ These two individuals came with two different sets of draft suggestions for the CDC. As a result, two different “draft notes” emerged, and the CDC members disagreed over which to pick.⁴⁰ Maroofi’s suggestions included two sections: (1) an overall analysis of the existing social and political situations of Afghanistan; and (2) specific opinions on different aspects of the 1964 Constitution of Afghanistan. Azimi’s suggestions included a brief history of the earlier Afghan constitutions, with specific references to the constitutions of 1964, 1977 and 1987.

This disagreement did not last long, however, as the CDC chose Azimi’s suggestions by a majority vote.⁴¹ Shahrani, Azimi, Musa Ashari, Asifa Kakar and Mukarama Akrami preferred Azimi’s suggestions.⁴² Rahim Sherzoy and Musa Maroofi preferred Maroofi’s suggestions.⁴³ The two draft suggestions differed on the four foundational questions of ideology; structure of the government; fundamental rights; and the question of who should police constitutional compliance and conduct all forms of judicial review. Azimi’s proposals subjected international human rights treaties to compliance with *Shari’a*, while Maroofi’s did not. Azimi proposed a semi-presidential system with a weak prime minister, while Maroofi proposed a presidential system. Lastly, Azimi recommended a constitutional court, while Maroofi empowered the president to police constitutional

³⁹ Interview with (A), *supra* note 6; Interview with (B), Member, Constitutional Review Commission, in Kabul, Afghanistan (July 6, 2015).

⁴⁰ Interview with (A), *supra* note 6.

⁴¹ Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with (A), *supra* note 6; Interview with (B), *supra* note 39.

⁴² J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N. Y. L. SCH. L. REV. 557, 567 (2007); INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

⁴³ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

compliance.⁴⁴ In general, Maroofi believed that Afghanistan had much to accomplish in 2003, and it would require a strong president to adopt and direct state policy. His suggestions thus included fewer checks on the executive. In contrast, Azimi's suggestions subjected the executive power to some moderate constraints.⁴⁵ For instance, Azimi proposed a prime minister who would be subordinated to the president and a constitutional court that would offer advisory opinions to the president.⁴⁶

The final draft was based on Azimi's suggestions and also included proposals prepared by Maroofi; as such, Maroofi did not oppose it. One CDC member recalled that both Maroofi and Azimi had prepared two sets of "notes" (memos) that the CDC used to prepare a first draft of the new constitution.⁴⁷ They were not two different drafts of the new constitution as claimed by some of the literature.⁴⁸ This view is consistent with the archival materials on the drafting process of the 2004 Constitution.⁴⁹

B. Divisive Constitutional Questions: the Inevitability of Constitutional Deferral on Foundational Issues

When the CDC began work in late 2002, Afghan political groups in general, and the CDC in particular, were divided on some key constitutional questions. The people involved in the drafting of the constitution identified the key principles of Afghan governance, and they recognized that they needed to design them in a way that would not

⁴⁴ Records of the Constitutional Drafting Commission in Archival Materials on the Process for the making of the 2004 Constitution of Afghanistan (2002-2004) [hereinafter Archival Materials].

⁴⁵ Archival Materials (2002-2004).

⁴⁶ *Id.*

⁴⁷ Interview with Nematullah Shahrani, *supra* note 7.

⁴⁸ *See, e.g.*, Thier, *supra* note 42; INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 14.

⁴⁹ Archival Materials (2002-2004).

offend key stakeholders. These key principles included the following: (1) both horizontal and vertical separation of powers (whether the political branches of the state should be structured as a presidential, parliamentary, or a semi-presidential system, and whether the state administration should be designed as a centralized state or a decentralized one); (2) the type of Islam that should influence society, and the degree of influence it should have on legislation; (3) the level of respect the state should give to fundamental rights; and finally, (4) the question of which, if any, judicial institutions should be entrusted with the power of judicial review.

The CDC had to work for consensus at two levels: first, consensus within the CDC, and second, alignment of the CDC's views with the powerful politicians and former elites. Among the groups whose interests needed to be secured were Karzai and his allies, who supported a presidential system with fewer checks; members from the Northern Alliance Group, who demanded a semi-presidential system with a strong prime minister; the mujahideen leaders, who demanded that Islam must be guaranteed and applied "as much as possible";⁵⁰ and the "liberals" who hoped to secure the protection of liberal rights and freedoms. Notwithstanding the deep division within its membership,⁵¹ the

⁵⁰ INTERNATIONAL CRISIS GROUP (2003), *supra* note 4, at 25.

⁵¹ Apparently, it was disagreements on these issues that prompted two initial draft suggestions associated with Maroofi (Suggestion A) and Azimi (Suggestion B). Suggestion A described Afghanistan as a unitary and democratic Islamic State, while Suggestion B described it as an Islamic republic based on principles of social justice. They both declared Islam to be the official state religion, but Suggestion A required the state to conduct the official rites in accordance with the Hanafi school, while Suggestion B did not. Similarly, Suggestion A stated that in places where the state had not made any legislation, the provisions of the Hanafi Fiqh would be considered law, while Suggestion B did not include such a provision. Another area where the two suggestions differed related to the structure of the government. Suggestion A provided for a highly centralized state with no devolution of power, creating a presidential system of the type under the 1977 Constitution, with a president who was both the head of the state and the head of the

CDC strove to secure the consent and interests of the Afghan power-holders by reconciling their conflicting views on these four foundational issues.

The CDC first discussed issues of religion—the extent of the role to be given to Islam and the *Shari‘a* in the formulation of laws of the state: would Afghanistan be an Islamic state where *Shari‘a* would be the source of all laws; or whether it would be a secular state with an Afghan legal code taking precedence. Debates on this issue led to another divisive contest over whether a particular Islamic school of jurisprudence should be given prominence in the new constitution—an issue that has historically divided Afghans, with different governments adopting different approaches.⁵²

Another significant and divisive issue concerned presidential powers and the structure of government. CDC members linked with the Northern Alliance Group (generally non-Pashtun CDC members), favored a structure that included a prime minister who shared executive power with a president, because they thought this arrangement would give the major ethnic groups a voice in setting policy—if the president is a Pashtun, the prime

government. Suggestion B, in contrast, provided for a structure that looked more like a semi-presidential system with a prime minister who shared executive power with a president. Interestingly, these two models represented the differences of opinions between the Karzai administration and the former mujahideen leaders and the Northern Alliance Group. Karzai and his foreign allies, the U.S. and the UN, demanded a presidential system, while the other groups favored a semi-presidential system. Because of these fundamental differences, constitutional deferral became inevitable. *See*, draft suggestions prepared by Musa Maroofi and Salam Azimi in the Records of the Constitutional Drafting Commission, available in the Archival Materials (2002-2004).

⁵² The public opinions that the Constitutional Review Commission collected illustrate this same divide. Notably, 694 of these public opinions supported the recognition of all the existing sects of *Shari‘a* in the country. Another 203 opinions supported the view that the new constitution should not recognize any sects, advocating for neutrality. However, some 5,277 opinions supported the precedence of Hanafi over the rest of the sects in Afghanistan.

minister will be a Tajik, for example.⁵³ CDC member, Musa Maroofi, disagreed, stating that Afghanistan needed a single and strong source of power to put all the pieces of the country together, which the three decades of war had torn apart.⁵⁴ Finally, the CDC settled on a semi-presidential system.

The relationship between the central government and the regional governments was another issue of contest. President Karzai and his allies favored a centralized system, while members from the Northern Alliance Group, the former mujahideen leaders, and the regional notables demanded a decentralized structure in which the provinces would be considerably independent, although not a federal system.⁵⁵ A decentralized structure apparently favored the interests of the *Jamīyy'āt-ye Islāmi* as their allies, such as Atta Mohammad Noor and Ismail Khan, controlled some of the biggest provinces-Mazar and Herat. Fearing that a more decentralized structure would threaten Afghanistan's unity, the CDC designed a centralized structure,⁵⁶ but power would be devolved to the regions over time.

Finally, the CDC debated question of judicial review, specifically which institution would perform judicial review and interpret the constitution. CDC members offered different options including a constitutional court, a commission for that matter and vesting that power in a supreme court. Eventually, they agreed on a constitutional court that would interpret the constitution and perform all types of constitutional review, but

⁵³ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

⁵⁴ Skype Interview with Professor Mohammad Hashim Kamali, Member, Constitutional Review Commission (April 13, 2015); Interview with Nematullah Shahrani, *supra* note 7.

⁵⁵ *See generally*, Barnett Rubin, Helena Malikyar, *The Politics of Center-Periphery Relations in Afghanistan*, Center for International Cooperation, 17-18 (2003).

⁵⁶ SARWAR DANISH, *HUQUQ-I ASĀSSI AFGHANISTAN* 291 [CONSTITUTIONAL LAW OF AFGHANISTAN] (2nd ed. Ibn Sina, 1391) [2013].

they disagreed on what other powers that court might enjoy, and they deferred on these controversial questions.⁵⁷

C. The Fragile Compromise: Partial Resolution of Key Constitutional Questions

The conflicting views within the CDC over the foundational issues were never completely reconciled or compromised. The CDC strategically deferred details on these foundational issues to create a scheme that would be acceptable to most, if not all, of the key stakeholders. For instance, with respect to what became Article 3, which requires that all state law conform to *Shari'a*, the CDC proposed different structures. When it failed to achieve consensus, it left the language considerably vague. One version read as follows:

In Afghanistan, no law shall contradict the basics of Islam and other values enshrined in the Constitution.

Another version stated this:

In Afghanistan no law shall contradict the basics of Islam and other values in the constitution; this provision shall also apply to international treaties Afghanistan has ratified.

Yet another version stated the following:

The Islamic Shari'a shall be the only source of legislation in Afghanistan.

As the CDC failed to decide which of these versions to include in the draft, it finally agreed on the following wording, leaving it to the CRC to make the final decision.

⁵⁷ Interview with Shukria Barakzai, Member, Constitutional Review Commissions, in Kabul, Afghanistan (March 25, 2015); Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Nematullah Shahrani, *supra* note 7; Interview with Mohammad Amin Ahmady, *supra* note 11.

*In Afghanistan no law shall contradict the basics of Islam and other values enshrined in the Constitution.*⁵⁸

Separation of powers was another issue that sparked disagreement within the CDC, an issue that continued to be unresolved at the final stage of the constitution-making process; in fact, it was deferred at each stage. At the beginning of the work of the CDC, some members proposed a parliamentary system and some others proposed a presidential system.⁵⁹ After some intensive discussions, the CDC members decided to design the political branches of government as a semi-presidential system with a prime minister. Nevertheless, the CDC members could not agree on how the prime minister should be elected. Ashraf Rasooli proposed that the prime minister should come from the political party holding the majority in Parliament.⁶⁰ Sarwar Danish proposed that the president should appoint the prime minister with the approval of Parliament because, in 2002, no political party existed that could win a majority in Parliament.⁶¹ Musa Maroofi suggested that the president should have power to appoint the prime minister without parliamentary approval.⁶² The CDC's final compromise was that the president should appoint the prime minister, who would then require approval by Parliament.

⁵⁸ One of the major debates with respect to the formulation of Article 3 included whether international treaties, specifically international human rights treaties, are in contradiction with Islam. Ashraf Rasooli, a member of the CDC, stated that some members of the CDC believed that Islam and international human rights treaties are contradictory and thus they subjected the compliance of international treaties, to which Afghanistan is a party, to the basics of Islam. Other members of the CDC believed that Islam and international human rights are not contradictory but rather complimentary, and thus they did not subject the compliance of international treaties to the basics of Islam.

⁵⁹ DANISH, *supra* note 56, at 282.

⁶⁰ This position was abandoned outright because the drafters believed that Afghanistan did not have any political parties at the time of the constitution-making.

⁶¹ DANISH, *supra* note 56, at 283.

⁶² View expressed by Musa Maroofi, during the debates of the CDC, Archival Materials (February 2003).

In short, during the constitutional drafting stage, the CDC's tensions over the role of Islam, Afghanistan's obligations under international law (questions of human rights), the relationship between the center and the regions, and constraints on executive power resulted in unwieldy political compromises among the elites and, to some extent, with the international community, which had drawn its own "red lines."⁶³ These unwieldy compromises ultimately led to the adoption of a first draft of the new constitution that was not satisfactory to President Karzai and his foreign allies.

D. An Overview of the CDC Draft with a Specific Focus on Foundational Issues

The CDC finalized a draft of the constitution with many deferrals on foundational issues. The drafters knew that they needed to defer on controversial foundational issues to win the agreement of the key stakeholders.⁶⁴ The CDC draft's most important issues included the relationship between the center and the regions; the division of executive power between a president and a prime minister; the role of Islam and the *Shari'a* in the constitution; and creating the institution that could oversee the implementation of the constitution and perform constitutional review.

1. Federalism vs. Unitary System

Vertical separation of powers became a contested issue during the work of the CDC. The CDC first studied different options, including federalism and unitary systems. As a practical matter, two decades of complicated civil war had effectively partitioned

⁶³ Barnett R. Rubin, *Crafting a Constitution of Afghanistan*, 15 J. OF DEMOCRACY 5 (2004).

⁶⁴ Interview with (J), Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (April 21, 2015).

Afghanistan; former *jihadi* commanders had governed areas under their control for much of the past twenty years. An apparent answer might be to create a system of devolved power—and possibly federal governance. Indeed, some of the most powerful groups advocated for a federal state. Ismail Khan, a *Jamīyy'āt-i Islāmi* commander, General Dostum, leader of the *Junbish-i Milli Islāmi*, and, previously, the leaders of *Hizb-i Waḥdat*, Khalili and Mohaqqiq (Shi'ite Hazaras), all supported a federal system of government.⁶⁵ Nevertheless, partly because of the unprecedented degree of Shi'ite participation in the central government in both the interim and transitional governments, and partly because of their recognition of continued resistance to federalism by Pashtuns, *Hizb-i Waḥdat* later moderated its suggestion to favor devolution and non-discrimination against *Ja'farī* jurisprudence.⁶⁶ But Dostum and his supporters, the Uzbeks, stuck to their demand to create a federal state. More specifically, among political elites, those exercising power in the provinces and representing regions and ethnic groups that had long felt to be subject of a Pashtun-dominated central state in Kabul, tended to advocate federalism or decentralization.⁶⁷ Those exercising power in Kabul and the Pashtun elites, who see Afghanistan primarily as a Pashtun-led state, as well as some of the Western-educated Afghan technocrats preferred a strong, centralized government.⁶⁸

In addition, governors in Pashtun areas favored a centralized state. Gul Agha Shirzai, the then-governor of Kandahar, supported the establishment of a strong central government as the only means to return to the rule of law, stability, and equitable

⁶⁵ Rubin & Malikiyar, *supra* note 55, at 16.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

economic development.⁶⁹ Similarly, Hajji Din Mohammad, the governor of Nangarhar province, rejected federalism stating, “Federalism is not the right formula for Afghanistan. The federal systems that are in place in Pakistan or in Germany will not be successful in Afghanistan. They would only push the country towards disintegration.”⁷⁰

The proponents and the opponents of federalism finally put forward a gradualist view by agreeing on a centralized state, but with incremental devolution of power to the regions over time. Yunus Qanooni expressed this gradualist point of view when he said, “[t]he debate should not be on either an all-powerful central state or a federal system. Neither is this realistic at the moment.”⁷¹ Similarly, Mohammad Amin Farhang, a member of the Rome Group in Bonn, argued, “[a] federal system cannot be established in the short-term. Currently escape from the center is a reality, but this will take Afghanistan towards gradual disintegration... State authority must be reinstated. Only after a strong central government is established, then we can slowly begin to move towards decentralization.”⁷² Although these views were not expressed in the text of the draft constitution, the powerful stakeholders agreed to a centralized state after receiving assurances that the central government would gradually empower the regional

⁶⁹ *Id.* at 17.

⁷⁰ *Id.* at 17. The argument that federalism will lead to disintegration derives from the experience of the past decades, in which regionally based commanders developed independent patronage and supply relations with governments and other support networks in neighboring countries. These political and economic linkages provided the infrastructure for the proxy war that took place on Afghan territory, pulling the country apart.

⁷¹ Qanooni’s interview is cited in Rubin & Malikyar, *supra* note 55, 18 (2003). Qanooni suggested that the center should appoint the highest provincial officials including governors and district governors, but the governors should appoint the rest of the provincial officials. He also suggested that fifty percent of customs revenue should be allocated to the center, while the other fifty percent should be designated to the provinces.

⁷² *Id.* at 18-19.

governments.⁷³

2. The Structure of the Government

The CDC draft recommended a semi-presidential system, proposing a prime minister to share executive power with a president. The CDC members provided several reasons for the importance of adding a prime minister. First, Afghanistan is comprised of many ethnic groups but has two larger ethnic groups—the Pashtuns and the Tajiks. The CDC designed the position of the prime minister to be based, in part, on ethnicity.⁷⁴ The CDC reasoned that if the president came from one of these large ethnic groups and the prime minister came from another, the country could achieve a better balance of power along ethnic lines.⁷⁵ Second, the CDC considered that a presidential system would lead to the consolidation of all executive power in the hands of one person, and thus it might lead to a dictatorship. Third, almost every past Afghan constitution included a post for a prime minister, thus the CDC designed a prime minister to help the president in the performance of the governmental functions.⁷⁶

Under the CDC structure, the prime minister was the head of the government and presided over the sessions of the council of ministers. To become prime minister, the president would make the appointment and the prime minister would present policies of the government to Parliament to obtain a vote of confidence. If Parliament issued a vote of confidence, the president would issue a decree accepting the appointment of the prime minister. If not, Parliament would then elect another person as prime minister,

⁷³ Interview with (A), *supra* note 6.

⁷⁴ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

⁷⁵ Interview with Shukria Barakzai, *supra* note 57; Interview with (X), *supra* note 24; Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Nematullah Shahrani, *supra* note 7.

⁷⁶ *Id.*

introducing him to the president within three days. If Parliament failed to appoint someone else within three days, the president would then issue a decree to move forward on his original nomination. At the same time, CDC members agreed that when political parties emerged and governmental stability improved, this structure could be changed in favor of a system where the prime minister would come from the party that had a majority in Parliament.⁷⁷

3. The Role of Islam

The CDC was plagued by fierce debates on ideology, particularly over the question of whether Islamic values or liberal principles should place limits on legislative and executive discretion. When the constitutional text was written, however, the drafters managed to develop ambiguous formulas that did not seem clearly to resolve the question. All factions within the CDC appeared to have found the language acceptable, even though (and perhaps because) it was open to multiple interpretations, effectively practicing deferral by leaving decisions about which ideological principles should govern to another time and another institution.

The CDC draft established Islam as the official state religion, but it did not make the Hanafi school of *Shari'a* the official madhhab of the state. Apparently, both the Sunni and the Shi'ite madhhabs were implicitly given recognition in the CDC draft; this way the powerful Shi'ite group would find the constitution advantageous, and the followers of both schools would acquiesce in it. The Afghan Shi'ite population had grown considerably stronger over the decades of the civil war and had armed themselves, so no

⁷⁷ Views expressed by Maroofi, Azimi, Barakzai, Eshaqzai, Danish, Ashari, Gillani, and Sediqi in the Records of the Constitutional Review Commission, Archival Materials (2002-2004).

government or constitution could take them lightly anymore. Everyone apparently knew that the Shi'ites could destabilize the constitutional order if their interests were not protected, and if the constitution offended them.⁷⁸

The CDC draft stated, “No law shall contradict the basics of Islam and other values enshrined in the Constitution,” but it did not clarify how much or whose Islam would be applied, or who should decide state laws’ compliance with the “basics of Islam.” As for the Hanafi fiqh—which had historically been dominant in Afghanistan—Article 137 of the CDC draft made Hanafi fiqh applicable only in cases where the state had not legislated. A similar provision related to the *Ja’fari* fiqh. For the first time in the history of Afghanistan, the *Ja’fari* fiqh became applicable in cases where the state had not said what the law is and where the parties to the case are the followers of Shi’ite Islam. This provision clearly intended to bring in the Afghan Shi’ite population to acquiesce and operate under the constitution. This Article, in fact, gave the Shi’ite population recognition and rights that they had been seeking for a long time and had sometimes resorted to military force to achieve.

4. Policing Constitutional Compliance: The Constitutional Court

Discussions over constitutional review and who should police constitutional compliance became one of the most important and divisive issues during the negotiations at the CDC. The CDC members proposed different options. One of these options put constitutional review in the hands of the head of state—the president would exercise this power when signing laws passed by Parliament. Another option would put the Supreme Court in charge of constitutional review. The third option would involve creating a

⁷⁸ Interview with Nematullah Shahrani, *supra* note 7.

separate constitutional court. And a fourth option would create a constitutional commission.⁷⁹

In the end, the CDC chose to proceed with a separate constitutional court to perform constitutional review of laws and legislation. They justified this decision with the doctrine of separation of powers:

We have horizontal separation of powers among the three state organs. The reason we wanted a separate constitutional court was to vest constitutional review power outside the three organs. We thought that if the power of constitutional review were given to the Supreme Court, it would use this power to weaken the parliament by striking down laws that the parliament has passed, specifically those dealing with Islam. The three organs of the state would not be equal if one of them had the upper hand in determining whether or not another organ's actions were constitutional.⁸⁰

More importantly, the CDC draft left vague some key language, specifically provisions that dealt with Islam and the *Sharī'a*; it had failed to reach a final compromise on these questions. CDC members believed that the Constitutional Court would interpret provisions related to Islam and the *Sharī'a*, in a way that would arguably favor individual liberal rights.⁸¹ In their view, the Supreme Court lacked the requisite training and expertise to do the job right.⁸² The CDC's design for a separate and independent constitutional court looked like this:

⁷⁹ Archival Materials (2002-2004).

⁸⁰ Interview with (X), *supra* note 24; Interview with Mohammad Ashraf Rasooli, Member, *supra* note 1.

⁸¹ *Id.*

⁸² Interview with (X), *supra* note 24. This CDC member stated that the Afghan judges are mostly trained in *Sharī'a* law and come from the *Sharī'a* Faculty. Because of the focus of the curriculum in the *Sharī'a* school, they lack the basic expertise to perform constitutional review of laws and legislations.

Draft Article 142. The Constitutional Court of the Islamic Republic of Afghanistan shall supervise and examine the conformity of laws with the Constitution.

Draft Article 143. The Constitutional Court shall be comprised of nine members appointed by the president for a period of six years. The president shall appoint one member as the head of the Constitutional Court. The members of the Court can be reappointed too. The presidents of the country shall be the permanent members of the Court after their terms of service.

Draft Article 144. Members of the Constitutional Court shall have good character; higher legal and jurisprudential (fiqhi) education and ten-years of experience in legislative, legal and judicial affairs; shall have completed 40 years of age and shall not have been convicted for a crime and deprivation of civil rights.

Draft Article 145. The Constitutional Court shall have the following authorities:

1. Examine the conformity of laws, legislative decrees and international treaties with the Constitution;
2. Interpret the Constitution, laws and legislative decrees;
3. Examine and adjudicate on frauds in the presidential elections;
4. Offer legal advice to the president;
5. And other authorities bestowed on the Court by law.

Draft Article 146. The president or the government can refer legislative bills to the Constitutional Court for their compliance with the Constitution.

Draft Article 147. In situations when a court, while adjudicating on a dispute, determines that the provision of the law on point in the dispute is in contradiction with the Constitution, the proceedings shall stop and the issue shall get referred to the Constitutional Court. This provision shall also apply in cases when a party to a dispute claims such a contradiction and the court approves it.

Draft Article 148. The decision of the Constitutional Court shall be considered final without any reviews. Its decisions shall be published in the Official Gazette.

Draft Article 149. The property of the president, vice-president, prime minister, members of the government and justices of the Supreme Court shall be recorded and examined in the Constitutional Court before and after the terms of their service.

Draft Article 150. Law shall regulate the structure and procedure of the Constitutional Court.

Ultimately, this CDC draft was submitted to the CRC for review and to the Constitutional Loya Jirga for approval. The CRC was instructed to revise this draft and

not to go beyond it.⁸³ The CRC undertook a thorough review of the CDC draft and made significant changes to the Constitutional Court and the post of the prime minister.

II. The Constitutional Review Commission (CRC): Broader Ethnic and Political Representation

The first draft of the constitution contained many deferrals on foundational divisive issues. The CDC adopted deferral as the solution for managing the various disagreements among its members and maintaining the tight timeline under which it operated. The CDC had hoped that the larger CRC would be able to build consensus on those deferred questions and reach a conclusion that would be acceptable to the powerful political groups. The CRC would then try to solve key constitutional issues, such as the relationship between the president and the prime minister, and the role of Islam, in a way that would get buy-in and not offend important figures.

President Karzai established the CRC by Decree No. 4 issued on April 23, 2003. The CRC had thirty-five members, seven of whom had been members of the CDC.⁸⁴ The CRC included Afghan legal experts, tribal elders, religious scholars, and individuals with a wide range of experience and specialization in various fields, including *Shari'a* and law (Appendix A provides short biographies of the CRC members).⁸⁵ The thirty-five

⁸³ Skype Interview with Professor Mohammad Hashim Kamali, *supra* note 54.

⁸⁴ The two women members of the CDC were not appointed to the Constitutional Review Commission. According to UNAMA, they had made little contribution to the CDC. INTERNATIONAL CRISIS GROUP, *supra* note 4, at 17.

⁸⁵ The CRC members included Nematullah Shahrani, an Uzbek, head of the CRC; Abdul Salam Azimi, Pashtun, as deputy; Mohammad Musa Maroofi, Pashtun; Mohammad Musa Ashari, Tajik; Mohammad Rahim Sherzoy, Pashtun; Sarwar Danish, Hazara; Mohammad Ashraf Rasooli, Tajik; Abdul Hai Elahi, Tajik; Abdul Haq Walah, Tajik; Abdul Aziz Aziz, Pashtun; Mohammad Tahir Borgai, Pashtun; Mohammad Yaqub Wahidi, Uzbek; Shamsudin Khan, Tajik; Mohammad Alam Eshaqzoy, Pashtun; Qazi

members of the CRC included representatives of four groups: the “Islamists,” the Karzai supporters, the Northern Alliance members, and the “liberals.” One CRC member was ideologically linked with the former PDPA government.⁸⁶

While President Karzai had acted considerably independently in appointing the CDC, he had to consult with the members of his cabinet in appointing the CRC. He had been under pressure from numerous political factions to appoint their agents to the CRC.⁸⁷ As such, Karzai worked with his National Security Council (NSC) in choosing the members of the CRC. The NSC included important figures, such as Qanooni, Abdullah, Fahim and Ghani. Except Ghani, all other members of the NSC were prominent members of the Northern Alliance.⁸⁸

CRC members Abdul Haq Walah and Likraj could not attend the CRC due to personal reasons and other commitments.⁸⁹ Daud Musa resigned from the CRC, later protesting against the CDC draft because of its simultaneous commitment to *Sharī‘a* and liberal values.⁹⁰ Favoring a more “liberal” constitution, Musa stated that the constitution could either embrace Islam or liberal values, but not both; in his view, they were

Mohammad Amin Wiqad, Pashtun; Mohammad Akram, Tajik; Nadir Shah Nikyaar, Pashtun; Lekraj, Hindu; Parween Momand, Pashtun; Mohammad Amin Ahmadi, Hazara; Shukria Barakzai, Pashtun; Mir Mohammad Afzal, Tajik; Fatima Gillani, Arab; Sulaiman Baloch, Pashtun; Sidiqa Balkhi, Hazara; Mohammad Hashim Kamali, Pashtun; Parween Ali Majrooh, Tajik; Mirajudin, Ismaili Tajik; Hakima Mashal Sediqi, Pashtun; Daud Musa, Tajik; Nadir Ali Mahdawi, Hazara; Mohammad Tahir Hashimi, Tajik; Amina Afzali, Tajik; Mohammad Sediq Patman, Pashtun; and Abdul Hai Khurasani, Tajik.

⁸⁶ Generally, among the mujahideen parties, the *Jamīyy ‘āt-i Islāmi* had six representatives in the CRC, the *Itteḥād-i Islāmi* had three representatives, and the new *Hizb-i Islāmi* had one representative, Qazi Mohammad Amin Wiqad. The *Mahāz-ye Isāmi* had two representatives, Fatima Gillani and Sediq Patman.

⁸⁷ INTERNATIONAL CRISIS GROUP, *supra* note 4, at 17.

⁸⁸ *Id.* at 16.

⁸⁹ DANISH, *supra* note 56, at 292.

⁹⁰ Interview with Mohammad Amin Ahmady, *supra* note 11.

contradictory.⁹¹ These departures left the CRC with a final composition of thirty-two members. The CRC was also assisted by three foreign expert advisors—Guy Carcassonne, Yash Pal Ghai, a Kenyan legal expert; and Barnett Rubin, an American political scientist. These advisors were invited by the UNAMA in consultation with the government of Afghanistan and President Karzai.⁹²

The CRC was not an expert commission. While some members were lawyers, there were also journalists, religious scholars, tribal leaders and representatives of different sects and ethnicities. Because of this, the “legal experts” in the CRC were skeptical of the CRC formation, complaining about the lack of legal expertise.⁹³ President Karzai, however, was of the view that the CDC, as an “expert body,” had prepared a first draft of the constitution that represented different sections of Afghan society.⁹⁴

The CRC members also had different ideological, regional, ethnic and political affiliations that represented earlier commitments to different constitutional ideals that had been tested in the past. Most of the CRC members, Shahrani, Azimi and Sediqa Balkhi for example, had been affiliated with the Karzai government, which preferred a centralized state and a strong presidential system. CRC members, such as Abdul Hai Elahi, Abdul Hai Khurasani and Amana Afzali, were representatives of *Jamāyy'āt-i Islāmi* and the Northern Alliance. This group favored a semi-presidential system and a decentralized structure of administration. CRC members Tahir Hashimi, Musa Maroofi,

⁹¹ *Id.*

⁹² Interview with (Z), Member, Secretariat of the Constitutional Review Commission, in Kabul Afghanistan (April 13, 2015).

⁹³ MOHAMMAD ASHRAF RASOOLI, *MŪRŪR-I BAR QĀWĀNĪN-I ASSĀSI AFGHANISTAN* 163 [REVIEW OF THE CONSTITUTIONS OF AFGHANISTAN] (2nd ed. 1391) [2013].

⁹⁴ Interview with Asadullah Jahidi, Member, Secretariat of the Constitutional Commissions and the Constitutional Loya Jirga, in Kabul, Afghanistan (May 2, 2015); Interview with (Z), *supra* note 92.

Rahim Sherzoy, Shukria Barakzai and Mohammad Tahir Borgai were the “liberals” who advocated for the protection of fundamental liberal rights. Qazi Amin Wiqad, Sarwar Danish and Shamsuddin Khan were the “conservatives,” who focused much more on the role of Islam. Other CRC members had ethnic affiliations. There were both Pashtun and Tajik “nationalists,” representing the same nationalist ideologies that were prominent in the 1970s. These two groups worked for issues related to national identity, including establishing a national language, an official language for the national anthem, and a determination of who is truly “Afghan.”

The CRC had representatives from minority sects as well. Sarwar Danish, Amin Ahmady, Nadir Ali Mahdawi and Sediqa Balkhi were from the Afghan Shi’ite Hazara group. This group was ideologically and politically linked to the Hizb-i *Wahdat-i Islami* Afghanistan, and advocated for sectarian equality.⁹⁵ Fearing Sunni dominance, as in the 1993 Sunni mujahideen draft, they argued for the recognition of the *Ja’farī* fiqh. Lastly, the CRC included one Hindu and one *Isma’īlī* member.

It is not surprising to find, therefore, that the CRC members did not trust each other; they knew of each other’s commitments to different ideologies. A number of CRC members were critical of those members who had links with the Karzai government and worked for his interests. One CRC member indicated that Shahrani reported the work of the CRC to President Karzai at the end of each CRC session.⁹⁶ Karzai then shared the CRC discussions with his advisors and experts and prepared to use his influence to

⁹⁵ Interview with Sediqa Balkhi, Member, Constitutional Review Commission, in Kabul, Afghanistan (May 10, 2015); Interview with Mohammad Sediq Patman, Member, Constitutional Review Commission, in Kabul, Afghanistan (July 7, 2015).

⁹⁶ Interview with Shukria Barakzai, *supra* note 57; Interview with (B), *supra* note 39.

undermine the independence of the CRC.⁹⁷ For this reason, the CRC chose not to share its original draft of the constitution with Karzai. Instead, the CRC kept the draft secret and “actually gave Karzai another draft, which was different than what the CRC really produced.”⁹⁸ A CRC member recalled, “we tried [our] best to keep the draft away from governmental influence at least until we completed the public consultation process and prepared a draft based on the views expressed by the people.”⁹⁹

A. CRC Working Committees

Presidential Decree No. 4, which established the CRC, divided the CRC into four different committees, each comprised of seven to eight members, including a committee head.¹⁰⁰ These committees were elected on the advice of the head of the CRC and the approval of its members.¹⁰¹ The head of the CRC nominated the committee heads, who were then confirmed by a simple majority of the CRC.¹⁰² These committees were selected in a way that balanced different views (liberal, Islamic, Pashtun, Tajik) in a committee.¹⁰³

⁹⁷ Interview with (B), *supra* note 39.

⁹⁸ Interview with Shukria Barakzai, *supra* note 57.

⁹⁹ *Id.*

¹⁰⁰ The first committee included Abdul Salam Azimi, Shamsuddin Khan, Nadir Shah Nikyar, Sidiqa Balkhi, Mohammad Ashraf Rasooli, Suliman Baloch, Abdul Rahim Sherzoy, and Abdul Aziz Aziz. The second committee was comprised of Mohammad Musa Ashari, Abdul Yahya Elahi, Parween Momand, Fatima Gillani, Qazi Amin Wiqad, Mirajudin, and Parween Ali-Majrooh. The third committee was comprised of Mohammad Musa Maroofi, Mohammad Hashim Kamali, Mohammad Amin Ahmadi, Mir Mohammad Afzal, Mohammad Sediq Patman, Nadir Ali Mahdawi, and Shukria Barakzai. The fourth committee included Sarwar Danish, Mohammad Tahir Borgai, Mohammad Yaqub Wahidi, Abdul Hai Khurasani, Mohammad Tahir Hashimi, Hakima Mashal Sidiqi, Amina Afzali, and Daud Musa.

¹⁰¹ Interview with Mohammad Alam Eshaqzai, Member, Constitutional Review Commission, in Nangarhar, Afghanistan (June 9, 2015).

¹⁰² Decree No. 4 of the President of the Islamic Transitional Administration of Afghanistan on the Appointment of the Constitutional Review Commission (April 2003).

¹⁰³ Interview with Nematullah Shahrani, *supra* note 7.

Additionally, for the purpose of unifying the possible conflicting views that would come out of the working committees, the CRC rules of procedure provided for a separate executive committee. This Executive Committee was comprised of Azimi, Sediqa Balkhi, Musa Ashari, Musa Maroofi, Hashim Kamali, Sarawar Danish and Hakima Sediqi (all of whom were supporters of a presidential system),¹⁰⁴ and Ashraf Rasooli and Alam Eshaqzai, (who supported a semi-presidential system).¹⁰⁵ The Executive Committee included the head of each of the four CRC working committees. The Executive Committee was elected on the basis of the suggestion of the head of the CRC and the consent of the rest of the CRC members.¹⁰⁶ Finally, the CRC had a general assembly that included all thirty-two CRC members, a group that studied, debated, and proposed changes to form within the CRC consensus, and finalized a working draft of the new constitution.

Rapporteurs recorded and noted all changes and recommendations agreed upon in each working committee. The chair of each committee presented his committee's proposed changes in the new draft to the Executive Committee. The Executive Committee discussed each committee's proposed changes and presented them to the CRC General Assembly. The General Assembly discussed and debated the changes and made final decisions regarding their incorporation into the draft based on a majority vote.

Again, the diversity of the CRC meant that the four working committees disagreed on major constitutional issues. The Executive Committee apparently failed because the

¹⁰⁴ Skype Interview with Professor Mohammad Hashim Kamali, *supra* note 54; Interview with Sediqa Balkhi, *supra* note 95; Opinions expressed by Maroofi and Ashari on prime minister, Archival Materials (2002-2004).

¹⁰⁵ Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Mohammad Alam Eshaqzai, *supra* note 101.

¹⁰⁶ Interview with (X), Member, *supra* note 24.

remaining CRC members, who were not members of the Executive Committee, complained that the Executive Committee could not resolve all of these issues because it did not represent the voices of all of the CRC members.¹⁰⁷ The four working committees studied the entire CDC draft separate and made separate recommendations for change. Thus, it was the duty of the CRC General Assembly to achieve agreement. Notably, any change to an article would first be approved in a committee, then in the Executive Committee, and finally in the General Assembly. This mechanism made it difficult for a change to get through all three stages, so many issues remained unresolved.

As a result of this structure, at times four different opinions emerged as to certain issues. For example, on the question of whether to refer to Afghanistan as the “Republic of Afghanistan” or as the “Islamic Republic of Afghanistan,” these committees came up with four different propositions. Committee members who were identified as “Western-educated technocrats” or “liberals” preferred to refer to Afghanistan as the “Republic of Afghanistan,” while those who considered themselves related to a former mujahideen group favored an “Islamic Republic.” The First Committee approved the wording of Article 1, describing Afghanistan as an “Islamic Republic.” The Second Committee disagreed on this provision. Committee members Parween Majrooh, Fatima Gillani and Mirajuddin recommended that the word “Islamic” should be removed, and it should read the “Republic of Afghanistan.”¹⁰⁸ These members expressed concern that if the country were to be defined as “Islamic Republic,” all of its laws would have to strictly comply with the “basics of the *Shari‘a*,” which could compromise rights. They argued that

¹⁰⁷ Telephone Interview with Mohammad Yaqub Wahidi, Member, Constitutional Review Commission (June 6, 2015).

¹⁰⁸ Records of the Debates of the Constitutional Review Commission, Archival Materials (2002-2004).

because Islam is so entrenched in Afghanistan, defining the state as “Islamic republic” would not add anything to Afghanistan’s commitment to Islam.¹⁰⁹ In contrast, Second Committee members, Qazi Wiqad, a former member of the mujahideen associated with *Hizb-i Islāmi*, and Abdul Hai Elahi, associated with *Jamīyy’āt-i Islāmi*, rejected this proposal, stating that Afghans fought three decades for Islam and an Islamic state, so calling it an “Islamic Republic” would be consistent with the demands of the people.

Similarly, the Third Committee, which included Maroofi, Kamali, Ahmady, Afzal, and Patman, unanimously approved “Republic of Afghanistan.” These members argued that “Islamic Republic” might somehow justify “Islamic fundamentalism.”¹¹⁰ All of these members were Western-educated Afghans who were supportive of liberal values in the Constitution. But members in the Fourth Committee disagreed on whether to define Afghanistan as a “Republic” or as an “Islamic Republic.” In short, all of the working committees deeply disagreed on this question.

When the issue came to the Executive Committee, which was responsible for unifying the views expressed in different committees, the debate intensified over whether to remove the word “Islamic.” The members of the Executive Committee had proposals of their own, including an “Islamic State” rather than “Islamic Republic,” among others, and there was a proposal advocating a constitutional monarchy based on the principles of Islam and “democracy.” As such, the Executive Committee also was unable to resolve the issue. Finally, it was during the meetings of the CRC General Assembly that a simple

¹⁰⁹ Debates in the Second Committee of the Constitutional Review Commission, Archival Materials (2002-2004).

¹¹⁰ Debates in the Third Committee of the Constitutional Review Commission, Archival Materials (2002-2004).

majority of votes approved “Islamic Republic of Afghanistan,” yet left the final decision to the Constitutional Loya Jirga.¹¹¹

The CRC tried to resolve most of the foundational issues in this way. But because this process was lengthy and involved intensive and long debates, many of the foundational issues were vaguely resolved and deferred—in a way that was acceptable to the CRC members. Although the result might not have been the best outcome for all, the CRC members understood it was the best result for that time.

B. The Public Consultation Program

The CRC’s next task, after studying and debating the CDC draft, was to conduct public consultation. The CRC considered whether to conduct public consultation before or after publicizing a draft.¹¹² Members of the CRC had different views on this matter. Some CRC members, such as Sarwar Danish, favored publishing a draft and then consulting the public, while others, such as Azimi, stated that the public’s views should be gathered first and then the draft should be publicized.¹¹³ The first group argued that releasing a published draft to the public would give the people the chance to express

¹¹¹ Interview with Shukria Barakzai, *supra* note 57.

¹¹² There are strong arguments for both prior and post-draft public consultation processes. Subsequent consultation gives the public a chance to comment on concrete proposals, while prior consultation provides greater scope for the expression of public views and the enhancement of people’s initiatives. It is also possible to have public consultation both before and after the draft is prepared. But the CRC chose to only conduct public consultation first and then publicized a draft. While the prior consultation in the Afghan context provided for greater enhancement of the people’s initiatives in the CRC draft, it did not give the Afghan public the chance to react to concrete and comprehensive set of proposals, and assess with some confidence its significance for them and the state.

¹¹³ Interview with Sediqa Balkhi, *supra* note 95; *see also* Records of the Constitutional Review Commission, Archival Materials (2002-2004).

concrete views on specific constitutional issues.¹¹⁴ The second group argued that the CRC should consult the people first, preparing a draft in light of the people's proposals on different aspects of the new constitution, and then publicizing that draft to give the people a sense of ownership.¹¹⁵ The UNAMA also favored not releasing the draft before the public consultation process. One UNAMA official tried to justify the refusal to publish a draft by claiming that a published draft would have a negative impact on public debate because it would polarize opinions.¹¹⁶ Ultimately, the CRC chose to conduct public consultation before publishing a draft.

In a country like Afghanistan, which in 2002-2004 lacked an educated class of people due to decades of war and instability, pre-draft consultation did not garner much input from the public. The CRC faced too many challenges in conducting the public consultation process because the people did not understand the questions on different aspects of the constitution.¹¹⁷ Some of the people who were asked for their views on federalism, separation of powers, and judicial review, for example, did not understand these concepts. Although there was some effort to help people understand those concepts so that they could comment, it was simply impossible to give the level of explanation necessary to everyone who needed it, given that most average citizens would not be able

¹¹⁴ Interview with Amina Afzali, Member, Constitutional Review Commission, in Kabul, Afghanistan (June 23, 2015); records of the Constitutional Review Commission, Archival Materials (2002-2004).

¹¹⁵ Interview with Mohammad Ashraf Rasooli, *supra* note 1; records of the Constitutional Review Commission, Archival Materials (2002-2004).

¹¹⁶ RASOOLI, *supra* note 93, at 165; INTERNATIONAL CRISIS GROUP, *supra* note 4, at 15. In an interview with the author, Mohammad Ashraf Rasooli indicated that President Hamid Karzai and the Secretariat of the Constitutional Review Commission had their own views and appeared not willing to release a draft to the people. Rasooli specifically stated that Hamid Karzai was working for the adoption of a presidential system.

¹¹⁷ UNAMA had regional offices in different zones of the country. These offices had the responsibility to distribute written questioners to the public.

to comment without some explanation.¹¹⁸ Because of this problem, the public comment period appeared to be ceremonial—not genuinely seeking public input. Moreover, the majority of the people, who had seen years of conflict and poverty, cared less about a “constitution” and separation of powers, and more about improving their living conditions.

According to some CRC members interviewed in 2015, the way the questionnaires were designed did not help.¹¹⁹ For example, the very first question asked, “what kind of government do you want?” The answer choices were these: (1) a monarchical system; (2) a republican system; (3) a parliamentary system; and (4) a presidential system. These kinds of multiple-choice questions limited the options of the people who could not express views on other forms of government, such as an Islamic state or a democratic state, and also required the public to understand each of these concepts.¹²⁰

Overall, the CRC spent much time and effort conducting this pre-draft public consultation,¹²¹ and yet the results did little to ensure that the public’s views were incorporated in the final version of the draft. The CRC arranged itself into ten groups of three members to conduct prior public consultation. Two of the ten groups were tasked

¹¹⁸ One CRC member recalled that the CRC members would first explain the draft to the public and then ask them for their views. She stated that it helped the people understand the questions and provided some useful input.

¹¹⁹ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

¹²⁰ *Id.* Telephone Interview with Mohammad Yaqub Wahidi, *supra* note 107. Amena Afzali, a Constitutional Review Commission member, stated that the Commission members would describe and explain to the people the issues of the Constitution. Thus, the people had a view on what these constitutional issues were.

¹²¹ The U.N. has reported that, despite considerable insecurity in large parts of the country and explicit death threats in many instances from the forces who oppose normalization in Afghanistan, some 178,000 Afghans participated in the consultations, nineteen percent of whom were women. A total of 556 meetings were held to discuss the draft, and 50,000 written comments were received.

with consulting Afghan refugees in Iran and Pakistan. Each group was assigned to a specific zone of the country.¹²² These groups traveled to almost every district of the country and conducted public meetings with the people and distributed written questionnaires.¹²³ The consultation process worked through focus groups, including elders, the ulema, women, business groups, youth groups, Afghan employees of NGOs and international organizations, and former Emergency Loya Jirga delegates.¹²⁴

A major consideration in the selection of the members in each public consultation group was that individuals who had an established, positive reputation in a specific area were assigned to that area. For instance, Mohammad Afzal, a highly regarded religious personality in the western part of Afghanistan, specifically in Herat, was a member of the group that travelled to the western zone; it was hoped that his involvement would help people consider themselves part of the constitution-making process, giving them a sense of ownership and encouraging them to participate in the public consultation process.¹²⁵

These groups began their work in late May 2003. After one month, the teams returned to Kabul and discussed the results of the consultation program, but the teams had limited

¹²² DANISH, *supra* note 56, at 294.

¹²³ During my fieldwork, I found out that the CRC members had different views on whether the public opinions mattered. Some CRC members, mainly Shukria Barakzai, indicated that the public consultations mattered and that the CRC included it in the draft it prepared. She said that the reason the Afghan Constitution guarantees so many fundamental rights and freedoms is because the public wanted it to do so. Barakzai's account, however, does not conform to the archival materials on the process. Moreover, with respect to the guarantees of fundamental rights, the CDC had provided similar guarantees that the CRC provided. So basically, not much was changed. Other CRC members indicated that the public opinions did not matter. They stated that the public wanted a semi-presidential system not a presidential one.

¹²⁴ Press Briefing by Manoel de Almeida e Silva, United Nations Assistance Mission in Afghanistan (UNAMA) 5 (June 2003).

¹²⁵ Interview with Mir Mohammad Afzal, Member, Constitutional Review Commission, in Herat, Afghanistan (July 27, 2015).

time to analyze the opinions they received from the public.¹²⁶ Nearly three months elapsed between late July 2003 when consultation process concluded and early November when the draft constitution was released, a period “during which input from the center appeared to have taken precedence over the results of the public consultation process.”¹²⁷ Similarly, just after a month of publishing the draft, Karzai issued a decree that would convene the Constitutional Loya Jirga. All in all, the public consultation process appears to be a symbolic gesture by the government to make the people think that they were part of the process so that they would acquiesce in the final document.

However, as in any constitution-making process,¹²⁸ the drafters of the 2004 Constitution had to find a way to reconcile the opposing requirements of creating incentives to tie in powerful elites with the demands of a consultative process intended to foster political dialogue and empower the people. In the end, it seemed that empowering the people was sacrificed for the need to tie in the political elites. Notably, the UNAMA officials cautioned that the consultation process should not constrain the CRC choices, “suggesting a desire for a process that appears to harvest public input but does not incorporate it meaningfully.”¹²⁹ At the same time, the UNAMA and the CRC feared that opening the process to the public could undermine the compromise that the CRC was trying to achieve.¹³⁰ The UNAMA and the Secretariat believed that broader participation by the public could lead to a breakdown of the fragile compromise the CDC and the CRC

¹²⁶ See, DANISH, *supra* note 56, at 93.

¹²⁷ INTERNATIONAL CRISIS GROUP, *Afghanistan’s Flawed Constitutional Process*, Addendum I, *Afghanistan: The Constitutional Loya Jirga*, ICG Afghanistan Briefing 2 (2003).

¹²⁸ KIRSTI SAMUELS AND VANESSA HAWKINS WYETH, *STATE BUILDING AND CONSTITUTIONAL DESIGN AFTER CONFLICT* 3 (2003).

¹²⁹ INTERNATIONAL CRISIS GROUP, *supra* note 4, at 20.

¹³⁰ *Id.*

had managed to achieve.¹³¹ There was also a fear that public discussions might be hijacked by factions of the former mujahideen parties that had strong regional support who would push for a more Islamic draft.¹³² The UNAMA officials suggested that any public consultation process lasting more than three months would empower such groups.¹³³ Still strong, these parties could mobilize the public opinion for the incorporation of their views and incentives in the constitution, and thus frustrate the elite bargains.

1. Important Aspects of the Constitution in the Public Consultation Process

The role of Islam, protection of rights, the structure of the government, and the relationship between the center and the regions, were the four most pressing issues discussed in the public consultation process. In 2003, Shahrani stated that in meetings with the public, the issue of whether an Islamic system could be democratic emerged as the most salient of these; followed by whether Afghanistan should be a republic, a monarchy, or a parliamentary democracy; and then whether the country should model itself after a federalist or centralist system.¹³⁴ These issues were of interest to regional notables and by extension to their supporters in rural areas. While public literacy on these foundational issues was limited, representatives of the regional notables and the former mujahideen leaders manipulated the public in favor of these notables' views.¹³⁵

¹³¹ Interview with Asadullah Jahidi, *supra* note 94.

¹³² INTERNATIONAL CRISIS GROUP, *supra* note 4, at 21.

¹³³ *Id.* at 20.

¹³⁴ RASHID, *supra* note 37, at 211.

¹³⁵ Interview with (B), *supra* note 39.

Public opinion differed on these questions. People in the South and East—areas dominated by ethnic Pashtuns—favored a republican presidential system, while the North and the West—areas dominated by non-Pashtuns—favored a republican semi-presidential system.¹³⁶ Apparently, the Pashtuns supported a presidential system, believing that the presidency would be occupied by a Pashtun figure. Although the Pashtuns may not comprise more than the fifty percent of the population required to elect a president, the CRC drafted a position for one vice president who would run with the president. A Pashtun president with a non-Pashtun running mate would easily win presidential elections. In contrast, the Tajiks and the Hazaras residing in central and northern Afghanistan, who were supporters of one or another of the Northern Alliance Group and its regional commanders, favored a semi-presidential system. This section of the people believed that a prime minister's post should be filled by one of their own.

Similarly, public opinion differed on the role of Islam and whether all sects should be recognized in the constitution. These views were also divided along geographic and ethnic lines. Mainly, people in southern Afghanistan, areas influenced by conservative religious figures trained in the Pakistani madrasas, demanded a dominant role for Hanafi Islam—one that would trump all other values in the constitution. In contrast, people in the north preferred a vision of Islam that did not oppose liberal rights and freedoms, particularly international human rights norms.¹³⁷

In total, the CRC distributed almost 500,000 questionnaires, out of which 80,000 completed questionnaires were received, along with numerous memoranda and

¹³⁶ Records of the Public consultation opinions, Archival Materials (2003).

¹³⁷ *Id.*

recommendations.¹³⁸ Members of the CRC also attended more than 500 public consultation meetings in all thirty-two provinces in Afghanistan as well as with refugees in Pakistan and Iran.¹³⁹ The following passage presents examples of questions asked in the questionnaires, including some of the responses that the public gave. The examples that are provided here are taken from a questionnaire related to the Eastern Zone of the country, specifically to Nuristan province. The same questions were asked in all regions but with different responses. With respect to the official madhhab of the state, the questionnaire asked the following:

The majority of the Afghan Muslims are followers of the Hanafi madhhab, and other minority sects exist in the country, such as the Shi'ites, should the constitution officially recognize this difference? [Translated from Dari.]

A bulk of the Nuristan participants answered that because the majority of Afghans are the followers of the Hanafi madhhab, criminal and other matters should be resolved in accordance with the Hanafi madhhab; and the followers of other sects, such as the *Ja'fari* sect, should have the right to resolve matters related to their sect in line with their fiqh. Not everyone who was asked had this view. A small number of the people stated that the

¹³⁸ Michael Schoiswble, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSN'L. L. 819, 834 (2006).

¹³⁹ *Id.*; see also Mohammad Hashim Kamali, *Islam and its in the Afghan Constitution 2004 with Special References to Personal Law* in THE IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN, AND EGYPT—IMPLICATIONS FOR PRIVATE LAW 23-43, 24 (Najma Yassari, ed., 2005); Barnett R. Rubin, *Crafting a Constitution for Afghanistan in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST: WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN AND AFGHANISTAN* (Said Amir Arjomand, ed., 2008); Mohammad Hamid Saboory, *The Process of Constitutionalism in Afghanistan*, in THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW 5 (Nadjma Yassari, ed., 2005).

only official madhhab should be from the Hanafi school, while a number of responses favored both the Hanafi and *Ja'farī* fiqh as official madhhabs of the state.

With respect to the issue of fundamental rights, the questionnaire asked the following:

What fundamental rights should be guaranteed and protected in the constitution? [Translated from Dari.]

The majority of the participants answered that the right to freedom of expression should be guaranteed within the limits of Islam, and the state should provide mandatory education all over the country. Because the majority of the residents in this area are farmers, they expressed their views that the government should guarantee the safety of their crops and help them improve the area's agricultural production.

These are two examples questions asked during the public consultation program from one questionnaire that was distributed in one district of the country. It is not within the scope of this dissertation to discuss every questionnaire and all the responses. It is important to understand, however, that the same questions were asked in different parts of the country, and answers differed significantly from region to region, which showed the division among the people on key constitutional issues. In short, although regional differences drove distinctive viewpoints about certain overarching issues among the general public, intra-regional differences of opinion remained due to multiple and conflicting allegiances.

C. CRC Debates and the Unresolved Divisive Constitutional Matters

The same constitutional questions that were controversial and divisive at the CDC stage were also contested during the CRC debates. As in the CDC, some CRC members proposed a presidential system, while other proposed a semi-presidential system. There

were also views that the CRC should design a parliamentary system.¹⁴⁰ Proponents of a presidential system argued that the situation in 2003 demanded a centralized source of power with a unified structure.¹⁴¹ In 2015, a CRC member recalled this:

[T]here was a need to put all the pieces of the war-torn country together under a centralized institution of presidency. We [the CRC] agreed that a presidential system could unify the executive, otherwise the fractured structure of power would become institutionalized and make it difficult for the government to adopt important policies.¹⁴²

Moreover, proponents of the presidential system stated that two parallel sources of power, a popularly elected president and an indirectly elected prime minister, would destabilize politics and create obstacles in policy-making in a time when Afghanistan was completely rebuilding its government.¹⁴³ In contrast, opponents of the presidential system argued that a presidential system could lead to the consolidation of all executive power in the hands of one individual, and thus result in a dictatorship.¹⁴⁴ In their view, in a semi-presidential system, the prime minister would share and check the power of the president. Ultimately, this second view prevailed.

The role of Islam and its relationship to the state continued to be a contested issue among the members of the CRC. Some CRC members demanded that the state legislate in accordance with “Hanafī *Shari‘a*,” others proposed the “basics of Islam.” Still some

¹⁴⁰ At least two Constitutional Review Commission members, Ashraf Rasooli and Abdul Hai Elahi, proposed a parliamentary system for Afghanistan (views expressed by Rasooli and Elahi, Archival Materials).

¹⁴¹ Views expressed by Mohammad Musa Maroofi, in the Records of the Constitutional Review Commission, Archival Materials (2003).

¹⁴² Interview with Nematullah Shahrani, Chair, *supra* note 7; Skype Interview with Professor Mohammad Hashim Kamali, *supra* note 54; Views expressed by Maroofi, Archival Materials (2003).

¹⁴³ Interview with Nematullah Shahrani, Chair, *supra* note 7; Views expressed by Maroofi, Archival Materials (2003).

¹⁴⁴ Interview with Mohammad Ashraf Rasooli, *supra* note 1; Views expressed by Abdul Hai Khurasani and Abdul Hai Elahi, Archival Materials (2003).

other CRC members proposed that the state should legislate in accordance with “Islam.”¹⁴⁵ The former mujahideen groups stressed the importance of practical applications of the *Sharī‘a* (Hanafi *Sharī‘a* as the source of legislation) “as much as possible.”¹⁴⁶ For instance, Sayyaf and Rabbani had a list of demands, including that “[*Sharī‘a*] become the supreme law of the land,”¹⁴⁷ a view also expressed in the Sunni mujahideen draft constitution. An *Itteḥād-i Islāmi* deputy noted, “While democracy was acceptable, it must be limited because it could not justify a government that contravened divinely established rules.”¹⁴⁸ These groups also expressed a clear desire for a more significant constitutional role for Islam than in the 1964 Constitution.¹⁴⁹ According to one mujahideen leader, who complained against the draft’s provision requiring legislation in accordance with the “basics of Islam,” if Afghans reduced the presence of Islam in the constitution, “by our hand, we would become kāfirs [unbelievers].”¹⁵⁰ A former *Jamīty‘āt-i Islāmi* commander criticized the “basic principles of Islam” language in the draft for its ambiguity and stressed that the new constitution needed to be clear on the role of Islam.¹⁵¹

However, other interest groups disagreed with the mujahideen leaders on the constitutional position of Islam and the *Sharī‘a*. An official of Junbish-i Milli-ye Islāmi, a political movement led by Abdul Rashid Dostum and comprised of Afghan Uzbeks,

¹⁴⁵ Interview with Shukria Barakzai, *supra* note 57.

¹⁴⁶ INTERNATIONAL CRISIS GROUP, *supra* note 4, at 9.

¹⁴⁷ RASHID, *supra* note 37, at 214.

¹⁴⁸ INTERNATIONAL CRISIS GROUP, *supra* note 4, at 15.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 25.

¹⁵¹ *Id.*

rejected references to *Shari'a* as the supreme law of the land.¹⁵² These were debates that reflected similar disputes during the drafting of the Sunni mujahideen parties in the 1990s and appeared hard to reconcile in clear language.

According to some CRC members, President Karzai and his allies regularly interfered in the CRC's work in order to influence the outcome of the discussions in favor of the President, making attempts to reach agreement on certain issues difficult.¹⁵³ For instance, Karzai and his supporters demanded a weak prime minister in the draft, but the majority of the members of the CRC resisted this demand. Nevertheless, ultimately President Karzai and his allies in the CRC succeeded in imposing Karzai's choice on the CRC.¹⁵⁴ Indeed, the final draft that went to the Constitutional Loya Jirga did not have a prime minister or a constitutional court.

In short, the CRC decided to finalize some of these contested issues while consciously leaving others to the Constitutional Loya Jirga to decide.¹⁵⁵ At a time when these disagreements dominated the constitutional negotiations, the French Advisor to the CRC, Guy Carcassonne, prepared a draft of his own.

1. Guy Carcassonne's Draft: Recommendations to Resolve the Unresolved Constitutional Issues

Carcassonne had provided a draft constitution when the CDC began its work, but Karzai rejected that draft. During the CRC negotiations, Carcassonne provided another draft (Carcassonne Draft 2) to the CRC that accentuated presidential powers. The CRC

¹⁵² *Id.* at 15.

¹⁵³ Views Expressed by Tahir Hashimi, Archival Materials (2003); Interview with Shukria Barakzai, *supra* note 57.

¹⁵⁴ Interview with Shukria Barakzai, *supra* note 57.

¹⁵⁵ DANISH, *supra* note 56, at 298-299.

used some of these recommendations, and it used Carcassonne's draft to improve the structure of the constitutional court; however, the CRC rejected most of its other recommendations.

Carcassonne Draft 2 (CD2) created a unified state headed by a president. The president would be the protector of national independence and territorial integrity. He would also be empowered to police constitutional compliance.¹⁵⁶ CD2 had provided for a weak prime minister—to the pleasure of President Karzai. Under this version, the president would have the power to appoint the prime minister without any parliamentary approval and terminate the appointment of the prime minister on his own initiative.¹⁵⁷

CD2 proclaimed that the religion of Afghanistan is the sacred religion of Islam. But it did not specify any role for *Shari'a* law.¹⁵⁸ In an unprecedented move, CD2 required that Afghanistan comply with the rules of public international law, and it provided that international treaties and conventions, when duly ratified or approved, took precedence over domestic laws.¹⁵⁹ Finally, the accepted standards of fundamental rights and freedoms as enshrined in his draft would have to be construed in accordance with the treaties and conventions that Afghanistan had ratified, including the Universal Declaration of Human Rights and other human rights treaties.¹⁶⁰

CD2 also included a separate constitutional court. This court included nine members appointed for a period of nine years: the president of the country, the president of the lower house of the National Assembly, and the president of the Senate would each

¹⁵⁶ Text of the Draft Constitution Prepared by Guy Carcassonne, art 25, Archival Materials (2002-2004).

¹⁵⁷ *Id.* art 31.

¹⁵⁸ *Id.* art 3.

¹⁵⁹ *Id.* art. 22.

¹⁶⁰ *Id.* art 23.

appoint three members.¹⁶¹ Carcassone's constitutional court would function as the primary institution to hear electoral complaints and declare the results of elections after hearing complaints.¹⁶² In addition, this court would have the power to conduct constitutional review, arguably both abstract and concrete review. Treaties that were signed, along with any implementation statutes associated with the signed treaties, would have to be submitted to the constitutional court for review.¹⁶³

According to this design, the prime minister, the president, and one tenth of the National Assembly would have standing to bring cases before the constitutional court.¹⁶⁴ This constitutional court could also perform incidental review when courts referred laws that they thought were unconstitutional.¹⁶⁵ The provision of a law found to be unconstitutional could not be enacted or enforced. Treaties determined unconstitutional could only be ratified after the constitution was amended in accordance with the requirements of the treaties.¹⁶⁶ The decisions of the constitutional court would be final and subject to no review; they would be binding on all authorities including the president, the Supreme Court, and other state institutions.¹⁶⁷

Creative as it was, CD2 did not appeal much to the CRC members. It was considered not suitable for a country like Afghanistan.¹⁶⁸ The CRC was cautious about considering

¹⁶¹ *Id.* art 68.

¹⁶² *Id.* art 70.

¹⁶³ *Id.* art 71.

¹⁶⁴ *Id.* art 72.

¹⁶⁵ *Id.* art 73.

¹⁶⁶ *Id.* art 74.

¹⁶⁷ *Id.* art 74 (2).

¹⁶⁸ Interview with Shukria Barakzai, *supra* note 57.

Carcassonne's draft because the draft was clearly prepared in a way that protected Karzai's interests.¹⁶⁹

D. The Role of the International Community

In light of recent history, managing a period of post-conflict transition is either driven by local actors or it involves massive participation by the international community.¹⁷⁰ In Afghanistan, this process included input from both domestic and foreign actors. Although the international community influenced the design of the constitution-making process in Bonn, the process included major domestic political groups and actors. The constitution-making process did include input from the international community, but these were mere suggestions and none "were ever imposed."¹⁷¹

From the start of the constitution-making process, the international community tried to offer expert support. The CDC had received visits from international experts, but Karzai and the UNAMA blocked expert and technical assistance citing a concern that the constitution would appear to be written by non-Afghans.¹⁷²

The role of the international community in the constitution-making process became more significant once President Karzai appointed the CRC. The CRC received much more support from the U.N. and other international sources than the CDC had.¹⁷³ Foreign advisors to the CRC and other foreign interest groups paid visits to the CRC and consulted with the members on various constitutional issues—the constitutional court and

¹⁶⁹ *Id.*

¹⁷⁰ MICHELE BRANDT; JILL COTTRELL, YASH GHAI, & ANTHONY REGAN, CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS 177 (2011).

¹⁷¹ Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57; Interview with Mohammad Amin Ahmady, *supra* note 11.

¹⁷² INTERNATIONAL CRISIS GROUP, *supra* note 4, 15.

¹⁷³ Thier, *supra* note 41, at 567.

the design of an electoral system.¹⁷⁴ Experts from the Max Planck Institute for Comparative Public Law and International Law, the United Nations High Commissioner for Refugees (UNHCR) and the International Rescue Committee attended some CRC sessions. A majority of the CRC members recalled that these people offered to help the CRC in every way possible and did not intend to impose any particular view (“in fact they did not dare to”).¹⁷⁵ This account is consistent with the records available in the archival material on the process.¹⁷⁶

Moreover, by mid-2003, as the CRC had failed to publicize a draft of the constitution, rumors emerged that the foreigners had drafted the constitution and that the Afghan government was keeping it a secret.¹⁷⁷ This timing reflected the CRC’s extreme caution when it came to the international community’s input in the draft.¹⁷⁸ A CRC member stated this:

We welcomed ideas and studied them to determine their applicability, but we resisted any attempt by the international community to tell us what to do; we examined Carcassonne’s suggestions and accepted those recommendations that were helpful and rejected the rest. We were cautious because there were rumors that the international community is imposing a constitution on Afghanistan.¹⁷⁹

The CRC used some of Carcassonne’s recommendations to improve the design of the

¹⁷⁴ Records of the meetings between the CRC and foreign advisors, Archival Materials (2002-2004).

¹⁷⁵ Meeting of the members of the Max Planck Institute for Comparative Public Law and International Law, the United Nations High Commissioner for Refugees (UNHCR) and the International Rescue Committee (IRC) with the Constitutional Review Commission, Archival Materials (2002-2004).

¹⁷⁶ *See generally*, Archival Materials (2002-2004).

¹⁷⁷ Many Afghans shared this concern. They expressed this view in the CRC’s meeting with the ‘*ulamā*’, the leaders of the former mujahideen groups, and the people. The people were concerned that the CRC conducted prior draft consultation because the foreigners drafted the constitution and wanted to impose it on the Afghans.

¹⁷⁸ Interview with Amina Afzali, *supra* note 114.

¹⁷⁹ Interview with Shukria Barakzai, *supra* note 57.

constitutional court.¹⁸⁰ In other areas where the views of foreign advisors were not helpful, the CRC rejected them.¹⁸¹ One such area was the structure of the government. At least, one “foreign advisor wanted Afghanistan to adopt a presidential system,” but the CRC rejected that view.¹⁸² The current strong presidential system was adopted because Karzai used the Constitutional Loya Jirga to adopt this system.¹⁸³

Thus, the international community’s influence on the Afghan constitution-making process was not as strong as some academic literature has claimed, literature that has painted the 2004 Afghan Constitution as an externally imposed document.¹⁸⁴ This literature claims that the international community centered its interests on protecting liberal human rights and minimizing the role of Islam.¹⁸⁵ However, in reality, the international community appeared much more interested in backing a strong presidential system. Both the U.S. and the U.N. opposed a parliamentary system in favor of a presidential system because both supported President Karzai.¹⁸⁶ The U.S. Special Representative to Afghanistan, Zalmay Khalilzad, played a key role in the adoption of the presidential system in favor of Karzai.¹⁸⁷ In retrospect, it seems that the U.S. and the U.N. supported a presidential system because of their foreign policy interests. Under the CRC draft, only the president was empowered to sign international treaties, making it easier for

¹⁸⁰ Interview with Nematullah Shahrani, Chair, *supra* note 7; Interview with Mohammad Amin Ahmady, *supra* note 11.

¹⁸¹ Interview with Shukria Barakzai, *supra* note 57; Interview with Mohammad Ashraf Rasooli, *supra* note 1.

¹⁸² Interview with Amina Afzali, *supra* note 114; Interview with Mohammad Ashraf Rasooli, *supra* note 1.

¹⁸³ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

¹⁸⁴ See e.g., Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

¹⁸⁵ *Id.*

¹⁸⁶ BRANDT ET AL, *supra* note 170, at 176.

¹⁸⁷ Interview with Mohammad Hafeez Mansoor, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (July 28, 2015).

the U.S. and the U.N. to enter into bilateral strategic and security agreements with Afghanistan. Furthermore, many Afghan stakeholders also favored a presidential system and played a key role in making sure that Afghanistan adopted the presidential system.

The data collected for this dissertation and the archival materials on the constitution-making process suggest that the international community also did not have an influential role in other areas of the constitution, including fundamental rights and the role of Islam. Discussions on the role of Islam and the protection of fundamental rights were mostly CRC driven. For instance, Afghanistan's obligation to abide by international human rights treaties is not a consequence of external influence, it is rather a decision made by the CRC.¹⁸⁸ Recognizing that Afghanistan was and wanted to remain a member of the international community, CRC members decided that Afghanistan should abide by human rights values that the international community shared.¹⁸⁹

CRC members including Ashraf Rasooli, Shukria Barakzai, Amin Ahmady, Nematullah Shahrani, Hashim Kamili, Musa Maroofi and Fatima Gillani stated that they felt a moral obligation to guarantee the protection of individual rights in the new constitution.¹⁹⁰ In their view, there was no contradiction between Islam and human rights values expressed in human rights treaties. Most of the CRC members were of the opinion

¹⁸⁸ Interview with Mohammad Amin Ahmady, *supra* note 11. For a discussion of the relationship of international human rights law with the national Afghan law and the Constitution, see Michael, Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSN'L L. 819 (2006).

¹⁸⁹ Interview with Shukria Barakzai, *supra* note 57; Interview with Nematullah Shahrani, *supra* note 7; Interview with Mohammad Amin Ahmad, *supra* note 11; Skype Interview with Professor Mohammad Hashim Kamali, *supra* note 54.

¹⁹⁰ Interview with Mohammad Amin Ahmady, *supra* note 11; Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57; Interview with Nematullah Shahrani, *supra* note 7.

that Islam provided the same rights that international law guarantees.¹⁹¹

Thus, the majority of the CRC members pushed for more guarantees of individual rights and a role for Islam that enabled the state to legislate in a manner not necessarily in accordance with narrow interpretations of the *Shari'a*, but in accordance with other moderate schools of Islam. For instance, in 2003, Shahrani stated, “Our constitution will be like a mirror. One side reflects the wishes of the Afghan people, the other side the world and the best laws of other countries. We wanted to relate Afghanistan to the world.”¹⁹² Similarly, Ashraf Rasooli, recalled that Yash Ghai was “shocked” by the women’s rights guarantees in the CRC draft.¹⁹³ Rasooli stated that “Ghai advised that for a society like Afghanistan, the CRC should have provided mechanisms to incrementally improve women’s rights,” but because women had suffered the most in decades of the civil war, “we tried to secure their rights directly in the supreme law of the land.”¹⁹⁴ Thus, the drafters played a major role in incorporating protections for fundamental rights into the Constitution.

E. Overview of the CRC Draft

The CRC completed the final version of the draft while disagreements loomed over the CRC members and between President Karzai and factions that opposed him, specifically the mujahideen leaders. The CRC introduced some 45 changes to the CDC draft (these changes are shown in Appendix B). The most important of these changes related to what form of Islam the state should respect; the structure of the government,

¹⁹¹ Interview with Nematullah Shahrani, *supra* note 7.

¹⁹² RASHID, *supra* note 37, at 212.

¹⁹³ Interview with Mohammad Ashraf Rasooli, *supra* note 1.

¹⁹⁴ *Id.*

specifically to powers of the prime minister and what mechanism should be used to appoint the prime minister; and the design of a constitutional court.

1. Islam in the CRC Draft

The CRC draft explicitly stated that it was founded on the basics of the sacred religion of Islam and that it respected the Universal Declaration of Human Rights at the same time. Specifically, Article 3 stated that the state could not pass any law that contradicted the “basics of Islam” and other “values enshrined in the constitution.” But the CRC did not make explicit the extent to which Islam was maintained or took precedence over other articles in the constitution.¹⁹⁵ Similarly, the draft stated that the state should respect international human rights treaties Afghanistan had ratified, but did not make clear how this obligation would be reconciled with the obligation to respect Islam in the Afghan context. Hanafi *Sharī‘a* was made residual, applicable only where no state law existed. Similarly, for cases in which the parties to a dispute were the followers of the *Ja‘farī* fiqh, courts were directed to apply the *Ja‘farī* fiqh.

The CRC understood that the role of Islam in Afghan constitutions had been a foundational issue. To decide this issue in a particular way would have offended key stakeholders.¹⁹⁶ To avoid opposition, the CRC deliberately left these provisions vague and open to future developments.

¹⁹⁵ Interview with Nematullah Shahrani, *supra* note 7; Interview with Mohammad Amin Ahmady, *supra* note 11; Interview with Sediq Patman, *supra* note 95; Interview with Sediqa Balkhi, *supra* note 95.

¹⁹⁶ Interview with (A), *supra* note 6.

2. Devolution of Executive Power

The CRC maintained the government's unified structure as designed by the CDC, but it engaged in serious discussion on the separation of executive power between a prime minister and a president. Debates over the appointment process for the prime minister became lengthy and heated among the CRC members, and between the CRC and President Karzai. Of great concern was whether the prime minister should obtain a vote of confidence from parliament. Initially, the CRC had designed a structure in which the appointment of the prime minister required a parliamentary vote of confidence, but Karzai and his National Security Council (NSC) demanded that the president, without parliamentary approval, should appoint the prime minister. Some of the CRC members also shared this view.

For example, Musa Maroofi desired that the appointment or the removal of the prime minister should be made easier.¹⁹⁷ Otherwise, the president and the prime minister would be two equals, potentially “not listening to each other.”¹⁹⁸ Maroofi further stated, “this structure should last until political parties develop in Afghanistan, and the system can then be changed to a structure where the prime minister comes from the party that has the majority in the parliament.” Until then, the president should appoint the prime minister without parliamentary approval.¹⁹⁹

In counterpoint, Parween Majrooh believed that the prime minister and the president should not be equal in terms of executive power, and because the people elect the president, the president should have more power than the prime minister—including the

¹⁹⁷ Views expressed by Musa Maroofi, Archival Materials (2002-2004).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

power to appoint the prime minister.²⁰⁰ This group argued that if the president and the prime minister were equal, differences of opinion could destabilize the country at a time of crisis.²⁰¹ However, other CRC members maintained that Karzai was demanding a presidential system, and that they could not change the constitution for the sake of one person. They maintained that the people wanted a parliamentary system and will act on the basis of the demands of the people. “If Karzai wants a weak prime minister, he should come and talk to us [the CRC] and justify his position.”²⁰²

Highly concerned with losing on the issue of the prime minister, the CRC mandated a committee of six members to consider Karzai’s proposal with respect to the post of the prime minister, and to bring changes that could ease the tension between the CRC and the President.²⁰³ After intense discussions and maneuvering by the Karzai administration, the six-member committee presented four different options to the President concerning the post of the prime minister. In each of these alternatives, the Committee had designed the prime minister’s position to be weaker than the CRC had initially adopted.²⁰⁴

Under the first option, the president would appoint and introduce the prime minister to Parliament for a vote of confidence.²⁰⁵ If Parliament rejected the appointment two times, the president could dissolve Parliament, wait until the election of the new

²⁰⁰ Views expressed by Parween Majrooh, Archival Materials (2002-2004).

²⁰¹ Archival Materials (2002-224).

²⁰² Opinions expressed by Abdul Hai Khurasani and Hakima Mashal Sediqi, available in the Archival Material (2002-224).

²⁰³ Debates of the CRC on Prime Minister, Archival Materials (2002-2004). This Committee included Sarwar Danish, Musa Maroofi, Sediq Patman, Hakima Mashal Sediqi, Abdul Hai Khurasani and Ashraf Rasooli.

²⁰⁴ DANISH, *supra* note 56, at 271-274.

²⁰⁵ *Id.* at 173.

parliament, and then appoint a prime minister.²⁰⁶ Under the second option, the president would appoint and introduce the prime minister to Parliament for a vote of confidence; if Parliament disagreed, then Parliament could introduce a person of its own choosing as the prime minister to the president within three days, otherwise the person nominated by the president was appointed as the prime minister (this was also the CDC's proposal).²⁰⁷ Under the third option, the president would appoint the prime minister with a parliamentary vote of confidence; if Parliament failed to issue a vote of confidence on this first attempt, the president could appoint another candidate without parliamentary approval.²⁰⁸ The fourth option would allow the president to appoint the prime minister without parliamentary approval, but the prime minister could be removed from office by a parliamentary vote of no confidence.²⁰⁹ The CRC preferred the third of these alternatives. At the same time, it assured the President that if the president chose any of the other three options, the CRC would accept it.²¹⁰ Ultimately, the executive chose the fourth option.

This new structure sparked rigorous discussion within the CRC. Some CRC members shared the government's position that the fourth alternative was the best up to the time when stronger political parties emerge and government stability improves, while others rejected it. For example, one CRC member stated that if the constitution required the prime minister to receive a vote of confidence from Parliament, in doing so the prime minister would rely on the regional notables, who would enjoy influence in Parliament,

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ RASOOLI, *supra* note 93, at 173.

²¹⁰ DANISH, *supra* note 56, at 295.

and thus would become dependent on them.²¹¹ Other CRC members rejected the idea of a prime minister who would not be required to obtain a vote of confidence from Parliament. They warned that under such a structure Parliament and the president would compete with each other on appointing and sacking prime ministers. If the prime minister obtained a parliamentary confidence vote, Parliament would cooperate with the prime minister rather than compete with him.²¹² But, while these discussions were ongoing, the government informed the CRC that its task was over and it was the duty of the government to convene the Constitutional Loya Jirga and submit a draft for approval.

3. The Constitutional Court

The CDC had proposed a constitutional court with a wide range of powers, including conducting constitutional review and adjudicating election disputes. The CDC had also authorized the constitutional court to offer legal advice to the president. However, when the CRC undertook a comprehensive review of the CDC's proposal, members found it unsatisfactory. While the CRC members agreed to include an independent constitutional court in the constitution, they disagreed on what powers the constitutional court should enjoy. The CRC debated the authority of the constitutional court and whether it could only perform constitutional review and offer legal advice to the president, or whether it could also examine executive actions for constitutional compliance.

First, the CRC members offered different views on the structure and organization of the constitutional court. First, the CRC members proposed that the president should

²¹¹ Views expressed by Musa Maroofi, Archival Materials (2002-2004).

²¹² View expressed by Khurassani and Elahi, Archival Materials (2002-2004).

appoint nine members to the constitutional court:²¹³ three members for three years; three members for six years; and three members for nine years. In this way, the constitutional court would remain independent because a president would not be able to fill the court with his allies, and it would ensure that experienced members remained on the court while new members were added. A CRC member proposed that the president should not be the only person to appoint the members of the constitutional court. Rather the lower house and the upper house of Parliament should each appoint three members (a proposal based on Carcassonne's draft).²¹⁴ Other CRC members argued that this mechanism would create divisions in the constitutional court and rejected the option.²¹⁵

Another central issue in designing the constitutional court related to its authorities and jurisdiction. Under the CDC draft, the constitutional court would have the power to interpret the constitution; conduct constitutional review; adjudicate on electoral disputes; and offer legal advice to the president. The CRC members hoped to create a stronger constitutional court. One CRC member stated that all laws passed by Parliament should go to the constitutional court for a review of their compliance with the constitution before the president signs them.²¹⁶ Other members proposed that the constitutional court should not only examine laws for constitutionality, but also review the actions of the president for compliance with the constitution. But they never reached agreement on this matter.

²¹³ Some CRC members stated that the court should have six members because finding nine qualified members appeared difficult at that time in Afghanistan.

²¹⁴ Opinions expressed by Abdul Hai Elahi, Archival Materials. Mohammad Tahir Hashim, another member of the CRC, favored the role of the parliament in appointing the members of the constitutional court.

²¹⁵ View expressed by Abdul Salam Azimi, Archival Materials (2002-2004).

²¹⁶ Views expressed by Mohammad Tahir Borgai, Archival Materials (2002-2004).

The CRC also debated whether the constitutional court should offer advisory opinion to the political branches of the government. The majority of the CRC members opposed this proposition, stating that the president might misuse such advisory opinions, which could also seriously undermine the independence of the constitutional court.²¹⁷ They feared that the political branches of the government would treat the constitutional court as an advisory body rather than a coequal and independent institution. The CRC members unanimously agreed to remove this provision from the CDC draft. The final version of the court in the CRC draft looked like this:

Draft Article 141. The Constitutional Court of the Islamic Republic of Afghanistan shall supervise the conformity of laws with the Constitution.

Draft Article 142. The Constitutional Court shall be comprised of six members appointed by the president for a non-renewable period of nine years subject to the approval of the Upper House. The president shall appoint one member as the head of the Court. Law shall regulate the structure and procedure of the Court.

Draft Article 143. Members of the Constitutional Court shall be Afghan nationals not having other nationalities; shall have higher legal and jurisprudential (fiqhi) education; shall have ten-year experience in legislative, legal and judicial affairs; shall have completed 40 years of age and shall not have been convicted for a crime and deprivation of civil rights.

Draft Article 144. The Constitutional Court shall have the following authorities:

1. Examine the conformity of laws, legislative decrees and international treaties with the Constitution;
2. Interpret the Constitution, laws and legislative decrees;

Draft Article 145. The president, the government or one-fifth of the members of each house of parliament can refer legislative bills to the Court for their compliance with the Constitution

Draft Article 146. In situations when a court, while adjudicating on a dispute, determines that the provisions of the law on point in the dispute is in contradiction

²¹⁷ Views expressed by Abdul Hai Elahi and Ashraf Rasooli, Archival Materials (2002-2004).

with the Constitution, the proceedings shall stop and the issue shall be referred to the Constitutional Court. This provision shall also apply in cases when a party to a dispute claims such a contradiction and the Supreme Court approves it. The Independent Human Rights Commission can also refer laws to the Constitutional Court if it finds that a provision of a law contradicted the constitutional rights of the citizens.

Draft Article 147. Legislative documents that are declared unconstitutional by the Constitutional Court shall be considered ineffective. The decision of the Constitutional Court shall be final without review. Its decisions are in effect after being published in the Official Gazette.

III. Review over Review: The Government Reviews the CRC Draft

The CRC submitted its draft, containing a weak prime minister and a strong constitutional court, to the executive in October 2003. Although it was expected that the executive would release the draft to the public, several members of the cabinet and other influential figures were unhappy with the CRC draft.²¹⁸ Anxious to secure greater power for the president and limit the possibility of alternative power centers, Karzai appointed another committee, comprised of the members of the CRC and the NSC, which redrafted key aspects of the constitution.²¹⁹ This Executive Review Committee included Salam Azimi, Shukria Barakzai, Sarwar Danish, Fatima Gillani, Sediq Patman, Ashraf Rasooli and Abdul Hai Khurasani from the CRC;²²⁰ and Yunus Qanooni, Abdullah Abdullah, Karim Khalili, Ali Jalali, Ashraf Ghani, Hidayat Amin Arsala, and Sayed Makhdoom Raheen from the NSC.²²¹

²¹⁸ Thier, *supra* note 42, at 568.

²¹⁹ *Id.*; RASOOLI, *supra* note 93, at 170.

²²⁰ Interview with Shukria Barakzai, *supra* note 57.

²²¹ Individuals from Karzai's National Security Council all held governmental positions. For instance, Qanooni was the Minister of Education; Abdullah Abdullah was the Minister for Foreign Affairs; Ali Ahmad Jalili was the Minister of Interior Affairs; Ashraf Ghani Ahmadzai was the Minister of Finance; Sayed Makhdoom Raheen was the

The Executive Review Committee included both proponents and opponents of a presidential system without a prime minister. Abdul Hai Khurasani, Sarwar Danish, and Ashraf Rasooli from the CRC were in favor of a prime minister who shared executive power with the president; in contrast, Sediq Patman and Salam Azimi favored a presidential system. Members from the NSC were also divided on this issue. Qanooni favored a semi-presidential system with a prime minister, while the rest of the Cabinet and NSC members advocated for a presidential system.²²²

These politicians were cautious because of their short-term political interests. Qanooni favored a system with a prime minister, because he saw himself as a possible future prime minister.²²³ Other members of the Northern Alliance Group entered into compromises with Karzai.²²⁴ For instance, Karzai had promised to make Fahim his vice-president; and not surprisingly, Fahim voted for a presidential system.²²⁵ Similarly, Khalili advocated for a presidential system with two vice presidents. Karzai and his allies had promised him to be the second vice-president if he delivered support for the presidential system at the Constitutional Loya Jirga.²²⁶ Ultimately, this Executive Review Committee introduced some fundamental changes to the CRC draft before publicizing it.

Minister of Information; Hidayat Amin Arsala was the Minister of Commerce; and Karim Khalili was Vice-President.

²²² Interview with Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57.

²²³ Interview with Ashraf Rasooli, *supra* note 1

²²⁴ See RASHID, *supra* note 37, at 214-216.

²²⁵ Interview with Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57; see also Rubin, *supra* note 63, at 12.

²²⁶ *Id.*

A. Changes to the CRC Draft

The Executive Review Committee removed the constitutional court and significantly changed the appointment mechanism of the prime minister—the president appointed the prime minister without parliamentary approval. The executive then publicized the draft and submitted this same draft to the Constitutional Loya Jirga for approval. Karzai and his supporters argued that Afghanistan had much to do in 2004, and differences of opinions between a president and a prime minister would stall the adoption of important policies.²²⁷ Arguing in favor of a presidential system, Karzai stated that a single center of power would “ensure supremacy of the law, consolidate peace and stability and maintain [a balance] between the three branches of state power.”²²⁸ He maintained that the country was still too divided to allow a national party to win an electoral majority to govern.²²⁹ Instead, small parties using force or pressure would form coalition governments “based on division of power and not on a united national goal,” which, Karzai said, “can lead to disorder.”²³⁰ At the same time, Karzai maintained that the presidential system would be temporary, and when stability improved and proper political parties emerged, a different system could be adopted.²³¹

While Karzai and his administration had agreed to a weak prime minister at the CRC negotiations, after receiving the CRC draft, they continued to contest the issue, ultimately advocating for the removal of the prime minister from the draft entirely. At the final meeting of the Executive Review Committee, in which Karzai, Lakhdar Brahimi and

²²⁷ Interview with Mohammad Sediq Patman, *supra* note 95.

²²⁸ Speech by Hamid Karzai, President of the Transitional Administration of Afghanistan, to the opening session of the Constitutional Loya Jirga (December 14, 2003).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Interview with Nematullah Shahrani, *supra* note 7.

members of the Cabinet and the NSC were present, the goal was to finalize the draft of the new constitution.²³² In that meeting, a CRC member read the draft prepared by the CRC and modified by the Executive Review Committee to the meeting. Through this review, it was revealed that under this version of the draft, the prime minister could head sessions of the cabinet. Karzai disagreed, maintaining that leading the sessions of the Cabinet should be the duty of the president. Karzai stated that if the prime minister led the sessions of the cabinet, he in fact, would become equal to a president. Accordingly, Karzai proposed a presidential system removing the prime minister.²³³

The majority of the members of the Cabinet and the NSC supported Karzai, including Fahim, who some CRC members accused of favoring a presidential system because he was promised the post of vice-president.²³⁴ Despite continued resistance from some of the CRC members, this idea was ultimately put to a vote in that very meeting, and the majority of the individuals present raised their hands in support of a presidential system with no prime minister.²³⁵ Qanooni was the only member of the Cabinet who disagreed with a presidential system.²³⁶ The CRC members on the Committee conceded on the issue of the Prime Minister, maintaining that it would be better to have no prime minister than to have one who was not only unequal to other ministers, but also weaker than

²³² RASOOLI, *supra* note 93, at 175; Interview with Shukria Barakzai, *supra* note 57.

²³³ Interview with Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57.

²³⁴ *Id.*

²³⁵ Interview with Shukria Barakzai, *supra* note 57.

²³⁶ Interview with Mohammad Sediq Patman, *supra* note 95; Interview with Nematullah Shahrani, *supra* note 7; Interview with Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57.

them.²³⁷ Under the structure Karzai and his supporters would approve, the president appointed the prime minister without parliamentary approval, while the rest of ministers would have to pass a vote of confidence in Parliament, and the prime minister would not be the head of the cabinet.

The constitutional court continued to be a controversial issue when the Review Committee reviewed the CRC draft. The President and his team, who had opposed the post of the prime minister, demanded that the constitutional court be removed from the draft.²³⁸ The President and his allies presented several reasons for this position. They argued that the constitutional court would become like Iran's Council of Guardians, using constitutional provisions, especially those having to do with Islam, to trump the political system.²³⁹ A CRC member stated that the then-President of Iran, Mohammad Khatami, had advised Karzai against the inclusion of the constitutional court.²⁴⁰ Khatami advised that Iran's experience with the Council of Guardians was a negative one, and that he wanted to remove the Council but could not.²⁴¹ For these reasons, Karzai and his team removed the constitutional court from the draft.

By removing the constitutional court from the draft, the powers of constitutional review and interpretation would then fall within the authority of the Supreme Court,²⁴²

²³⁷ Interview with Ashraf Rasooli, *supra* note 1; Interview with Shukria Barakzai, *supra* note 57.

²³⁸ Interview with Mohammad Amin Ahmady, *supra* note 11.

²³⁹ Interview with Mohammad Amin Ahmady, *supra* note 11; Interview with Mohammad Sediq Patman, *supra* note 95; Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, Int'l J. Const. L. Blog (2015).

²⁴⁰ Interview with Mohammad Amin Ahmady, *supra* note 11.

²⁴¹ *Id.*

²⁴² When the executive removed the Constitutional Court from the draft, Article 121 one showed up in the draft, which read, "At the request of the Government, or courts, the

and the constitutional court's power to oversee the implementation of the constitution would fall under the authority of the president.

Other important aspects of the draft that the Committee changed dealt with the role of Islam and international human rights. For instance, the Committee changed the wording of Article 3 of the CRC draft, which had previously stated that in Afghanistan, no law could contradict the "basics of Islam and other values of the Constitution." It was changed to require the state to legislate only in accordance with the "sacred religion of Islam" rather than the "basics of Islam."

IV. A Final Attempt to Resolve the Unresolved Constitutional Questions: The Convention of the Constitutional Loya Jirga (CLJ)

The sacred religion of Islam is the basis of this draft...the Constitutional Drafting and the Constitutional Review Commissions have deeply discussed whether Afghanistan should be a presidential or a semi-presidential system...For the sake and welfare of the country, for maintaining the rule of law...safeguarding the balance of power among the three branches of the government, we have all agreed to propose an Islamic presidential republican system.

--President Hamid Karzai²⁴³

Afghans were still unsettled on the post of a prime minister in the constitution; the role of Islam; and which institution should perform judicial review, when President Karzai convened the CLJ. And despite its long efforts to arrive at an optimal version of a constitution, the CRC finally gave up on these contentious issues due to pressure from

Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution. The Supreme Court can interpret the Constitution, laws and legislative decrees."

²⁴³ Speech by President Hamid Karzai, *supra* note 228.

Karzai. In the end, the CLJ assembled in Kabul on December 13, 2003, to decide whether to adopt the draft even though debates continued over these key issues.

The CLJ membership included leaders of some of the powerful groups, such as the *Jamīyy'āt-i Islāmi*, who had repeatedly opposed a presidential system, as well as other individuals aligned with constitutions of the past, such as members ideologically associated with the PDPA government and those associated with the 1964 Constitution. While some of the most powerful groups in the country assembled in the CLJ to be coordinated, the Taliban still remained “outsiders” to the constitutional negotiations.

The CLJ also struggled to agree over key foundational issues that had divided the earlier bodies. In fact, the CLJ argued from the middle of December 2003 until the beginning of January 2004, sometimes bitterly, over the draft constitution. Points of contention included the form of government; the role of Islam; the structure of the state; language and ethnic identity; the constitutional court, and women’s rights. A substantial number of delegates refused to vote on critical issues. Gridlock threatened the process and any possible outcome. President Karzai asked Lakhdar Brahimi and Zalmay Khalilzad to mediate.²⁴⁴ Finally, these two individuals compromised with the powerful groups to get them to vote for a presidential system in exchange for concessions on other articles.

A. Reactions to the Draft Released to Public

When the government publicized the draft, in the absence of popular literacy, the draft became a matter of interest to the powerful politicians, including the mujahideen groups, the monarchists, politicians linked to the former communist groups, and

²⁴⁴ The Constitution Building Process of Afghanistan 2001-2004, International IDEA, 3 (2004).

international diplomats. The structure of the government and the institution that would oversee the implementation of the constitution received the most attention. These elites believed that the document reflected the wishes of President Karzai, and that the U.S. supported its concentration of powers in the president's hands.²⁴⁵ They concurred on the need for substantive revisions that would reduce presidential powers, invigorate an anemic parliament and provincial councils, and establish a constitutional court.²⁴⁶ At the same time, "conservative Islamic groups," specifically members from the *Itteḥād-i Islāmi*, complained that the draft contained ambiguous language about Islam; they maintained that the state was unchecked by the more stringent, *Sharī'a*-based "basics of Islam," but followed the more flexible "sacred religion of Islam."²⁴⁷ Ultimately, they demanded clearer provisions with respect to the *Sharī'a*.

Former mujahideen associates were among the first to react to the draft. Burhanuddin Rabbani expressed his view that Afghanistan "needs a parliamentary system to get out of the current crisis."²⁴⁸ He stated that in Afghanistan, powerful politicians did not trust each other, and national unity could only be built in the National Assembly where each section of the society would have representatives.²⁴⁹ Rabbani argued that experience has shown that the concentration of power in the hands of one person leads to despotism and

²⁴⁵ INTERNATIONAL CRISIS GROUP (Addendum), *supra* note 127, at 1.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Burhanuddin Rabbani, *Afghanistan Barāy-i Reḥaye az Buḥrān-i Kononi ba Yak Neẓām-e Parlamāni Neyāz Darad [Afghanistan Needs a Parliamentary System to get out of the Current Crisis]* in ABDUL SHOKOR WAQIF HAKIMI, MAQĀLĀT-I DAR PERĀMON-YE MABĀḤIS-YE MOSAWIDA-YE QĀNUN ASSĀSI, [ARTICLES ON THE PROVISIONS OF THE DRAFT CONSTITUTION OF AFGHANISTAN] (1981) [2003].

²⁴⁹ *Id.* at 3.

dictatorship (citing to the experience of the Middle East dictatorships).²⁵⁰ In order to avoid dictatorship, Rabbani argued that the CLJ should demand a parliamentary system.²⁵¹

Wahid Mozhda, a member of the former *Hizb- Islāmi* Hikmatyar Mujahideen Party, stated that the draft constitution gave the president too much power, including the power to oversee the implementation of the constitution. Mozhda expressed concern that the president would misuse this provision. “Who,” he asked, “would decide when the president has disregarded the provisions of the constitution?”²⁵² He further stated that because the draft constitution had no institution (such as a constitutional council, a constitutional court, or a constitutional commission), to check the actions of the executive, the president’s power to oversee the implementation of the constitution would make him completely unaccountable.²⁵³ Thus, he proposed that the CLJ should consider limiting the power of the president to avoid dictatorship. Similarly, Abdul Kabir Ranjber, a member of the Central Committee of the PDPA in the 1990s, stated, “[i]f this presidential system is allowed to stand, Afghanistan will once again become a dictatorship and eventually we will slip back into civil war.”²⁵⁴

²⁵⁰ *Id.* at 3.

²⁵¹ This view reflected Rabbani’s view under the Sunni draft constitution of 1993, but here Rabbani demanded a parliamentary system while in the mujahideen draft had advocated for a semi-presidential with a strong prime minister. It merely reflected his political goals more than a strong ideological commitment.

²⁵² Wahid Mozhda, *Žarorat-ye Mahar Kardan-ye Qudrati Zemamdar dar Mosawida-ye Qānun Assāsi [The Necessity of the Limitation of the Power of the Executive in the Draft Constitution]*, in ABDUL SHOKOR WAQIF HAKIMI, MAQĀLĀT-I DAR PERĀMON-I MABĀHIS-YE MOSAWIDA-YE QĀNUN ASSĀSI [ARTICLES ON PROVISIONS OF THE DRAFT CONSTITUTION] (1981) [2003].

²⁵³ *Id.*

²⁵⁴ Liz Sly, *Afghan factions divided on draft constitution: Delegates discuss having a president or parliament*, CHICAGO TRIBUNE, (December, 2003), available at

Other political groups and civil society organizations demanded that the draft include a constitutional court. These individuals expressed concern that if there were no organ to oversee the implementation of the constitution, no one would respect it.²⁵⁵ The problem with past Afghan constitutions, they claimed, was that the heads of the state were the sole judges of constitutional compliance. They did not judge their actions as unconstitutional.²⁵⁶ Thus, they argued that the current draft should include a separate institution for that purpose.

Many Afghans and other observers, however, believed that the major decisions had already been made behind the scenes. President Karzai had expressed the hope that the CLJ would conclude its business within a week to ten days. But delegates made use of their prerogative at the CLJ to influence some of the changes in the draft.

B. The Convention of the Constitutional Loya Jirga (CLJ)

Within one month of the publication of the Executive Review Committee's draft, in December 2003, Karzai convened the CLJ. The CLJ included 450 elected members and fifty appointed members.²⁵⁷ Elections to the CLJ took place in the following way: first, people in districts elected the required number of individuals based on population.²⁵⁸ The elected members then travelled to the center of the province as district representatives

http://articles.baltimoresun.com/2003-12-14/news/0312140047_1_kabul-afghanistan-draft-constitution.

²⁵⁵ See generally, ABDUL SHOKOR WAQIF HAKIMI, MAQĀLĀT-I DAR PERĀMON-I MABĀHIS-YE MOSAWIDA-YE QĀNUN ASSĀSI [ARTICLES ON PROVISIONS OF THE DRAFT CONSTITUTION] (1981) [2003].

²⁵⁶ *Id.*

²⁵⁶ Liz Sly, *supra* note 254.

²⁵⁷ Decree No. 34 of the President of the Islamic Transitional Administration of Afghanistan on the Convention of the Constitutional Loya Jirga, Official Gazette No. 811 (2003).

²⁵⁸ *Id.*

where they elected the required number of individuals to the CLJ as provincial representatives.²⁵⁹ Representatives of refugees in Pakistan and Iran, internally displaced persons, and Hindus and Sikhs elected another forty-two members to the CLJ.²⁶⁰ Fifteen percent of these forty-two members were to be women.²⁶¹ The election of these forty-two members took place in the following ways:

1. In each province, women elected two women to the CLJ;
2. The refugees residing in Iran and Pakistan elected twenty-four members through broad consultation;
3. Internally displaced peoples residing in Herat, Kandahar, and Helmand elected six members to the CLJ;
4. Hindus and Sikhs elected three members to the CLJ after broad consultation.

The majority of the former mujahideen associates and the regional commanders, such as Rabbani, Sayyaf, and Ahmad Nabi Mohammadi from the *Ḥarakāt-i Inquilāb-i Islāmi* mujahideen party, were elected to the CLJ. In addition, Karzai appointed 50 members, who arguably supported his constitutional vision, to the CLJ. This group included very influential notables, such as Asif Mohsini from the Shi'ite *Ḥarakāt-i Islāmi*, Mojaddidi from the *Jabhā-ye Nejat-i Milli-ye Islāmi* Party, Abdul Rashid Dostum, from the *Junbish-i Milli-ye Islāmi*, and Sayed Ahmad Gillani, from the *Maḥāz-i Milli-ye Islāmi* Party. These were all notables who had led their factions during the civil war in the 1990s.

The election of the chairman of the CLJ became one of the most important aspects of the CLJ. The chairman would play a large role in overseeing the revision of an article of the draft. Amendments to the draft could only be accepted by the chairman and put to

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

secret ballot if they were supported with the signatures of 151 delegates.²⁶² One CLJ member stated, “[f]ifty-two of us signed a letter to challenge the new constitution’s provision that officially named our country the Islamic Republic of Afghanistan. We wanted to have a discussion about how Islam had been misused in our history, but our petition was dismissed out of hand [apparently by the Chairman of CLJ].”²⁶³ Thus, the role that the chairman played made the post important to every group present at the CLJ.

Each powerful group nominated a candidate to the position of the chairman of the CLJ. Karzai nominated Mojaddidi, the *Jamīyy‘āt-i Islāmi* nominated Abdul Hafeez Mansoor; the monarchists nominated Azizullah Wasifi,²⁶⁴ the associates of the Afghan communists nominated Kabir Ranjber.²⁶⁵ At the end of the day, Karzai’s candidate, Mojaddidi, won with 252 votes.²⁶⁶ All three of the losing candidates opposed the presidential system, advocating for a more devolved structure of executive power.²⁶⁷

²⁶² Interview with Khalil Ahmad Khinjani, Member, Emergency Constitutional Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (May 18, 2015).

²⁶³ MALALAI JOYA, *A WOMAN AMONG WARLORDS: THE EXTRAORDINARY STORY OF AN AFGHAN WOMAN WHO DARED TO RAISE HER VOICE* 81 (2009).

²⁶⁴ Azizullah Wasifi was a Kandahari Pashtun. He was a supporter of the former King Zahir Shah and had served as the Minister of Agriculture under the government of the Zahir Shah. He had also served in various official positions during the government of Daud Khan in the 1970s.

²⁶⁵ Abdul Kabir Ranjbar was a member of the People’s Democratic Party of Afghanistan (PDPA), a Parchamite. He was a member of the powerful Central Committee of the ruling People’s Democratic Party of Afghanistan in the late 1980s. He had also served as the president of the Afghan Academy of Sciences.

²⁶⁶ RASHID, *supra* note 37, at 433. Abdul Kabir Ranjbar got 29 votes; Azizullah Wasifi got 43 votes; Abdul Hafeez Mansoor got 154 votes.

²⁶⁷ Interview with (T), Member, Constitutional Loya Jirga, in Kabul, Afghanistan (August 4, 2015).

In his opening address to the CLJ, Karzai argued strongly for a presidential system and appealed for national unity.²⁶⁸ Critics, mostly members of the Northern Alliance and the *Jamīyy‘āt-i Islāmi*, refuted him, saying that Karzai wanted a dictatorship that the people would not accept.²⁶⁹ All “non-Pashtun groups—Uzbeks, Tajiks, Turkmen, and Hazaras—temporarily buried their rivalries” and opposed Karzai.²⁷⁰ Most preferred a parliamentary system (a semi-presidential system to be more precise) with power divided between a president and a prime minister, and greater provincial autonomy.²⁷¹ Except Sayyaf,²⁷² former mujahideen leaders, and the monarchists, who wanted more power for King Zahir Shah, opposed the presidential system.²⁷³ But the Pashtun delegates supported Karzai and a presidential system.

After the CLJ elected its chairman, members of the CLJ were divided into ten working committees—each comprised of 50 members.²⁷⁴ The ten committees studied the

²⁶⁸ Karzai stated this: “Our vision for Afghanistan is of a country where people relate to each other through reason and shared ideas, convictions and behaviors, not through ethnic bonds, because this is not the way of building nations. I never want, neither do you I am sure, that a person who belongs to the majority ethnic group necessarily becomes the president, and another belonging to the second largest ethnic group becomes the vice-president, leaving the leftovers to the smaller ethnic groups. I do not want such an Afghanistan.”

Karzai Speech to Closing Session of the CLJ, *supra* note 228.

²⁶⁹ RASHID, *supra* note 37, at 213.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 214.

²⁷² Interview with Abdul Rab Rasool Sayyaf, Chairman, Second Working Committee of the Constitutional Loya Jirga, Member, Emergency Loya Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (March 26, 2015). Abdul Rab Rasool Sayyaf stated that he supported a presidential system with a powerful president because in Islamic political theory, the head of the state is the first person.

²⁷³ RASHID, *supra* note 37, at 214.

²⁷⁴ The First Committee was headed by Burhanuddin Rabbani; the Second Committee was headed by Abdul Rab Rasool Sayyaf; the Third Committee was headed by Ahmad Nabi Mohammadi; the Fourth Committee was headed by Mawlawi Mohammad Tahir; the Fifth Committee was headed by Ayatollah Asif Mohsini; The Sixth Committee was

entire draft constitution. In addition, there was a Reconciliation Committee composed of the heads of the ten working committees and the executive staff of the CLJ,²⁷⁵ which also included the Chairman and the Secretary of the CLJ. The task of the Reconciliation Committee was to build agreement and consensus among the ten different working committees.²⁷⁶ Leaders of the former mujahideen parties headed almost every working group of the CLJ. For example, Rabbani, Sayyaf, Nabi Mohammadi, Asif Mohsini, and Haji Farid headed the first, second, third, fifth and the eighth working committees of the CLJ.²⁷⁷ This formation was important because the heads of the CLJ working committee were members of the Reconciliation Committee. The Reconciliation Commission made very important decisions.

The outcome of the meetings of the ten committees determined the fate of the articles of the draft constitution. The committees divided the 172 articles of the draft constitution into three categories: articles that the CLJ agreed upon (124); articles that were considered debatable and needed amendments (34); and articles in which differences of opinion existed (14). Overall, the CLJ made thirty-four changes to the draft (Appendix B shows these changes).

The CLJ Reconciliation Committee (RC) played a significant role in reconciling the views of the delegates, who had worked in ten separate groups—studying the draft of the

headed by Mawlawi Gul Mohammad; the Seventh Committee was headed by DR. Moshahid; the Eighth Committee was headed by Ustad Farid; Ninth Committee was headed by Hashmat Ghani Ahmadzai; and the Tenth Committee was headed by Mawlawi Sayed Mohammad Hanif.

²⁷⁵ DANISH, *supra* note 56, at 302-303.

²⁷⁶ *Id.* at 302.

²⁷⁷ See records of the election of the working Committees of the Constitutional Loya Jirga, Archival Materials (2002-2004).

constitution separately and independently in different rooms.²⁷⁸ These groups generally lacked consensus. The RC discussed each debated article, proposed changes, finalized those changes, and then approved the amended article by majority votes.²⁷⁹ The RC then presented the revised version of the draft to the CLJ general meetings hoping that the CLJ would approve their version of the draft.²⁸⁰

A final draft of the constitution, however, was not easily agreed upon. Almost all non-Pashtun delegates went on strike. The key disagreements focused on the question on official language(s), the national anthem, and the structure of the government.²⁸¹ Towards the end of the CLJ, with still no agreement on key issues, an angry Mojaddidi walked out of the CLJ and did not return until Brahimi and Khalilzad privately met with him at his home.²⁸² The CLJ's fate hung in the balance until Khalilzad and Brahimi pulled off the final compromises between the delegates.²⁸³

C. The Unresolved Constitutional Questions

Controversial questions at the CLJ included the form of the government; the place of Islam; the structure of the state; national language and ethnic identity; and women's rights. These issues divided the CLJ along ethnic and ideological lines. Ethnic Pashtuns favored a centralized administration with a strong president at the head. Non-Pashtun groups, including ethnic Tajiks, Hazaras and Uzbeks, favored a parliamentary system

²⁷⁸ Records of the work of the Constitutional Loya Jirga, Archival Materials (2002-2004).

²⁷⁹ *Id.*

²⁸⁰ Interview with Khalil Ahmad Khinjani, *supra* note 262.

²⁸¹ Interview with Abdul Hafeez Mansoor, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (July 28, 2015); Interview with Abdul Shokor Waqif Hakimi, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (August 9, 2015); Interview with Khalil Ahmad Khinjani, *supra* note 262.

²⁸² RASHID, *supra* note 37, at 216.

²⁸³ *Id.*

with a strong prime minister at the head of the government.²⁸⁴ However, preservation of short-term political interests ultimately led to a final decision inspired by President Karzai and his allies' constitutional vision. Powerful individuals from the Northern Alliance who could influence debates in favor a different constitutional vision—one with a prime minister—could not agree on what they wanted.²⁸⁵

1. The Structure of the Government

The structure of the government, the presidential system, continued to be one of the most contested issues. Non-Pashtun regional and political notables opposed the presidential system fearing that they would be shut out under such a powerful presidency.²⁸⁶ Abdul Kabir Ranjber stated, "I think the majority of delegates are opposed to [the presidential system]."²⁸⁷ Similarly, Hafiz Mansoor, a senior member of the *Jamīyy' āt-ye Islāmi*, said that he had secured the signature of 320 of the 500 delegates for a list of amendments weakening the power of the presidency.²⁸⁸ Nevertheless, the Secretary of the RC questioned the validity of the support of the 320 CLJ members for the semi-presidential system, claiming that "some of the signatures on this matter were fake—in some areas the same person had signed multiple times."²⁸⁹

Meanwhile Karzai pressed for the adoption of the presidential system, and he was not alone. Some of the very influential members in the CLJ and in his cabinet also favored a presidential system. For example, Syyaf stated that he supported a presidential system at

²⁸⁴ *Id.* at 214-215.

²⁸⁵ Rubin, *supra* note 63, at 12 (2005).

²⁸⁶ Interview with (T), Member, and Secretary of the (X) Committee, Constitutional Loya Jirga, in Kabul, Afghanistan (August 4, 2015).

²⁸⁷ Sly, *supra* note 254.

²⁸⁸ Interview with Abdul Hafeez Mansoor, *supra* note 281.

²⁸⁹ *Id.*

the CLJ because the head of the state should have the most power in accordance with Islamic political theory.²⁹⁰ Sayyaf stated that Islam does not teach us to have two executives.²⁹¹ Similarly, some of the Western-educated technocrats in Karzai's cabinet, such as Ashraf Ghani, Ali Ahmad Jalali and Hedayat Amin Arsala, supported a presidential system. These technocrats argued that a presidential system would enable Afghanistan to adopt much needed policies with ease.²⁹² Ghulam Rabbani Nasher, a CLJ member appointed by Karzai from Kabul stated, "[w]e have had twenty-four years of civil war and we need a strong president to unite the country. The ones who want a parliamentary government [...] are only looking for power for themselves. They have the money and the guns, and in a parliament, they will be able to buy power."²⁹³

At the final stages of the CLJ, the question of the form of government continued to divide the different ethnic groups. Finally, however, the presidential system was adopted with a major deferral. A CLJ member stated, "We agreed on the presidential system on the condition that it would be tested for two to three terms, if it did not work, we would amend the constitution to include a post for a prime minister."²⁹⁴ Another CLJ member remembered, "This provision was written down in the constitution, but the government removed it from the draft."²⁹⁵ A CLJ member linked with the *Jamāyy'āt-i Islāmi*, who resisted the presidential system, stated that the opponents of the presidential system acquiesced only because the presidential system was a temporary decision with the possibility of revision in the future—not having a constitution was worse than working

²⁹⁰ Interview with Abdul Rab Rasool Sayyaf, *supra* note 272.

²⁹¹ *Id.*

²⁹² Interview with (T), *supra* note 286.

²⁹³ Sly, *supra* note 254.

²⁹⁴ Interview with Khalil Ahmad Khinjani, *supra* note 262.

²⁹⁵ *Id.*

under one that was subject to revision.²⁹⁶

2. The Role of Islam

Another major contested issue at the CLJ related to the role of Islam. The CLJ working groups came out with different proposals. These proposals reflected the earlier discussion in the CDC and the CRC. For example, while the First CLJ Working Group proposed that the “sacred religion of Islam should be the basis of all legislation,” the Second Working Group proposed that, “[in] Afghanistan no law could contradict the beliefs and provisions of the sacred religion of Islam.”²⁹⁷ The Third Working Group approved the original wording of Article 3, as submitted to the CLJ, without any changes. The Fifth Working Group proposed that no law could contradict “the sacred religion of Islam and other values enshrined in the constitution that are not in contradiction with the sacred religion of Islam.”²⁹⁸ The Sixth Working Group proposed, “No law should be promulgated outside the framework of the *Shari‘a* and repugnant to the beliefs and provisions of the sacred religion of Islam.”²⁹⁹

With so many different formulations, it was the task of the RC to achieve a compromise. One CLJ member remembered that the draft that came to the CLJ did not have satisfying provisions with respect to Islam and the *Shari‘a*, stating, “We wanted to bring the constitution closer to Islam.”³⁰⁰ Thus, the CLJ proposed, “no law in Afghanistan should contradict the beliefs and provisions of Islam.”³⁰¹ Because Sayyaf proposed this formulation, it was approved in the RC. Members of the RC were all Sayyaf’s fellow

²⁹⁶ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281.

²⁹⁷ See the records of the Constitutional Loya Jirga, Archival Materials (2002-2004).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Interview with Abdul Rab Rasool Sayyaf, *supra* note 272.

³⁰¹ *Id.*

mujahideen (nine of the heads of the ten CLJ working groups were former mujahideen leaders).³⁰² Sayyaf stated, “Once we got what we wanted in terms of Islam and the *Sharī‘a*, we made them un-amendable, making them very strong to protect them from any future limitation.”³⁰³

³⁰² JOYA, *supra* note 263, at 80-83.

³⁰³ According to Sarwar Danish, member of the CDC and CRC, the words “beliefs and provisions” in Article 3 relate directly to two main parts of the teachings and instructions of Islam, the belief and the provisions. Islamic teachings and instructions include three main parts: 1) the principles of belief (*Osul-i Eteqadi*); 2) ethical principles (*Osul-i Akhlaqī*); and 3) *Sharī‘a* provisions (*Ahkam-i Fiqhi*). The principles of belief include the science of theology—unity of God and his attributes and names—the study of the prophets and their prophecies; and Eschatology—the study of the day of Judgment (*Akhira*). Theology includes what are called the principles of faith (*Eman*). Ethical principles include the duty to do good and avoid evil. It also includes the virtues of being moral and the consequences of immorality. The *Sharī‘a* jurisprudential provisions (*Ahkam-i Fiqh*), which is a larger part of the instructions and teachings of Islam, relates to the practical duties of every Muslim, meaning that whatever a Muslim does, there is a provision in the *Sharī‘a* for it. The word “beliefs” (*Mutaqidat*) in Article 3 is considered to refer to the principles of Islamic belief (theology), and the word “provisions” (*Ahkam*) refers to obligatory and positive duties that are explained in the *Sharī‘a*. Nevertheless, there is no mention of ethical teachings and instructions in Article 3, according to Sarwar Danish. Article 3 as such does not include ethical principles. As there are many schools and madhhabs in both theology—*Mutazila*, *Ash‘ariya*—and Islamic—Hanafi, *Sha‘fi*, *Maliki*—the question rises as to which beliefs and provisions Article 3 refers. While these schools agree on the basics of Islam, they sharply disagree on several issues. In other words, while Article 3 states that in Afghanistan no law can contradict the beliefs and provisions of the sacred religion Islam, would a law, which contradicts only the beliefs and provisions according to the Hanafi School or Shi’ite school, but conforms to the beliefs and provisions according to other schools of theology and *Sharī‘a*, for example, contradict Article 3? Although the answer to this question is very difficult, some insights can be offered on it. Apparently, Article 3 seems to be formulated broadly in the sense that it does not relate to a particular school or schools of thought, say the Hanafi school. Article 3 rather includes all the schools of Islamic theology and *Sharī‘a*. As such, for a law to be considered against Article 3, it must be in contradiction with the beliefs and provisions as understood by all schools of Islamic theology and *Sharī‘a*.

Hafizullah Danish, professor at Kabul University, School of *Sharī‘a*, states that a contradiction with all the schools, can only take place if “beliefs and provisions,” as in Article 3, are interpreted to mean the basics of Islam on which all the schools agree. Therefore, the formulation of Article 3 in previous Afghan constitutions, which referred to the “basics of Islam,” was much clearer than the current formulation of Article 3 in the

3. Debates on Constitutional Review: The Contentious Inclusion of the Constitutional Supervision Commission

The CLJ continued to debate whether to include an institution that could oversee the implementation of the constitution and perform constitutional review. The majority of the delegates at the CLJ wanted to reintroduce a constitutional court as it had existed in the CRC draft.³⁰⁴ The delegates at the CLJ protested against the provision of the draft that gave the president the power to oversee the implementation of the constitution.³⁰⁵ They asked who would judge constitutional compliance if the president disregarded the constitution. Being the sole arbiter, the president could misuse this provision.³⁰⁶

Although they arguably did not know that a constitutional court existed in the CDC and the CRC drafts, the CLJ members believed that it would be unwise to have no venue for judicial review and allow the president to oversee the implementation of the constitution with unchecked power. One CLJ member recalled that the CLJ wanted a strong institution to judge constitutional compliance, apparently a German style constitutional court or a French style constitutional council.³⁰⁷ The reason that the CLJ wanted a constitutional court related to the fact that in the past the executives had largely

Afghan Constitution of 2004. As the result of the interpretation of Article 3 as explained above, if a law contradicts the belief and provisions of the sacred religion of Islam as understood by one school of theology or *Sharī'a*, it could not be considered to be in contradiction with Article 3. This is simply because even if a law contradicts the beliefs and provisions of a *particular school* of theology or Islamic *Sharī'a*, the law is not in contradiction with the beliefs and provisions of the sacred religion of Islam — beliefs and provisions understood as the basics of Islam on which all the schools in Islamic theology and *Sharī'a* agree.

³⁰⁴ Interview with Abdul Rab Rasool Sayyaf, *supra* note 272; SARWAR DANISH, *supra* note 56, at 307.

³⁰⁵ Interview with Khalil Ahmad Khinjani, *supra* note 262; Interview with (T), *supra* note 286.

³⁰⁶ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281.

³⁰⁷ *Id*; Interview with (T), *supra* note 286.

disregarded the constitution and no strong institution existed to be able to check the power of the executive.³⁰⁸ Asif Mohsini, one of the most influential members of the CLJ, stated that almost all of the ten CLJ working groups proposed a separate constitutional court, and the draft that the RC finalized had a constitutional court in Article 64 that had the power to perform constitutional review.³⁰⁹ Nevertheless, the draft that came to the general meetings of the CLJ did not contain a constitutional court.³¹⁰

President Karzai still argued against the inclusion of a constitutional court in the draft on the same grounds as he had during the CRC debates.³¹¹ One CLJ member stated that Salam Azimi convinced the Chairman of the CLJ that Afghanistan did not need a constitutional court stating, “Afghanistan is a poor country without enough qualified constitutional lawyers; and the government does not have enough budget to satisfy the expenses of the organization and personnel of the constitutional court.”³¹² Azimi further stated that the CLJ should not split the judiciary over constitutional issues by inserting a constitutional court.³¹³

When this decision was shared with the members of the CLJ, there was chaos in the CLJ and discussions over a constitutional court went without any final resolution, ending in deadlock between the majority of the CLJ members and the supporters of President

³⁰⁸ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281.

³⁰⁹ SHEIKH ASIF MOHSINI, TASWĪB-E QĀNUN ASSĀSI DAR LOYA JIRGA JADI 1382 [THE ADOPTION OF THE CONSTITUTION IN THE LOYA JIRGA OF DECEMBER] (1389) [2010]; *See also* RASOOLI, *supra* note 93, at 179.

³¹⁰ *See also* RASOOLI, *supra* Note 93, at 179.

³¹¹ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281; Interview with Abdul Rab Rasool Sayyaf, *supra* note 272.

³¹² Interview with (T), *supra* note 286.

³¹³ *Id.*

Karzai.³¹⁴ The final compromised proposal shrunk to a commission that would oversee the implementation of the constitution with a massive deferral on how it was to be set up and what powers it would enjoy. The CLJ-approved version of Article 157 stated:

An Independent Commission for the Supervision of the Implementation of the Constitution should be established in accordance with the provision of the law.³¹⁵

The last minute inclusion of this Constitutional Supervision Commission into the CLJ draft resulted in confusion over which institution should conduct all forms of judicial review and interpret the constitution. The confusion arose primarily because of the ambiguity in Articles 157 and 121, especially due to the changes that the CLJ brought to Article 121. Before the inclusion of Article 157, Article 121 read:

At the request of the government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution. The Supreme Court can interpret laws, legislative decrees and the constitution.

This language in Article 121 changed after the CLJ inserted Article 157 in the draft it finalized. Article 121, after the inclusion of Article 157 in the draft the CLJ finalized, read:

At the request of the government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution *and their interpretation in accordance with the law* (emphasis added).

³¹⁴ Interview with Khalil Ahmad Khinjani, *supra* note 262.

³¹⁵ Loya Jirga Draft, art. 157, Archival Materials (2002-2004).

In this language, the Supreme Court is not explicitly authorized to interpret the constitution. Article 121 ambiguously states “their interpretation in accordance with the law,” making it difficult to understand whether the interpretation of the constitution is part of “their interpretation in accordance with the law,” or not. Delegates at the CLJ agreed to it because this vague language was open to multiple interpretations that they could influence in the future.

This matter was further complicated because Article 157 also failed to make clear whether the Commission is the body whose job is to interpret the constitution, but a group of CLJ members interviewed in 2015 stated that the Commission was implicitly authorized to interpret the constitution.³¹⁶ This textual vagueness would later become the crux of the crisis over which institution, the Supreme Court or the Commission, could perform constitutional review and constitutional interpretation.

Different views emerged after Article 157 was included in the Constitution. Sarwar Danish, a member of the CDC and CRC, maintained that when Article 157 came into the constitution, it did not have any effect on the power of the Supreme Court to interpret the constitution under Article 121.³¹⁷ Other CRC members, such as Ashraf Rasooli and Hashim Kamali, believed that the major disagreement in the CLJ was whether the Supreme Court would be the most effective institution to interpret the constitution. The majority of the delegates favored an institution other than the Supreme Court to interpret

³¹⁶ Interview with Khalil Ahmad Khinjani, *supra* note 262; Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281; Interview with Abdul Rab Rasool Sayyaf, *supra* note 272.

³¹⁷ DANISH, *supra* note 56, at 307.

the constitution.³¹⁸ Thus when the Commission emerged, it was believed that it would have the power to interpret the constitution. But it remains contested to this day whether the Court or the Commission is the proper institution entrusted with constitutional review and constitutional interpretation.

4. Other Contested Issues at the CLJ

National and ethnic values, especially provisions dealing with official languages and the language of the national anthem, were also hotly debated. The draft that the government submitted to the CLJ stated that from among the many languages of Afghanistan, only Dari and Pashtu were the official languages. Similarly, Article 20 stated that the national anthem of the country should be in the Pashtu language. These two provisions specifically created a lot of tension as the non-Pashtun delegates in the CLJ opposed them and demanded amendments. Uzbek delegates demanded that the state also recognize their language as official. This recognition was significant because non-Pashtuns would not acquiesce if their languages were not given recognition in the draft.

These disagreements were strongest between the Pashtun and Tajik delegates. After considering different proposals from the CLJ working committees, the RC approved the national anthem in the Pashtu language. Almost all Tajik delegates demanded that the national anthem should be in Dari, as it had been during the interim and transitional

³¹⁸ Interview with Mohammad Ashraf Rasooli, *supra* note 1; Interview with Khalil Ahmad Khinjani, *supra* Note 262. Moreover, in an interview with the author, Abdul Rab Rasool Sayyaf, one of the most influential members of the Constitutional Loya Jirga, stated that the purpose of the Commission was to implicitly authorize it to perform constitutional interpretation. The CLJ could not do this explicitly because of the opposition from the government.

administration; if not, they stated, it should be available in both Dari and Pashtu.³¹⁹ But the Pashtun delegates would not agree to this compromise. The discussions on this issue stalled the progress of the CLJ for two days as the Tajik delegates refused to attend the sessions of the CLJ. Karzai appealed to these protesting delegates, promising them that at the closing of the CLJ, he would ask the Pashtun delegates to accept the national anthem in both languages.³²⁰ However, Karzai did not mention this when he delivered his closing speech to the CLJ.³²¹ At the same time, other members of the CLJ stated that the majority of the delegates at the CLJ approved the national anthem in Pashtu language. A CLJ member remembered that a proposal by Pashtun delegates to require the state employees to know both Pashtu and Dari languages raised objections from the Tajiks, who feared that the provision was a threat to fire all functionaries not conversant in Pashtu.³²² They did agree, if reluctantly, that the national anthem would be in Pashtu.³²³

As to the official language of the state, Abdul Rashid Dostum, from the ethnic Uzbek group and a regional notable who led his group in the civil war in 1990s and the 2000s, demanded that Uzbeki should be a third official language. This demand angered other delegates, especially the Pashtuns, who stated that it would turn the country into a “weak, federal state.”³²⁴ Ultimately, and in order to get “buy-in” within the broader public and

³¹⁹ Interview with Khalil Ahmad Khinjani, *supra* note 262; Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281.

³²⁰ *Id.*

³²¹ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281.

³²² Interview with Mohammad Ismail Yoon, Secretary, Reconciliation Committee of the Constitutional Loya Jirga, in Kabul, Afghanistan (July 12, 2015); *see also* Rubin, *supra* note 63, at 17.

³²³ Rubin, *supra* note 63, at 17.

³²⁴ Nazar Mohammed, a Pashtun delegate from Kabul, stated "We are afraid because if we accept Uzbek as the third official language, we know Dostum has strong links to

ethnic groups, the CLJ draft recognized more linguistic pluralism than ever before: Pashtu and Dari remained the official languages of the state, but six other languages received mention, along with a guarantee of the freedom to broadcast and publish in any of them.³²⁵

Finally, however, while debates were not over on these constitutional questions, the draft was overwhelmingly approved by the CLJ in its unexpected final meeting in which delegates stood to approve the constitution.³²⁶ CLJ delegates, including the Islamists, the “liberals” and the supporters of the former King, Zahir Shah, all supported the new documents, calling it an “historic moment” in Afghanistan.³²⁷ Many hailed the Constitution as the first step towards democracy and a more representative government in this war torn country.³²⁸ At the same time, many recognized that the constitution was far from complete and remarkably vague. They concurred that future clarification was needed to answer some of the vague and deferred questions, but for now it was to be operative.³²⁹

V. The Promulgation of the Constitution

According to a member of the Secretariat of the CLJ, the adoption of the constitution took place in the following manner:

foreign countries such as Uzbekistan and this could create closer ties with that country. They will want to build schools with only their language. This will create a federalist state and divide Afghanistan. It is a disaster.”

³²⁵ Rubin, *supra* note 93, at 17.

³²⁶ RASOOLI, *supra* note 93, at 183. *See* Section V, *infra* for more details about the final CLJ meeting.

³²⁷ DANISH, *supra* note 56, at 309.

³²⁸ *Id.*

³²⁹ *Id.*

On the night of January 3, 2004, the head of the Secretariat of the CLJ asked the Secretariat to prepare 1000 copies of the constitution. The head of the Secretariat and his advisors directed the typists to include the corrections and changes they wanted to have included in the constitution. The Chairman of the CLJ signed a copy of the draft, and the Secretariat prepared many copies and put them on the desk of each CLJ member. The next morning when the CLJ session began, delegates were told that they had the final copy of the constitution that the Chairman of the CLJ had signed and that they should stand up as a sign to approve the constitution. Then, an overwhelming majority of the delegates stood as a sign to approve the new Constitution.³³⁰

At the final morning of the CLJ meeting, some CLJ members were not satisfied with the document and began to collect signatures to file a complaint to force some amendments, specifically Article 20, which stated that the national anthem should be in Pashtu; however, they did not meet the required threshold for forcing an amendment.

After twenty-two days following the adoption of the Constitution, Karzai finally signed and promulgated the CLJ draft into the “Constitution of the Islamic Republic of Afghanistan” on January 26, 2004.³³¹ However, shortly after President Karzai signed the Constitution, there were some rumors that Karzai had signed a different draft than the one the CLJ had approved.³³² This speculation spread quickly and was shared by many, including academics, Afghan elites, and the public.³³³ Abdul Hafeez Mansoor, a member of the CLJ, stated that he and his group filed a complaint with the Afghan Supreme Court that President Karzai had signed a document that is something other than what the CLJ approved.³³⁴ Nevertheless, they did not hear back from the Supreme Court.

³³⁰ Interview with Asadullah Jahidi, *supra* note 94.

³³¹ RASOOLI, *supra* note 93, at 183.

³³² HAFEEZ MANSOOR, AFGHANISTAN JAZEERA NIST (AFGHANISTAN IS NOT AN ISLAND) 137-146 (2006).

³³³ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Khalil Ahmad Khinjani, *supra* note 262; Interview with Abdul Hafeez Mansoor, *supra* note 281.

³³⁴ Interview with Abdul Hafeez Mansoor, *supra* note 281.

Opponents of President Karzai claim that Karzai signed a different draft, removing limits on presidential power and including provisions that benefited the Pashtun ethnic group.³³⁵ However, inquiry into the draft that the CLJ finalized and the version that Karzai promulgated reveals that Karzai had signed the same draft that the CLJ approved. But the draft approved by the CLJ was slightly changed before the President signed it.³³⁶ In fact, it was these changes that provoked the rumors that Karzai had signed a different document. An examination of these changes reveals that, contrary to what most believe, in some areas, the changes have limited the power of the president.³³⁷

There is currently no reliable information about who made these changes. Sarwar Danish provides an account of what these changes were and why they were made. Danish explains that after the CLJ approved the constitution, members of the Secretariat of the CLJ and the CRC regularly met with President Karzai and the vice-presidents. In one of these meetings, Salam Azimi, Musa Ashari, and Sarwar Danish from the CRC; Enayatullah Qasimi and Zalmay Hiwadmali advisors to Karzai; Farooq Wardak and Malik Kamawi from the Secretariat of the CLJ were present.³³⁸ The purpose of the meeting was to discuss the textual and the spelling mistakes that remained in the constitution after the CLJ speedily adopted it. According to Danish, there were sentences and phrases that were adopted in the CLJ debates but were never included in the draft approved by the CLJ.³³⁹

³³⁵ Interview with Abdul Shokor Waqif Hakimi, *supra* note 281; Interview with Abdul Hafeez Mansoor, *supra* note 281.

³³⁶ See generally, the Records of the work of the CLJ, Archival Materials (2002-2004); DANISH, *supra* note 56, at 311-312.

³³⁷ See Appendix B for a description of the changes between each of the approved drafts.

³³⁸ DANISH, *supra* note 56, at 311.

³³⁹ *Id.*

The changes in the final draft of the constitution are the result of these meetings. The individuals present in this meeting decided that these mistakes should be fixed in the presence of the members of the CRC and the Secretariat of the CLJ. They decided that the Chairman of the CLJ, Mojaddidi, would sign these corrections before President Karzai would sign and promulgate the constitution. This process of corrections continued until the morning of the day Karzai signed and promulgated the Constitution.³⁴⁰ Some of the most important individuals, including King Zahir Shah, Fahim, Abdullah, Khalili, Asif Mohsini, Zalmay Khalilzad, and other foreign diplomats and individuals involved in the constitution-making process, were present at the Constitution promulgation ceremony at the Presidential Palace. The President signed the constitution approved by the CLJ only after these corrections were made to the draft.

A. Changes to the Final Draft of the Constitution

The committee that was tasked with polishing the constitution in terms of language brought some forty-eight changes to the CLJ-approved version of the draft. Most of these changes are not substantial. The majority of other changes related to replacing the word “Wāz‘a” (enact/levy) by “Tārḥa” (plan/design). These changes apparently dilute the responsibility of the state in adopting policies with respect to positive rights such the right to education and the right to public healthcare.³⁴¹

In some other areas these changes replaced words that were mistakenly and unintentionally used in the CLJ draft. For instance, Article 64 of the CLJ draft stated that the appointment of ministers should take place with the “*Taṣwīb*” of the Wolesi Jirga.

³⁴⁰ *Id.*

³⁴¹ Wāz‘a would require the state to take and adopt policies while Tārḥa would not put a strong obligation on the state to take and adopt the necessary policies.

Taşwīb” literally means “adoption” and is used only for the approval of laws in Parliament. This provision of Article 64 was changed in the final version of the draft to state that the appointment of the ministers should take place with the “*Ta’īd*” of the Wolesi Jirga. *Ta’īd* means approval and is used for the approval of the presidential nominees by the Wolesi Jirga. Thus, the final version of the draft was the correct usage of the word.

In addition to these grammatical changes, two changes appeared more substantial and controversial. One of these two changes dealt with the official languages, and the other dealt with the Constitutional Supervision Commission. First, Article 16 in the CLJ draft read that from amongst many languages of Afghanistan, Pashtu and Dari should be the official languages of the state. After the CLJ approved the draft, a final sentence was added to this Article which reads, “Academic and national administrative terminology and their usage in the country shall be preserved.” Notably, these terminologies are in Pashtu, so the addition of this clause angered non-Pashtun groups. This change has continued to create many problems, particularly in areas of legislation in the Wolesi Jirga, because Pashtun and non-Pashtun members of the Wolesi Jirga have used the failure to use national terminology as a reason to block legislation.

As explained above, Article 157 created confusion about the appropriate body to interpret and implement the constitution. Specifically, the CLJ version of the draft read that the Commission should be established in accordance with law; the president should appoint the members of the Commission. In the final version of the draft signed by the President, Article 157 subjects the appointment of the members of the Commission to the

approval of the Wolesi Jirga. This change does not support the claim that President Karzai made the changes to the constitution.

In this way, after two years and much manipulation, Afghanistan saw its eleventh constitution. This Constitution has since then been directing the Afghan political discourse, becoming the only Afghan constitution to survive for so long in its original form.

Chapter Five:

The Reception of the 2004 Constitution (2004-2016): How has the 2004 Constitution Fared?

Dear Delegates, [a]llow me to take a few minutes to tell you why... I have expressed my preference for a presidential system of government.... In the presidential system we have now adopted in the Constitution, the president cannot dissolve the parliament. As long as there is the president, there is the parliament... This is why I thought this was the best option...of course the Constitution is a document that can be amended.... the Constitution is not the Qur'an. If five or ten years down the line we find that stability improves, proper political parties emerge, and we judge that a parliamentary system can function better, then a Loya Jirga can at a time of our choosing be convened to adopt a different system of government.

--President Hamid Karzai¹

This chapter describes how the governing elites and the people of Afghanistan received the 2004 Constitution. It suggests that the drafters' decision to defer on foundational issues promoted acquiescence and coordination in some ways. In a country concerned with re-establishing physical security, rebuilding a shattered economy, and in which the weakened government did not have the power to enforce either religious or human rights clauses, Afghan elites and citizens alike are comfortable deferring ideological questions that the constitution left open. While people have continued to have strong feelings about ideological issues in the abstract, under the circumstances, they are understood to be second order questions. They are content to hold the debate later if the state does not adopt a position with which they disagree. Similarly, deferral on which

¹ Address to the Closing Session of the Constitutional Loya Jirga, by Hamid Karzai, President of the Transitional Islamic State of Afghanistan (Jan. 4, 2004), *available at* <http://www.kabul-reconstructions.net/images/KarzaiCLJClosingAddress.pdf>.

institution would interpret the Constitution and perform all types of constitutional review helped promote acquiescence. Fairly early in the life of the 2004 Constitution, a political practice emerged that vested the power of review in two different bodies in the Constitution. Politicians and courts started to treat a vaguely-described constitutional supervision commission as a de-facto constitutional court with the power of pre-promulgation abstract review, and treated Afghanistan's Supreme Court as the body empowered to carry out post-promulgation abstract review and concrete review. Most importantly, although this fragmented structure has not been effective in constraining the political branches, the political elites of Afghanistan seem comfortable with it.

On the other hand, deferrals over the structure of the government and the electoral system have provoked significant disagreement and strife, particularly because politicians who held power tried to use the ordinary political process to answer these questions to their satisfaction and do so in a way that offended other stakeholders. For instance, throughout his two terms in office under the 2004 Constitution, President Karzai exercised his contested powers in a way that systematically promoted his own interests and those of his political allies. Specifically, Karzai used his power to legislate by decree, attempting to resolve some of the by-law deferrals and setting up important institutions like the Electoral Commission in a way that supported his power. As a result, Karzai's opponents, who felt marginalized in the process, began to work together to ensure that the few institutions that could protect their political interests, such as the Constitutional Supervision Commission, maintained their independence and power.

As the president claimed to answer a growing number of deferred questions in ways that offended important political figures, some of Karzai's opponents began to threaten

that they would stop acquiescing to the constitutional order and would cease to be coordinated by the rules that it laid down. A disputed presidential election after Karzai's final term only intensified the battle between the supporters of a strong presidency and other stakeholders whose only power lay in Parliament. As the opponents of the presidential system were declared losers in the contested 2014 presidential election, they withdrew their acquiescence to the strong presidency but acquiesced to what has so far remained an extra-constitutional framework designed to secure their interest.²

At the same time, disgruntled “outsiders,” who had never accepted the 2004 constitutional order, including the Taliban, are increasingly gaining strength in parts of the country. This is further threatening the effectiveness of the 2004 Constitution as a coordination device. These combined challenges have led to broad recognition that the 2004 Constitution will not be able to coordinate Afghanistan effectively for the long term (at least on the structure of the government). Afghan elites have thus agreed that the decision to adopt a strong presidency without a constitutional court needs to be revisited to garner acquiescence.

I. The Elite and the Public's Initial Embrace of the Constitution: Did Constitutional Deferral Help Afghans Acquiesce in the Constitution?

The 2004 Constitution of Afghanistan was adopted after three decades of political turmoil and failed experiments in constitution drafting. In light of how the Constitution was adopted, including the questions that remained unanswered and the multitude of compromises, many worried that the general population and the losers in the constitutional bargain—the opponents of a strong presidential system—would ultimately

² See *infra*, section IV.

reject it. Instead, the majority of the Afghan elites and the populace enthusiastically embraced the new Constitution, showing a remarkable willingness to operate under its terms.³ In fact, the adoption of the Constitution was viewed as a major success in the war torn and politically fragmented society.⁴ Zalmay Khalilzad, the U.S. Ambassador to Afghanistan, called it the “the most enlightened constitution in the Islamic world” with regard to freedom of religion and the rights of women.⁵ Most importantly, the Afghan mujahideen leaders strongly received the 2004 Constitution, calling it the “most Islamic” constitution in the Muslim world.⁶ The Afghan government still celebrates the first week of January, in which the CLJ adopted the Constitution, as the week of the Constitution.

This positive reception of the Constitution was particularly surprising given that the 2004 Constitution is a considerably vague document, in which a number of important questions are either vaguely resolved, only superficially addressed, or not resolved at all. The ambiguity in the 2004 Constitution seems to be a deliberate choice by the drafters. They knew that they would offend a majority of the key stakeholders if they resolved and

³ Amir Taheri, *Afghans Can Build on Their New Constitution*, NEW YORK POST (Jan. 6, 2004).

⁴ See e.g., 2 DA AFGHANISTAN NAWAI ASSĀSI QĀNUN: LA TASWĪDA TAR TAWSHĪH (THE NEW CONSTITUTION OF AFGHANISTAN: FROM DRAFTING TO PROMULGATION [THE SECRETARIAT OF THE CONSTITUTIONAL COMMISSION, 2004]).

⁵ ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD*, 197 (2016); Carlotta Gall, *Afghan Council Gives Approval to Constitution*, INTERNATIONAL NEW YORK TIMES (Jan. 5, 2004) available at <http://www.nytimes.com/2004/01/05/world/afghan-council-gives-approval-to-constitution.html>.

⁶ Interview with Abdul Rab Rasool Sayyaf, Chairman, Second Working Committee of the Constitutional Loya Jirga, Member, Emergency Loya Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (March 26, 2015); SHAYKH ASIF MOHSINI, *TASWĪB-E QĀNUN ASSĀSI DAR LOYA JIRGA JADI OF 1982 [THE ADOPTION OF THE CONSTITUTION IN THE LOYA JIRGA OF DECEMBER]* (1389) [2010]; see also Danish Karokhel, *Jahādi Dalo da Assāsi Qānun Mohem Takī da Zan Kral [Jihad Leaders Win the Constitution’s Important Points]* in *THE LOYA JIRGA OF THE CONSTITUTION OF AFGHANISTAN* (Institute for War and Peace Reporting, 2003).

concretized foundational issues in a way that did not satisfy everyone.⁷ Therefore, the Constitution only vaguely defines the role of Islam and which body would determine whether the state had legislated in line with the “beliefs and provisions of the sacred religion of Islam” as in Article 3. Similarly, the structure of government remained somewhat unresolved, as the CLJ only tentatively adopted the current presidential system, reserving the possibility of revisiting it through a constitutional amendment in the future. The opponents of the presidential system agreed on the condition that the presidential system would be revisited after “two-three terms.”⁸

Moreover, the text of the 2004 Constitution did not clarify which electoral system should be used for legislative elections: first-past-the-post (FPTP) electoral system, used in the 1960s; list-based proportional representation (list PR); or something else entirely. An appendix to the Constitution indicated that some form of list PR should be used and left it to the government to take action after the Constitution was adopted.⁹

In short, the final text of the 2004 Constitution is a symphony of ambiguity and deferrals by design. The question of whether the state should be restrained by democratic institutions, by liberal institutions, or by principles of Islam was left in the hands of a legislature that was not yet elected and a judiciary that was under the thumb of the executive. Afghanistan’s future path, therefore, rested entirely with the Afghan politicians (liberals, Islamists, presidentialists and semi-presidentialists), and their ability

⁷ Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015); Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (April 7, 2015).

⁸ Interview with Khalil Ahmad Khinjani, Member, Emergency Constitutional Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (May 18, 2015).

⁹ Andrew Reynolds, *Electoral Systems Today, The Curious Case of Afghanistan* 17 J. OF DEMOCRACY 104, 105 (2006).

to continue to ensure the independence of the institutions that would secure their interests, either by law or through constitutional interpretation. At the same time, these groups showed willingness to operate under the rules set down by the Constitution in a hope to influence these institutions and resolve constitutional ambiguity to their satisfaction. Thus, deferral played an important role to enable the Constitution to be embraced by the public as well as the elites.

II. How Constitutional Deferral Shaped Political Discourse from 2004 to 2016

The Constitution, as drafted and approved, has survived and coordinated Afghans for more than twelve years—the first constitution to have survived and coordinated for so long in its original form. At the age of twelve, the Afghan Constitution has already outlived many of its counterparts.¹⁰ This is an incredible achievement, considering the unstable security situation in the country and the strong political divisions between the executive and the legislature in the country since the adoption of the Constitution.

While the various deferrals and ambiguities in the text of the Constitution may have been key to the final adoption of the 2004 Constitution, some compromises and deferrals have not continued to satisfy the public and the elites. This is primarily because President Karzai and his allies exploited constitutional ambiguity and deferral to concretize some particular constitutional practices that offended other key stakeholders. For instance, Karzai and his allies fleshed out constitutional ambiguity surrounding the power of the Supreme Court to interpret the Constitution by giving the Court power to interpret the Constitution and the authority over post-promulgation abstract review and concrete

¹⁰ Tom Ginsburg, Aziz Huq, *What Can Constitutions Do? The Afghan Case* 24 J. OF DEMOCRACY 116, 116 (2014).

review of constitutional issues. An institutionally weak and executive-dependent Supreme Court then resolved other ambiguities in a way that secured Karzai's interests. Similarly, Karzai utilized decrees, thereby by-passing parliament, to enact laws concerning Afghanistan's electoral institutions and set up these institutions in a way that benefited candidates in power.

These maneuvers by Karzai and his allies made the presidency considerably stronger and shut out other important figures who wanted to limit the power of the president. In the wake of the contested 2014 presidential election and the resulting National Unity Government (see *infra*, section IV), the Afghan elites and the people appear to have agreed to revisit the decision to adopt a strong presidency without a prime minister. Specifically, the contested election has provided an opportunity for those who want to amend the Constitution and rethink the choices that were rejected in the 2002-2004 constitutional negotiations. Most importantly, they have agreed to make this change by amending the Constitution.

Nevertheless, some constitutional deferrals, especially those on the vague ideological clauses, seem to be satisfactory. Afghans appear to be willing to operate under them and leave determination of their practical impact to another time and institution.

A. Deferrals on the Vague Ideological Clauses

The drafters of the 2004 Constitution deferred on how Islamic or liberal values would constrain executive power through the use of vague language.¹¹ The 2004 Constitution, as

¹¹ Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015); Interview with Shukria Barakzai, Member, Constitutional Review Commission, in Kabul, Afghanistan (March 25, 2015); Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan

eventually ratified, begins with an irreconcilable preamble outlining the principles that are to guide Afghanistan in the post-Taliban era. It paradoxically, according to many Afghans, states that principles of democracy, rule of law, and Islam will guide the Afghan state notwithstanding the difficulty to practically reconcile these principles in the Afghan context.¹² The Constitution leaves it to future politicians and judges to determine how such principles can be reconciled in practice.

Similarly, the text of the Constitution attempts to guarantee liberal democracy and governance by providing a long list of protected rights and freedoms, including social, political, and property rights.¹³ Nevertheless, the Constitution does not simply declare most rights to be constitutionally guaranteed, rather it instructs the legislature to define the scope of the protected rights and freedoms and then to enact laws that would define the powers of the institutions that will protect them. Further, the Constitution states that the state should respect and observe the Universal Declaration of Human Rights and other international human rights treaties that Afghanistan has ratified. But it leaves it to the legislature to define how to do this in practice.¹⁴

The Constitution also defers the question of how the state should respect Islam, stating in Article 3 that no law should contradict the “beliefs and tenets of the sacred religion of Islam.”¹⁵ This language raises significant questions. For instance, does Article

(April 7, 2015); Interview with Mohammad Amin Ahmady, Member, Constitutional Review Commission, in Kabul, Afghanistan (April 9, 2015), see also records of the debates at the Constitutional Review Commission, Archival Materials on 2002-2004 Constitution-Making Process (2002-2004).

¹² See, Qānun-i Assāsi-ye Jamhūri-ye Islāmi-ye Afghanistan, Preamble, Official Gazette No. 818, 2004, [Constitution of the Islamic Republic of Afghanistan] (1382) [2004].

¹³ *Id.* arts. 22-57.

¹⁴ *Id.* arts. 6, 7.

¹⁵ *Id.* Art. 3.

3 require the state not to legislate in contradiction with the “beliefs and tenets of the sacred religion of Islam” as interpreted by the Hanafi school or some/all other schools of Islamic *Sharī‘a*?¹⁶ Also, who decides whether the state has legislated in accordance with the “beliefs and tenets of the sacred religion of Islam”? The Constitution thus leaves it to a later date to determine the practical implications of Article 3.

The drafters of the Constitution initially designated a constitutional court that could resolve these deferred questions and ambiguities in the Constitution.¹⁷ The constitutional court would have arguably been staffed by people trained in the country’s law schools, not those trained in the country’s *Sharī‘a* faculties.¹⁸ But, for reasons explained in Chapter Four of this work, the proponents of a strong presidential system dropped the constitutional court and vested most of the power of constitutional review and constitutional interpretation in the Supreme Court, which, at that time, was filled with members of traditional *ulamā’*.¹⁹ Most of the former mujahideen leaders favored this decision, believing that the (then) religiously-trained Supreme Court would resolve the vague ideological clauses in a way that would favor Islamic values.²⁰ At the CLJ, however, opponents of a strong presidency demanded a much stronger and arguably liberal institution that would resolve constitutional ambiguity, but they failed and instead

¹⁶ *Id.* Art. 3.

¹⁷ Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015); Skype Interview with Professor Mohammad Hashim Kamali, Member, Constitutional Review Commission (April 13, 2015).

¹⁸ Interview with Mohammad Ashraf Rasooli, *supra* note 17.

¹⁹ INTERNATIONAL CRISIS GROUP, *Afghanistan’s Flawed Constitutional Process, Addendum I, Afghanistan: The Constitutional Loya Jirga*, ICG Afghanistan Briefing, 8 (2003); INTERNATIONAL CRISIS GROUP, *Reforming Afghanistan’s Broken Judiciary*, Asia Report No. 195, 23-24 (2010).

²⁰ Interview with Mohammad Ashraf Rasooli, Member, *supra* note 17; *see also*, INTERNATIONAL CRISIS GROUP (2003), *supra* note 19, at 8.

implemented a Constitutional Commission that they believed would resolve the vague ideological clauses in a way that would favor liberal values.²¹ Thus, everyone agreed to the constitutional scheme.

Although the ideological questions still remain controversial, the Constitution appears to have done a fairly good job at coordinating the various factions and interests by deferring them to future. At the very least, it has avoided conflict and has opened the door to further debate over whether Islam and liberal rights can be reconciled in a country where such discussions previously meant certain persecution. At the same time, however, Afghans still disagree how these apparently contradictory ideological clauses can be completely reconciled. The government has also avoided adopting a clear-cut position on these issues. At times, governmental practice has sent competing signals over the implementation and interpretation of these vague ideological clauses, refusing to concretize a particular practice.

As an example, in 2006 an Afghan court sentenced Abdul Rahman to the death penalty for rejecting Islam and converting to Christianity.²² He had made the conversion 16 years before his conviction, when he was working as a medical aid officer for a Christian relief organization in Pakistan caring for Afghan refugees.²³ When he returned to Afghanistan to settle a custody dispute for his daughters, he was arrested after his family denounced him to the police.²⁴ When questioned in court, Abdul Rahman

²¹ Interview with Mohammad Ashraf Rasooli, *supra* note 17.

²² Mandana Knust & Rassekh Asfshar, *The Case of an Afghan Apostate-The Right to a Fair Trial Between Islamic Law and Human Rights* in THE AFGHAN CONSTITUTION IN MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 593 (A. Von. Bogdandy & R. Wolfrum eds., 2006).

²³ *Id.*

²⁴ *Id.*

identified himself as a Christian.²⁵ Consequently, the court sentenced him to death for apostasy under Hanafi fiqh (Article 130 of the Constitution authorizes the application of Hanafi fiqh when there is no state law on a particular issue, such as apostasy). However, high-ranking state officials and dignitaries called for Abdul Rahman's release, reminding Afghanistan of its duty under international human rights treaties and the Constitution to respect the freedom of religion.²⁶ Finally, under pressure from Afghan civil society and the international community, the indictment was rejected on procedural grounds.²⁷

Similarly, in 2007, a primary court in Balkh Province sentenced Sayed Parwiz Kambakhsh to death on blasphemy charges.²⁸ Kambakhsh was accused of distributing newspaper articles that allegedly were offensive to the religion of Islam and the Prophet Mohammad.²⁹ The people in Balkh Province demanded the death penalty for Kambakhsh and the Balkh primary court did impose a death sentence.³⁰ On appeal, Kambakhsh changed his venue from Balkh to Kabul. The Kabul Court of Appeals reduced the sentence to ten years imprisonment.³¹ Many Afghans and members of the civil society condemned the decision by holding protests in Kabul in support of Kambakhsh, citing his constitutionally guaranteed right to freedom of speech, freedom of the press, and

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Decision of the Kabul Appeals Court on the Case Concerning Insult to the Holy Religion of Islam and the Holy Prophet (SAW), Decision No. 580 (2007).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

freedom of religion.³² Finally, under pressure from civil society, President Karzai ordered Kambakhsh's release.³³

These two cases demonstrate that Afghans are still divided over critical ideological questions, such as the role of religion and liberal rights. Up to the present, there has never been a predictable decision on these kinds of questions. In the examples cited, the government has not clarified the scope of the rights guaranteed in the Constitution, arguably because the people are deeply divided on these questions. Instead, to avoid clarifying these rights, the government relied on procedural grounds to find a way to prevent persecution. The fact that this is happening illustrates that ideological issues remain problematic and divisive, and it also shows that the government is willing to leave things as they are because to do otherwise would likely provoke unrest.

III. The Executive's Abuse of Constitutional Ambiguity and Deferral

After the adoption of the 2004 Constitution, Hamid Karzai, then President of the Transitional Administration of Afghanistan, became the first democratically elected president of Afghanistan. He was in office from June 2004 until September 2014, when his second term expired and constitutional term limits prevented him from seeking a third term. During his ten years as the President of Afghanistan under the 2004 Constitution, President Karzai and his allies did not cede power. Karzai's administration and the people he installed in the Supreme Court instead used their power to interpret the 2004 Constitution in a way that ensured his continued control over all aspects of the

³² *Karzai Intervenes in Case of Parwiz Kambakhsh*, KABUL PRESS (2008), available at <http://www.wluml.org/node/4390>.

³³ *Parwiz Kambakhsh Released from Prison*, KABUL PRESS (September 2009), available at <http://kabulpress.org/my/spip.php?article4013>.

government. Most importantly, through these measures, he was able to exercise significant control over the judiciary and the Constitutional Supervision Commission, which together shared the power of constitutional interpretation and the resolution of disputes over state constitutional compliance.

President Karzai and his allies began exploiting constitutional deferral and constitutional ambiguity right after the Constitution was adopted, when they chose the Single Non-Transferable Vote (SNTV) electoral system for electing the legislature. The 2004 Constitution had deferred to the legislature on this question, but because in the immediate aftermath of the adoption of the Constitution no legislature was elected, Karzai's Transitional Administration assumed the task of working out the details of the system in cooperation with the UNAMA.³⁴ By mid-2004, they had chosen what they thought was the best approach: a closed-list PR system using multimember districts based on Afghanistan's 34 provinces, which seemed less complicated than the open-list PR initially agreed upon during the constitutional negotiations.³⁵ Closed-list PR allows party leaders to determine which candidates appear on the ticket and in what order, meaning that voters cast their ballots for a party, not a specific candidate.³⁶

However, not everyone in the Karzai Cabinet agreed on a closed-list PR system, arguing that it would not work in Afghanistan for various reasons, including the lack of political parties in 2004.³⁷ In light of these objections, President Karzai sought alternatives, and ultimately the Cabinet chose the SNTV system, which ended up leading

³⁴ Reynolds, *supra* note 9, at 105.

³⁵ *Id.* 106-107.

³⁶ *See generally*, DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION (2d. ed. 2011).

³⁷ Reynolds, *supra* note 9, at 108.

to the election of a docile legislature,³⁸ as self-interested independent candidates came to the legislature.

Moreover, Karzai adopted the Law on the Independent Election Commission (IEC) by a decree. Article 156 of the Constitution provides for an independent electoral commission, but leaves it to the legislature to decide how the Commission should be staffed and what power it should enjoy.³⁹ Under Article 8 of the Law on Organization, Duties, and Authorities of the IEC, a law adopted by Karzai and his allies, the president had the authority to select nine of the 27 candidates introduced by the selection committee as the members of the IEC for six years.⁴⁰ For a variety of reasons, the adoption of this system worked to the advantage of the candidates in power generally, and to the benefit of Karzai, specifically.⁴¹ Through their influence over the IEC, Karzai and his supporters were arguably able to ensure that disputes were resolved in a manner that benefitted them.

Likewise, President Karzai and his allies apparently clarified the Supreme Court's vague constitutional right over judicial review and constitutional interpretation in a way that entrenched the President and his allies. Under the current structure of constitutional review in Afghanistan, only the government and courts can ask the Supreme Court for a

³⁸ *Id.*

³⁹ QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 156, OFFICIAL GAZETTE NO. 818, 1382 (2004).

⁴⁰ Law of Organization, Duties, and Authorities of the Independent Electoral Commission and Independent Electoral Complaint Commission, Art. 8 (2), Official Gazette No. 1112 (2013).

⁴¹ Shamshad Pasarlay, Mohammad Qadamshah, & Clark B. Lombardi, *Reforming the Afghan Electoral System: The Current Debate and its implications for the Plans to Amend the Afghan Constitution*, INT'L J. CONST. L. BLOG (May 8, 2015), available at <http://www.icconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-constitution/>

judicial review opinion. Other institutions do not have standing. The Supreme Court was indeed under the thumb of the executive,⁴² and Karzai used it to resolve constitutional disputes in a way that favored his own interests. For instance, in 2009, when President Karzai postponed the date for the presidential elections, his opponents complained that the extra time would give Karzai an opportunity to influence the outcome of the elections.⁴³ But the Supreme Court came out in support of Karzai and decided that the President's decision was constitutional.⁴⁴ Similarly, in 2010, when a dispute emerged over the results of the parliamentary election, Karzai established a special election court to investigate complaints related to elections. Afghanistan's Constitution and electoral laws do not provide for the establishment of a special court to review election results; this power is vested in the IEC. As a result, the question of the constitutionality of the Special Election Court caused consternation among politicians who opposed Karzai. Karzai asked the Supreme Court to issue a decision on the constitutionality of the Special Election Court. The Supreme Court issued a statement the same day in favor of the President, upholding the constitutionality of the Special Election Court.⁴⁵

⁴² Throughout his two terms in office, President Karzai filled the Supreme Court with his allies. He refused to remove some justices, such as Chief Justice Azimi and Justice Abdul Malik Kamawi, after their terms expired. Karzai did not replace them as long as he was in office.

⁴³ National Democratic Institute, *The 2009 Presidential and Provisional Elections in Afghanistan*, 17 (2010).

⁴⁴ INTERNATIONAL CRISIS GROUP (2010), *supra* note 19, at 28.

⁴⁵ Ghizaal Haress, *Adjudicating Election Complaints: Afghanistan and the Perils of Unconstitutionality A Case Study of the Special Election Tribunal – 2010*, 21 (AREU, 2014), available at [http://www.areu.org.af/Uploads/EditionPdfs/1404E%20Adjudicating%20Election%20Complaints%20A%20Case%20Study%20of%20the%20Special%20Election%20Tribunal%20-%202010%20\(2\).pdf](http://www.areu.org.af/Uploads/EditionPdfs/1404E%20Adjudicating%20Election%20Complaints%20A%20Case%20Study%20of%20the%20Special%20Election%20Tribunal%20-%202010%20(2).pdf).

In the process, however, President Karzai's actions incentivized his opponents to work together to protect their own interests. While Karzai dominated the Supreme Court, which consistently issued decisions that favored him, his opponents and the Wolesi Jirga (lower house of Parliament) tried to ensure that a few institutions—such as the Constitutional Supervision Commission—retained their independence and sufficient power to protect their own interests. However, this battle between the executive and the legislature to control constitutional adjudication institutions gave rise to a crisis over constitutional interpretation and constitutional review.⁴⁶ The executive and the legislature each began to favor a different institution to perform constitutional review and constitutional interpretation functions based on which best served their interests and political goals.

A. How the Battle to Control Constitutional Adjudication Institutions Led to a Crisis over Constitutional Interpretation

The text of the 2004 Constitution does not clearly designate the Supreme Court or the Constitutional Supervision Commission as bodies empowered to interpret the Constitution. However, in the aftermath of the adoption of the Constitution, the Supreme Court interpreted the constitution and performed judicial review without any challenges to its jurisdiction. For instance, when a question arose over the meaning of the word majority (*aksārīyyāt*) in the context of parliamentary votes approving government ministers, the Court sided with the executive, providing the needed interpretation that

⁴⁶ Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, INT'L J. CONST. L. BLOG (2015), available at <http://www.icconnectblog.com/2015/03/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis/>.

“majority” meant the majority of the present members.⁴⁷ Similarly, when a dispute arose over the jurisdiction of the Supreme Court and whether it had the power to interpret the Constitution, the Court interpreted Article 121 of the Constitution stating that the pronoun “their” (*anhā*) in Article 121 of the Constitution included constitutional interpretation.⁴⁸

As the Supreme Court continued to side with the executive, the Afghan Parliament began to challenge the Court’s authority over constitutional interpretation; Parliament several times tried to address the problem of judicial independence and constitutional jurisdiction of the Supreme Court, but it did not succeed,⁴⁹ primarily because of the executive’s firm hold on the judiciary. Under the Constitution, the president appoints all the judges of the lower courts without any parliamentary approval.⁵⁰ Similarly, only the government and courts can bring cases involving judicial review before the Supreme Court. This structure denies access to judicial review to those parties that oppose the government or view government acts as unconstitutional.⁵¹

The Supreme Court’s constitutional interpretation authority became complicated in May 2007 when the Wolesi Jirga passed a no-confidence vote on Foreign Minister,

⁴⁷ Mohammad Hashim Kamali, *Ten Years of the Afghan Constitution: What are the Issues* 11 (Afghanistan Research and Evaluation Unit, AREU, 2014), available at <http://www.areu.org.af/Uploads/EditionPdfs/Afghanistan%20constitution%20ten%20years%20on%20English.pdf>.

⁴⁸ *Id.* at 11 (2014). Article 121 of the Constitution states, “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.”

⁴⁹ INTERNATIONAL CRISIS GROUP (2010), *supra* note 19, at 16.

⁵⁰ QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 132, OFFICIAL GAZETTE NO. 818, 1382 (2004).

⁵¹ Rainer Grote, *Separation of Powers in the New Afghan Constitution*, 64 HEIDELBERG J. OF INT’L L. 897, 911 (2004).

Rangin Dadfar Spanta. Spanta's case triggered a pattern of bad relations between President Karzai and the Wolesi Jirga, which also raised questions over whether the Supreme Court was the proper body to interpret the Constitution and perform constitutional review functions.⁵² As a result of these debates, the Wolesi Jirga finally adopted the law establishing the Constitutional Supervision Commission in 2010 under Article 157 of the Constitution, and through this law Parliament empowered the Commission to interpret the Constitution.

In this way, the Wolesi Jirga created a rival institution that would also interpret the Constitution and do so in a way that would arguably serve the interests of the Wolesi Jirga. Moreover, the Wolesi Jirga gave itself the power to challenge the executive's actions before the Commission, whereas previously it did not have this right under the structure adopted by the Constitution.

1. Foreign Minister Spanta's Case and its Aftermath

In April 2007, the Iranian government began to forcefully deport Afghan refugees. In May 2007, using its powers under Article 92 of the Constitution, Parliament impeached the Foreign Minister Spanta, questioning him about the mass deportation of Afghans.⁵³ Parliament found the minister's explanations unsatisfactory. As a result, he became the subject of a no-confidence vote.⁵⁴ But the no-confidence vote against Spanta was not

⁵² Kamali, *supra* note 47, at 11.

⁵³ *Id.* at 10.

⁵⁴ Article 92 of the Afghan Constitution gives the Wolesi Jirga the right to vote a minister out of office. It states that, "The House of the People, on the proposal of twenty percent of all its members, shall make inquiries from each Minister. If the explanations given are not satisfactory, the House of the People shall consider the issue of a no-confidence vote. The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the House of the People."

conclusive.⁵⁵ When the votes were counted, it had in fact failed by one vote. Parliament also discovered two invalid votes, and if these invalid votes were counted, the no-confidence vote would have succeeded.⁵⁶ Parliament decided to cast a second no-confidence vote. At this second vote, Parliament succeeded in removing Spanta from office by a vote of 141 to 73.⁵⁷ This second vote-casting caused confusion about its constitutionality, and President Karzai refused to appoint another minister in place of his sacked Foreign Minister.⁵⁸

As Parliament pressed for a new appointment, Karzai asked the Supreme Court to review the constitutionality of the second vote undertaken by Parliament. On examining the second vote, the Court found that the vote was unconstitutional because the basis for the no-confidence vote was not within the rational control of the Minister.⁵⁹ It also violated established parliamentary procedure.⁶⁰ Angered, several members of Parliament stated that the Supreme Court did not have jurisdiction to hear this case, as it was not related to the constitutionality of a law allowed under Article 121 of the Constitution. Parliament refused to recognize the legality of the decision.⁶¹ As a result, confusion arose over whether the Supreme Court had the authority to hear such cases.

⁵⁵ Carlotta Gall, *Afghan Legislators Vote Out Foreign Minister*, NEW YORK TIMES, May, 13, 2007, available at <http://www.nytimes.com/2007/05/13/world/asia/13kabul.html?pagewanted=print>.

⁵⁶ J. ALEXANDER THIER & JOHN DEMPSEY, RESOLVING THE CRISIS OVER CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN, UNITED STATES INSTITUTE OF PEACE, PEACE BRIEFING (2009), available at http://www.usip.org/sites/default/files/USIP_0309_2.PDF.

⁵⁷ Gall (2007), *supra* note 55.

⁵⁸ THIER & DEMPSEY, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

In response to this problem, the executive (President Karzai) and the Supreme Court each proposed legislation that would resolve the jurisdictional questions. In particular, the Supreme Court attempted to clarify its jurisdiction through a proposed amendment to the Law on the Organization and Jurisdiction of the Courts, revising the previous Article 24 to explicitly authorize the Court to interpret the Constitution and resolve disputes stemming from the implementation of law and the exercise of legal authority between Parliament and the executive.⁶² Nevertheless, Parliament rejected this proposed amendment, contending that the Supreme Court does not have the power to interpret the Constitution under Article 121.⁶³

At the same time, the executive drafted an enabling law on the Commission that would have allowed the Commission to review draft legislation “prior to the endorsement of the President” and express an opinion on the constitutionality of the draft legislation before it became law.⁶⁴ The Commission was also empowered to provide advisory opinions on “issues arising from the constitution” and “[review] previous laws for their inconsistency” with the constitution and offer advice to the President,⁶⁵ who would then take necessary measures.

In the draft that the executive prepared, the Commission was empowered to provide advice, not to issue binding decisions on any subject, or to interpret the constitution outside the bounds of the issues prescribed in the law.⁶⁶ Parliament then amended the draft legislation on the Commission to remove the explicit, but limited, power to provide

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

an opinion on legislation prior to endorsement by the President. Instead, Parliament inserted language that gave the Commission the “expansive power of the interpretation of the Constitution.”⁶⁷ Nevertheless, President Karzai vetoed this legislation on the grounds that it violated Articles 121, 122, and 157 of the Constitution.⁶⁸

Karzai argued the following: (1) Article 121 of the Constitution implied broad constitutional interpretation powers for the Supreme Court, which has historically had this power; and (2) the Commission was meant to be a supervisory body for the implementation of the Constitution, not a body for interpretation.⁶⁹ However, Parliament overrode Karzai’s veto by a two-thirds majority, making the law of the Commission enforceable with the revision made to it by Parliament,⁷⁰ meaning with the power to interpret the Constitution.

On March 6, 2009, Karzai referred this new law of the Commission to the Supreme Court to review it for compliance with the Constitution. The Supreme Court, not surprisingly, promptly ruled in the executive’s favor, declaring unconstitutional those

⁶⁷ Law of the Independent Commission for the Supervision of the Implementation of the Constitution, Art. 8 (1), Official Gazette No. 986 (2009).

⁶⁸ Article 121 of the Constitution states that, “At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.” Article 122 states that, “No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent formation of special courts [for the trials of the President, Ministers and Justices of the Supreme Court] stipulated in Articles Sixty-Nine, Seventy-Eight and One Hundred Twenty Seven of this Constitution, as well as cases related to military courts. Law shall regulate the organization and authority of these courts.” Article 157 stipulates the establishment of the Independent Commission for supervision of the implementation of the Constitution in accordance with the provisions of the law.

⁶⁹ THIER & DEMPSEY, *supra* note 56.

⁷⁰ Article 94 of the Constitution of Afghanistan authorizes the Wolesi Jirga, Lower House of Parliament, to override the veto of the president by two-thirds majority.

provisions of the law that authorized the Commission to interpret the Constitution.⁷¹ These maneuvers by the President effectively circumvented legislative review and quashed all challenges to the executive in the original draft law on the Commission.⁷² Increasingly resistant to executive interference, however, Parliament did not agree with the opinion of the Supreme Court and proceeded to review Karzai's Commission nominees.⁷³ The Commission was finally officially established in June 2010 with the

⁷¹ In its opinion, the Supreme Court made references to the draft constitutional court under the earlier drafts of the Constitution (*see* Chapter Four, *supra*). The Court specifically stated that in the earlier drafts of the Constitution, the drafters had envisioned a separate constitutional court to interpret the constitution and perform constitutional review of laws. Nevertheless, the Court continued, for specific reasons that constitutional court was removed from the draft of the Constitution. When the constitutional court was removed, its powers and authorities, including constitutional review and constitutional interpretation, were given to the Supreme Court. The Court further stated that in the final discussions of the Constitutional Loya Jirga "which took place behind the scenes," in a subsequent draft of the Constitution in the final day of the Loya Jirga, the structure of the Independent Commission for the Supervision of the Implementation of the Constitution was incorporated in Article 157 of the Constitution (*see* Chapter Four, *supra*). However, the inclusion of Article 157 in the Constitution did not affect Article 121, which authorizes the Supreme Court to perform judicial review and interpret the Constitution. In the Court's view, Article 121 was maintained with the same force in the Constitution authorizing the Court to perform judicial review and interpret the Constitution. The language of Article 157 reads, "The Independent Commission on the Supervision of the implementation of the Constitution will be established by law." The Court argued that this language clearly states that the Article does not bestow any authority in terms of empowering the Independent Commission to interpret the Constitution, or international treaties and conventions because no such authorization has been included in this Article." As a result, the Court concluded that the authority to interpret the Constitution, similar to the interpretation of other laws, decrees, and international treaties, has been essentially assigned to the Court.

⁷² INTERNATIONAL CRISIS GROUP (2010), *supra* note 19, at 16.

⁷³ *Id.*

confirmation of its members—all of whom agreed to vigorously pursue their duties as constitutional arbiters.⁷⁴

In this highly fractious political situation, the Commission began its work. The executive and the Supreme Court treated the Commission as a body that did not have the power to interpret the Constitution. By contrast, Parliament treated the Commission with the power to interpret the Constitution and offer opinions on a dispute between the executive and Parliament. The executive would send constitutional interpretation and constitutional review requests to the Supreme Court, while Parliament would use the Commission for that purpose. This dispute became even more controversial in the aftermath of the 2010 contested parliamentary elections, which further fragmented constitutional review and constitutional interpretation in Afghanistan and set a practice in which the two bodies performed different review functions.

2. The 2010 Contested Parliamentary Elections

The 2010 Wolesi Jirga elections constituted the second parliamentary election, and the fourth national election, conducted in Afghanistan since the adoption of the 2004 Constitution.⁷⁵ This parliamentary election came just months after the 2009 contested presidential election in the country, which had severely undermined the integrity and

⁷⁴ SARI KAUVU, SIX YEARS LATE, THE CONSTITUTIONAL COMMISSION IS FORMED; BUT WILL IT TAKE ON PRESIDENT AND PARLIAMENT? (The Afghanistan Analyst Network 2010), *available at* <https://www.afghanistan-analysts.org/six-years-late-the-constitutional-commission-is-formed-but-will-it-take-on-president-and-parliament/>.

⁷⁵ THE 2010 WOLESI JIRGA ELECTIONS IN AFGHANISTAN, NATIONAL DEMOCRATIC INSTITUTE 15 (NDI, 2011), *available at* <https://www.ndi.org/files/Afghanistan-2010-election-observers-final-report.pdf>.

independence of the Afghan electoral institutions,⁷⁶ the Independent Electoral Commission (IEC), and the Independent Electoral Complaints Commission (IECC).

In preparation for the 2010 elections, the IEC implemented reforms aimed at preventing fraud.⁷⁷ Nonetheless, the performance of the IEC and the IECC were rigorously challenged.⁷⁸ Not only was security an overwhelming and constant concern, but there were also flaws in Afghanistan's electoral system, both laws and institutions. These flaws, which affected the independence of both bodies throughout and after the process,⁷⁹ were highlighted when the IEC released the much-delayed final results, which were immediately rejected by the administration of President Karzai.⁸⁰

Later, on November 24, 2010, the IEC announced the final certified results of the September Wolesi Jirga elections.⁸¹ However, soon after the election results, an organization of defeated candidates began to hold protest meetings around the country demanding that the government: (1) declare the September 2010 parliamentary elections illegitimate; (2) hold new parliamentary elections using computerized national ID cards; and (3) prosecute all individuals involved in electoral crimes in a timely and serious manner.⁸²

On December 26, 2010, unsatisfied with the election outcomes announced by the IEC

⁷⁶ See, e. g., THE 2009 PRESIDENTIAL AND PROVINCIAL COUNCIL ELECTIONS IN AFGHANISTAN, NATIONAL DEMOCRATIC INSTITUTE (NDI, 2010), available at https://www.ndi.org/files/Elections_in_Afghanistan_2009.pdf.

⁷⁷ NATIONAL DEMOCRATIC INSTITUTE (2011), *supra* note 76, at 15.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ ELECTION OBSERVATION MISSION, AFGHANISTAN 2010 PARLIAMENTARY ELECTION, FINAL REPORT, DEMOCRACY INTERNATIONAL 42 (2011), available at https://www.democracyinternational.com/sites/default/files/DI%20Afghanistan%202010%20EOM%20Final%20Report_web.pdf.

⁸² *Id.* at 42

and IECC and endorsed by the international community, President Karzai moved to further undermine the authority of Afghanistan's electoral institutions.⁸³ Acting on the recommendation of the Supreme Court, Karzai announced the establishment of a special court to further investigate complaints related to the 2010 parliamentary elections. Afghanistan's Constitution and electoral laws do not provide for the establishment of a special court to review election results. This power is vested in the IEC and the IECC.⁸⁴ Nevertheless, the Special Election Court claimed it had the authority to nullify election results, call for recounts, and order re-runs of elections.⁸⁵

The question of the constitutionality of the Special Election Court caused consternation. The members of the sitting Parliament asked the Constitutional Supervision Commission to review the constitutionality of the Special Election Court. The Commission declared that the creation of the Special Election Court was unconstitutional because the IEC and the IECC were the only bodies that had the power to resolve electoral disputes.⁸⁶ Both the IEC and the IECC repeatedly supported the Commission's position and argued that no other institutions had authority over electoral affairs.

Later, Karzai asked the Supreme Court to issue a decision in response to a letter submitted to him from 200 winning candidates calling for their inauguration in Parliament.⁸⁷ Even though it was unclear what Karzai was asking the Supreme Court to

⁸³ *Id.* at 43.

⁸⁴ LAW OF ELECTIONS, art. 57, OFFICIAL GAZETTE NO. 1012 [Suspended] (2010).

⁸⁵ DEMOCRACY INTERNATIONAL, *supra* note 81, at 43-44.

⁸⁶ Legal Opinion of the Independent Commission for the Supervision of the Implementation of the Constitution on the Special Election Court to Adjudicate the Complaints of the Parliamentary Election Candidates (2010).

⁸⁷ DEMOCRACY INTERNATIONAL, *supra* note 81, at 45.

rule on, the first thing the Supreme Court did was to reiterate that the establishment of the Special Election Election Court was consistent with the Constitution.⁸⁸ This move extremely angered the winning candidates to Parliament who challenged the Supreme Court's authority maintaining that the Supreme Court does not have power to hear such cases.

Subsequent to these disputes, Parliament had always supported the Commission on its authority to interpret the Constitution and offer opinions on disputes between the legislature and the executive while rejecting the Supreme Court's power to do so. Thus, the crisis over constitutional interpretation and constitutional adjudication reached its peak during the 2010 contested parliamentary elections.

B. Six Years After the Establishment of the Constitutional Supervision Commission: Is there Still a Crisis?

It has been six years since the emergence of a crisis over constitutional interpretation and constitutional review. It appears that the dispute over constitutional interpretation has subsided at least for now. The political branches of the government appear to have settled on a practice in which the Court and the Commission perform different review functions, albeit in a way that has secured the interests of the executive.⁸⁹ The work of the Court and the Commission reveals that a consensus, though implicit, has been emerging to vest the two institutions with different types of constitutional review powers.⁹⁰

Since its establishment in 2010, the Commission has interpreted the Constitution on many occasions. In the beginning, the executive and the Supreme Court disputed the

⁸⁸ *Id.*

⁸⁹ Interview with (W), Member, Independent Commission for the Supervision of the Implementation of the Constitution, in Kabul, Afghanistan (March 12, 2015).

⁹⁰ Pasarlay, *supra* note 46.

Commission's power to issue constitutional interpretation opinions, but they no longer do so. After its establishment, the executive also began sending requests to the Commission, seeking interpretive opinions and legal advice. In this manner, the political settled on the power of the Commission to interpret the Constitution because it fragmented the power of constitutional review and constitutional interpretation in favor of the political branches of the government. In fact, the executive began to treat both the Supreme Court and the Commission as advisory bodies rather than co-equal and independent institutions.

In short, the Commission has reached a rather interesting *modus vivendi* with the Supreme Court, which has been to date effectively ratified by the governing elites of Afghanistan who appear to use the two institutions to do different things. Nevertheless, there do seem to be distinctions between the Commission and the Supreme Court regarding constitutional review and constitutional interpretation, and the following sections attempt to describe those roles.

1. Constitutional Powers of the Commission

The work and the data from the Commission show that it performs three functions as part of its authority to oversee the implementation of the Constitution: it interprets the Constitution; offers legal advice to the government and Parliament; and conducts a pre-promulgation abstract review of legislation on the request of the government or Parliament.⁹¹ Moreover, the Commission is also legally obligated to present an annual report on the implementation of the Constitution to the president—there has yet to be such a report for reasons that have never been explained.

⁹¹ *Id.*

First, in its interpretive role, the Commission offers opinions to the National Assembly, the President, the government, and the Supreme Court (the Court has not yet requested an opinion, but on one occasion, the Commission issued an advisory opinion addressed to the Supreme Court on the establishment of a Special Court to adjudicate on the corruption scandal of Kabul Bank).⁹² Notably, Article 8(1) of the Law of the Commission states that the Commission can interpret the Constitution upon the request of the National Assembly, the Supreme Court, the president and the government.⁹³ Even though the Supreme Court had determined that this provision of the Law of the Commission is unconstitutional, Parliament has disregarded with the Court's view and continues to treat the Commission as a body authorized to interpret the Constitution.

While initially only Parliament referred matters to the Commission for constitutional interpretation, today the executive also requests many constitutional interpretation opinions. Because of these requests, it appears that the executive no longer questions the Commission's power to interpret the Constitution and has even sent interpretive requests to the Commission. For example, upon the request of President Karzai, the Commission issued an interpretive opinion on the delays in the 2014 presidential election, in which the Commission justified the delay in the election.⁹⁴ Similarly, the Commission interpreted Article 7 of the Constitution upon the request of the Ministry of Justice regarding whether

⁹² Legal Advice of the Independent Commission for the Supervision of the Implementation of the Constitution on the creation of the Kabul Bank Court to the Supreme Court, Opinion No. 36 (2012) (the Commission in this opinion stated that it is in the authority of the Supreme Court to create a new and special court and refer to it a special case).

⁹³ Law of the Commission, *supra* note 67, art. 8 (1).

⁹⁴ Legal and Interpretive Opinion of the Independent Commission for the Supervision of the Implementation of the Constitution to the President on Postponing the 2014 Presidential Election and Article 61 of the Constitution, Opinion No. 73 (2014).

international treaties become effective in Afghanistan upon signature or ratification, opining that international treaties become effective in Afghanistan only when the National Assembly approves them.⁹⁵ Overall, these requests suggest that the executive has not only agreed that the Commission should interpret the Constitution, but it also used the Commission for that purpose.

In addition, the Commission appears to be solidifying its own role, including regularly conducting pre-promulgation abstract reviews of legislation (reviewing laws before they go into effect). Notably, the Commission does not have any statutory power to conduct these reviews, but it effectively performs these reviews by offering legal advice, mostly to the National Assembly and to the executive.⁹⁶ Both the legislature and the executive have made these types of requests to the Commission. For example, in July 2012, the Minister of Government on Parliamentary Affairs asked the Commission to review the constitutionality of the proposed Law on Combating Administrative Corruption.⁹⁷ Likewise, in September 2012, the Commission reviewed the proposed law of elections and sent an opinion to the IEC, stating that some of the law's provisions were contrary to the Constitution.⁹⁸ Most requests like these are sent from Parliament.⁹⁹

⁹⁵ Interpretive Opinion of the Independent Commission for the Supervision of the Implementation of the Constitution on Article 7 of the Constitution (dealing with international treaties) to the Ministry of Justice, Opinion No. 43 (2012).

⁹⁶ Pasarlay, *supra* note 46.

⁹⁷ Legal Opinion of the Independent Commission on the Supervision of the Implementation of the Constitution on the Constitutionality of the Proposed Law of Combating Administrative Corruption, Opinion No. 41 (2012).

⁹⁸ Legal Advice of the Independent Commission on the Supervision of the Implementation of the Constitution on the Constitutionality of Proposed Law of Election, Opinion No. 16 (2010).

⁹⁹ *See generally*, MAJMU' A-E TAFSİR HA, NAZARIYA HA WA MASHWĀRA HAI HŪQUQI-E KAMISON-E MUSTAQIL-E NIZĀRAT BAR TAṬBIQ-YE QĀNUN-E ASSĀSI [THE COLLECTION OF

The Commission also offers legal advice to the president and Parliament on the implementation of the Constitution. In particular, Article 8(3) of the Law of the Commission states that the Commission has the duty to offer legal advice to the president and Parliament; this represents a significant portion of the Commission's work. Parliament has been an active participant in this respect, with more requests than the president or his cabinet.¹⁰⁰

Nevertheless, with the formation of the National Unity Government under the leadership of President Ashraf Ghani in 2014, it appears that constitutional interpretation requests from the executive are now going to the Supreme Court. Notably, President Ghani is a proponent of strengthening the Supreme Court, particularly on constitutional matters, and he appears disinclined to support the Commission.¹⁰¹ Ghani arguably holds this opinion because the Commission's former head consistently supported Karzai's position on previous occasions.¹⁰² Further, President Ghani's second Vice-President, Sarwar Danish, who was a member of the Constitutional Drafting and the Constitutional Review Commissions, is of the view that during the drafting of the Constitution, the Supreme Court, not the Commission, was the organ that had been given the power to interpret the Constitution.¹⁰³ President Ghani sought the advice of the Supreme Court, not the Commission, to interpret Article 83 of the Constitution on the question of whether it

INTERPRETIVE AND LEGAL ADVISORY OPINIONS OF THE INDEPENDENT COMMISSION FOR THE SUPERVISION OF THE IMPLEMENTATION OF THE CONSTITUTION] (1393) [2014].

¹⁰⁰ *Id.*

¹⁰¹ Interview with (W), *supra* note 89.

¹⁰² *Id.*

¹⁰³ SARWAR DANISH, *HUQUQ-I ASSĀSI AFGHANISTAN* [CONSTITUTIONAL LAW OF AFGHANISTAN] 307 (1391) [2nd ed. 2013]. Nevertheless, in a recent speech before the Wolesi Jirga, on the occasion of the nomination of the members of the Constitutional Supervision Commission for the vote of confidence, Sarwar Danish did not acknowledge constitutional interpretation as part of the power of the Supreme Court.

would be constitutional for Parliament to continue work after the expiration of its term on June 22, 2015.¹⁰⁴ Although this move angered Parliament, which stated that they would not accept the view of the Court, Ghani's move may constitute a shift from the previous practice in which President Karzai played a strategic role by referring questions to both institutions depending on which best secured his interests.

2. Constitutional Adjudication Power of the Supreme Court

Somewhat distinct from the Commission, the Supreme Court appears to perform two types of review functions: concrete judicial review and post-promulgation abstract review. While there is no recorded case in which the Court has conducted concrete review of legislation, it has been active in conducting post-promulgation abstract review.¹⁰⁵ For instance, in September 2014, on the request of the Foreign Ministry, the Supreme Court issued an opinion reviewing, in abstract, the constitutionality of the Law of Diplomatic and Consular Staff of Afghanistan that Parliament had passed.¹⁰⁶

Although Article 121 is vague on whether the Supreme Court can interpret the Constitution, the language implies constitutional interpretation power:

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.¹⁰⁷

¹⁰⁴ *Ghani Seeks Constitutional Solution as End of Parliament's Term Looms*, TOLONews (June 11, 2015), available at <http://www.tolonews.com/en/afghanistan/19966-ghani-seeks-constitutional-solutions-as-end-of-parliaments-term-looms>.

¹⁰⁵ Pasarlay, *supra* note 46.

¹⁰⁶ Opinion No. 20 of the High Council of the Supreme Court on the Unconstitutionality of Articles 5 and 8 of the Law of Diplomatic and Consular Staff of Afghanistan in Official Gazette No. 1114 (2014).

¹⁰⁷ QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 121, OFFICIAL GAZETTE NO. 818, 1382 (2004).

Under this Article, the Supreme Court asserts jurisdiction to interpret the Constitution, as it often does while reviewing laws for constitutionality. However, since the establishment of the Commission, the Supreme Court has only rarely issued an “interpretive opinion,” (an interpretation of the provisions of the Constitution without performing constitutional review). However, this does not mean that the Supreme Court has been completely stripped of its constitutional interpretation power. In fact, as stated earlier, President Karzai strategically sent questions on constitutional matters to both institutions depending on which best secured his interests. But now, President Ghani has apparently moved to treat the Afghan Supreme Court as a constitutional interpretation body.

In short, both the Supreme Court and the Commission share constitutional interpretation and constitutional review powers. While the power of the Commission remains uncontested, at least for now, Parliament strongly objects to the Supreme Court’s power over constitutional interpretation. In every instance that the executive has asked the Supreme Court to deliver an interpretive opinion, Parliament has objected. At the same time, however, no one contests the power of the Supreme Court to perform judicial review, both post-promulgation abstract review and arguably concrete review. There is still dispute over whether either of these two institutions can review executive actions for constitutional compliance. Currently, neither the commission nor the court can review executive actions for constitutional compliance. Afghan politicians appear comfortable deferring this question to the future.

IV. Afghanistan's Contested Presidential Elections and the Risk to Constitutional Coordination

Since the fall of the Taliban and the enactment of Afghanistan's 2004 Constitution, Afghanistan has seen numerous elections for different governmental offices. Under the Constitution, the IEC is empowered to supervise all elections in the country. However, the Constitution does not provide details about the IEC's framework or responsibilities, or what mechanisms it should use to resolve election disputes. Former President Hamid Karzai took advantage of these lacunae to entrench his presidency.¹⁰⁸ The 2004 and 2005 electoral laws were enacted through presidential decrees because no Parliament had been elected. Similarly, Karzai adopted the Law of the IEC through a presidential decree and set up the IEC in a way that secured the President's power. It was against this background that presidential elections in 2009 and in 2014 foundered and nearly split the country.

The 2009 presidential polls were the first elections organized and implemented under Afghan leadership and the IEC. Earlier elections were organized under the joint leadership of the UNAMA and the Karzai administration.¹⁰⁹ During the 2009 election cycle, the IEC struggled to establish its autonomy from the President, as the President had appointed each of its members without input from any other organ.¹¹⁰ Then, in February 2009, Parliament passed a law requiring parliamentary approval of the election commissioners. This change would have shielded the IEC from executive influence; however, Karzai vetoed this legislation.¹¹¹ Thus, the IEC remained under the thumb of

¹⁰⁸ Pasarlay et al, *supra* note 41.

¹⁰⁹ *See generally*, NOAH COBURN, ANNA LARSON, *DERAILING DEMOCRACY IN AFGHANISTAN: ELECTIONS IN AN UNSTABLE POLITICAL LANDSCAPE* (2013).

¹¹⁰ Pasarlay, et al, *supra* note 41.

¹¹¹ NATIONAL DEMOCRATIC INSTITUTE (2010), *supra* note 76, at 10-11.

the executive and the elections laws worked in favor of the candidates in power.

The 2009 presidential election was held on August 20, 2009. When the IEC announced the preliminary results, the incumbent, President Hamid Karzai, won with 54.62 percent of the total votes. Abdullah Abdullah, who had campaigned on reducing the power of the presidency, switching to a parliamentary system, and strengthening provincial governments,¹¹² came in second with 27.75 percent.¹¹³ Shortly after the announcement of the preliminary results, Abdullah brought claims that fraud infected the election and favored Karzai. As a result of Abdullah's complaint, the IEC conducted an audit of the votes. This audit decreased Karzai's percentage of the vote from 54.62 to 49.67 and increased Abdullah's percentage from 27.75 to 30.59.¹¹⁴ As no candidate had more than 50 percent of the vote, the law required a runoff.¹¹⁵

Before the runoff, Abdullah announced that he would not participate in the runoff election. In a press conference, he read a list of grievances about Afghanistan's electoral process, mentioned that the IEC had favored Karzai, and said that government resources had been used to support Karzai's campaign.¹¹⁶ For weeks, Abdullah had been advocating for the Afghan government to take major steps to fix problems that allowed wide scale fraud in the first polling. He had said that his participation in the runoff would

¹¹² *Id.* at 25

¹¹³ AFGHANISTAN INDEPENDENT ELECTORAL COMMISSION, PRELIMINARY RESULT SHEET, 2009 PRESIDENTIAL ELECTION (2009), *available at* <http://afghanistanelectiondata.org/open/data>.

¹¹⁴ Afghanistan Independent Electoral Commission, Final Result Sheet, 2009 Presidential Election (2009).

¹¹⁵ The Afghan Constitution provided for a "winner take all, first past the post" majority electoral system for electing presidents. A candidate needs to get more than 50 percent of the votes to become president. If a candidate fails to win 50 percent votes in the first round, the Constitution provides for a second round of election between the two leading candidates in the first round.

¹¹⁶ NATIONAL DEMOCRATIC INSTITUTE (2010), *supra* note 76, at 52.

depend on Karzai's administration answering a list of demands that included the removal of the head of the IEC; the suspension of three ministers; and the ability of Abdullah's campaign to observe all meetings at the IEC data center.¹¹⁷ Ultimately, Abdullah withdrew, arguing that the run-off would be no fairer than the first vote because the government did not make the necessary personnel changes at the IEC.¹¹⁸ The day after Abdullah's decision, the IEC announced that there was no need for a second round election and declared Karzai the duly elected President for another term.¹¹⁹

A. The 2014 Presidential Election and the Plans to Amend the Constitution

The 2014 presidential election was the third consecutive presidential election under the 2004 Constitution. Hamid Karzai had been president for two terms, but term limits did not allow him to run a third time. The race to succeed Karzai was remarkably vibrant. During the build up to the 2014 elections, two candidates emerged as front-runners. These were the former foreign minister and runner up in the 2009 presidential election, Abdullah Abdullah; and the former minister of finance and, before that, a World Bank official Ashraf Ghani Ahmadzai.¹²⁰ Other important candidates included former foreign minister, Zalmay Rasool; Abdul Rab Rasool Sayyaf; Gul Agha Sherzai, former governor of Nangarhar Province, and before that, governor of Kandahar Province; and Hidayat Amin Arsala, a former minister in Karzai's cabinet.

All of these candidates acknowledged problems with the way Afghanistan's government had worked under Karzai's administration. They campaigned on very

¹¹⁷ *Id.* at 47-48.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Clark B. Lombardi & Shamshad Pasarlay, *Might Afghans Amend The 2004 Constitution? Hints from a Televised Presidential Debate*, Int'l J. Const. L. Blog (April 2014).

different visions of the Afghan government.¹²¹ A broader range of candidates than most people expected were engaged in questions of constitutional design and some were willing to consider quite dramatic overhauls of government structure—so long as it guaranteed better governance.¹²² None was running as the champion of the status quo.¹²³ Admitting that Afghanistan’s government has been inefficient and often corrupt, each candidate promised to cure the pathologies of poor governance in different ways.¹²⁴ However, the two frontrunners disagreed sharply over whether the solution should include a significant amendment to the Constitution—one designed to change the basic structure of government.

Ashraf Ghani, now President, emphasized that his proposals would not require any constitutional changes to the structure of government. He seemed to be insisting that with changes to Afghan leaders’ philosophy of governance, and changes to its internal operating procedures, the system could work well.¹²⁵ He asserted that the power currently vested in the hands of the president should be distributed both to specialized agencies within the executive branch and, where appropriate, to regional bodies that could develop policies tailored to the needs of their region.¹²⁶ In contrast, Abdullah Abdullah (now Chief Executive), proposed that the Constitution should be amended to move Afghanistan to a parliamentary form of government. Like Ghani, Abdullah suggested that this should be accompanied by statutory devolution of power and argued that if one combined proper governmental reform (like the establishment of a parliamentary government) with the

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

devolution of some power, there would be no need for a constitutional amendment to make Afghanistan a federal state.¹²⁷

The leading candidates headed to the election with these different visions of Afghan governance. In the first round of the election, no candidate received more than fifty percent of the votes cast. The runoff election was contested between Ghani and Abdullah, the two candidates who received the majority of the votes in the first round. In the first round of the elections, Abdullah had received 45 percent of votes and Ashraf Ghani had received 31 percent of votes cast.¹²⁸ At least in the first round, there were few claims of manipulation or fraud. In the second round runoff election between Abdullah and Ghani, however, when Abdullah fell behind, he and his supporters accused the IEC of systematic fraud, corruption, and electoral engineering. In the end, they declared that the IEC was illegitimate and preemptively refused to recognize any finding that Abdullah had lost.¹²⁹ A complete political deadlock thus emerged on the results of the election, and the ensuing crisis threatened to push Afghanistan to the edge of violent breakup.

1. The September 2014 Power-Sharing Agreement

Afghanistan's contentious presidential election was ultimately resolved not by the ballot box but by a U.S.-brokered extra-constitutional deal that created a National Unity Government (NUG).¹³⁰ The power-sharing agreement, or the National Unity Government Agreement (NUGA), between Ghani and Abdullah provided that Ghani would be

¹²⁷ *Id.*

¹²⁸ 2014 PRESIDENTIAL ELECTION FIRST ROUND RESULTS, AFGHANISTAN INDEPENDENT ELECTORAL COMMISSION, <http://www.iec.org.af/results/en/elections>.

¹²⁹ Pasarlay et al, *supra* note 41.

¹³⁰ ALI JALALI, FORGING AFGHANISTAN'S NATIONAL UNITY GOVERNMENT, UNITED STATES INSTITUTE OF PEACE, PEACE BRIEF (January 2015), *available at* <http://www.usip.org/publications/forging-afghanistan-s-national-unity-government>.

recognized as President of Afghanistan and Abdullah would be recognized as its Chief Executive—a position not envisioned in the 2004 Constitution. Under this structure, the President would cooperate with the Chief Executive in appointing ministers and setting policy.¹³¹ Together, they would appoint a commission to draft proposed amendments to the Afghan election laws and institutions. They would also appoint a commission to draft proposed amendments to the Constitution that would create a post for a constitutional prime minister. The President would then convene a loya jirga empowered under the Constitution to debate, approve, or modify proposed amendments to the Constitution.¹³²

In this way, after the election, the opponents of the presidential system basically withdrew their acquiescence to the 2004 Constitution, at least on the structure of the government, and agreed to another structure (a de facto semi-presidential system). Although Abdullah and his allies had acquiesced to be coordinated under the Constitution after the 2009 contested presidential election, following the 2014 election they were no longer playing by the rules set down in the Constitution. It seems that by 2009, some deferred questions, such as the final authority of constitutional interpretation and constitutional review, were still unanswered and that Abdullah and his team believed they could influence such institutions through their proxies in Parliament and limit the executive power. Thus, they were willing to operate under the system. Nevertheless, by 2014, President Karzai had fleshed out the Constitution in a way that strengthened the presidency and that had weakened his opponents. By this time, Abdullah and his allies

¹³¹ See generally, *Agreement between the Two Campaign Teams Regarding the Structure of the National Unity Government*, TOLONews, (September 20, 2014), http://www.tolonews.com/TOLONews_photo/National_Unity_Government_agreement.pdf.

¹³² *Id.*

may have concluded that a combination of a strong presidency and his failure to win the presidency was unacceptable. The costs of operating under the strong presidency were too high and no longer acceptable to the opponents of the presidential system. moreover, in 2014, Abdullah and his allies saw an opportunity to leverage for power, and they succeeded to some degree.

V. The Outsiders to the Constitutional Bargain: The Taliban's Refusal to Acquiesce

While the 2004 Constitution managed to coordinate the “insiders” to the constitutional bargain through a strategy of constitutional deferral, not surprisingly, it failed to coordinate the disgruntled “outsiders,” the Taliban. From the time of the Bonn Conference, the international community had considered the Taliban too powerless to disrupt the political order, and so there was no attempt to coordinate them. The Taliban were also left out of the process for the making of the 2004 Constitution. As a result, they never acquiesced to the emerging constitutional order. While the majority of the Afghans and the government were celebrating the adoption of the Constitution, which they viewed as a remarkable achievement, the Taliban were strengthening their military power and ultimately challenging the legitimacy of the Constitution and the government it established by refusing to play by the rules set down in a constitution in which they had no role.

In retrospect, excluding the Taliban from the Bonn negotiations and in the 2002-2004 constitutional negotiations has proven to be a major mistake. Only six months had passed after the promulgation of the 2004 Constitution when the U.N. Special Representative Lakhdar Brahimi acknowledged this mistake, referring to the absence of the Taliban as Bonn's "original sin."¹³³ He believed that the international community should have taken the time to persuade the Taliban to come to Bonn, acknowledging that they still represented some interests.¹³⁴ Similarly, no Taliban representatives were invited to attend the CLJ.

After more than 13 years of resisting the Afghan government and the 2004 Constitution, the Taliban have now shown interest in peace negotiations in Afghanistan. However, they have put changes to the 2004 Constitution at the forefront of their agenda in any peace talks. The Taliban label the current Constitution as "produced in the shadow of the B-52 warplane."¹³⁵ A new constitution must, in their view, "not contain a single article or paragraph that is against the Islamic principles, national interest and Afghan traditions."¹³⁶ Although it is not clear exactly what the Taliban want to change in the Afghan Constitution, it is clear that they reject the current Afghan Constitution and refuse to play by its rules.

¹³³ Lakhdar Brahimi, Interview by Mary Sack and Cyrus Samii, *Journal of International Affairs* 58, 244 (Fall 2004).

¹³⁴ *Id.*

¹³⁵ SEAN KANE, TALKING WITH THE TALIBAN: SHOULD THE AFGHAN CONSTITUTION BE POINT OF NEGOTIATIONS, USIP, SPECIAL REPORT: 356, 2 (2015); Thomas Rutting, *Qatar, Islamabad, Chantilly, Ashgabad: Taleban Talks Season Again?*, AFGHANISTAN ANALYSIST NETWORK (2012), available at <https://www.afghanistan-analysts.org/qatar-islamabad-chantilly-ashgabad-taleban-talks-season-again-amended/>

¹³⁶ Rutting, *supra* note 135.

In short, these combined challenges to the 2004 constitutional order by the insiders and outsiders have been sufficiently strong that there is now broad recognition that the 2004 Constitution, as it has come to be interpreted, will not be able to coordinate Afghanistan effectively in the long term—at least on the question of the structure of the government. The document needs to be amended in a way that gives all the stakeholders an incentive to play by the rules that this Constitution itself sets down. If that happens, the Constitution might arguably start to coordinate again, at least on the structure of the government.

Part III: Lessons from Afghanistan's Constitutional History: Can it Work in Other Divided Societies?

Chapter Six:

Lessons for other Divided Countries from the Experience of Afghanistan

This chapter considers the lessons that can be drawn from the constitutional history of Afghanistan. It suggests that coordination and deferral theories could be useful to guide Afghanistan's planned constitutional amendment process to help ensure that the 2004 Constitution can once again coordinate the ethnically diverse people and often-combative political factions in Afghanistan. Moreover, this chapter suggests that the lessons learned from the constitutional history of Afghanistan might help inform constitution-making processes in other divided countries.

Certain Afghan constitutions survived and coordinated the diverse peoples of Afghanistan, and others did not. More successful constitutions that coordinated Afghanistan for longer periods of time combined these approaches at the various stages of drafting. (1) An effort was made to identify and include all of the powerful elites in the constitution-making process. (2) If the framers failed to include all of the important stakeholders in the process, the language of the constitution, on its surface, did not offend any of those who had the ability to threaten use of force (political, economic, or military). (3) The drafters created room for elite participation to influence the interpretation and implementation of the constitution going forward. In other words, the drafters deferred on answers to foundational questions in a way that secured the interests of major stakeholders. And (4) the government ruling under a constitutional order avoided interpreting and implementing the constitution in a way that created unrest. In light of coordination and deferral theory, it is likely that the combination of these four

approaches, and the rule systems they created, enabled these more successful constitutions to last longer because they were able to change over time, giving people incentive to work within the system to try to influence the eventual answers to open questions.

Attention to these approaches should inform future efforts to improve the effectiveness of the 2004 Afghan Constitution, such as efforts at drafting and proposing amendments to help it continue to coordinate major political factions in the country. Lessons learned from Afghanistan's constitutional experience may also inform and help constitution-making processes in other tribalized, majority-Muslim countries such as Libya or Yemen, which share many important similarities with Afghanistan.

Like Afghanistan, Libya and Yemen are post-conflict (or, more accurately, in-conflict) countries facing a current political crisis. There is a deep division in these countries about what Islam means and what form of Islam (traditionalist Islam or modernist Islam) should influence state behavior. Libya and Yemen have each previously tried and failed to adopt a constitution that enables them to effectively coordinate their divided societies. They share deep division on foundational issues (such as the role of Islam and the question of federalism). Finally, Libya and Yemen are grappling with the challenge of reforming their shattered polities at a time when there is a commitment to identify the nation in Islamic terms, but in which divisions about the nature of Islam threaten to erupt into violence.

Constitution-making processes in Libya and Yemen have failed because those who initiated the constitution-making processes, and those who participated in them, failed to realize that on foundational issues of a divided society, (like questions of religion,

national identity and fundamental rights), constitution-makers might never get an answer that is satisfactory to everyone—the general populace or to major stakeholders. The constitutional experience of Afghanistan shows that the main purpose of constitutions in divided societies might be to bring all the parties with guns to the negotiation table and allow them the flexibility to resolve existential constitutional questions in the future rather than at the time of the making of a constitution. Constitution-making processes in Yemen failed because they were not designed with these goals in mind. They might have been (or will be) successful if they considered these lessons.

I. Future Amendments to the 2004 Constitution: Considerations and Looking Ahead

After the 2014 contested presidential elections, it appears that many Afghans have come to a more educated view about the strengths and weaknesses of the 2004 Constitution. Many Afghans are sufficiently dissatisfied that they have ceased to acquiesce to a government run by a strong president who is (often) elected in deeply imperfect elections, and they openly oppose the current governmental structure, or at least, its strong presidential system. The growing dissatisfaction was revealed during the contested presidential elections in 2014 and the National Unity Government (NUG) that followed, a move that essentially restructured the government through an extra-constitutional agreement. At the same time, dissatisfied outsiders like the Taliban, who were not invited to the negotiating table and who had never accepted the 2004 constitutional order, are gaining in strength and influence over large areas of the country. These combined challenges from the insiders and the outsiders to the constitutional order have been so strong that Afghanistan has had to recognize a very real possibility of

coordination failure. There is now broad recognition that the 2004 Constitution, as it has come to be interpreted and implemented, will not be able to coordinate Afghanistan effectively for the long term. The Afghan elites have agreed on some, but not all, of the changes necessary to make it more effective.

With the creation of today's NUG, a growing number of elites seem to be committed to finally carrying out the full reconsideration of governmental structure that the 2004 Constitutional Loya Jirga thought had been promised. They now seek to replace the current presidential system with a semi-presidential one, in which a prime minister would share executive power with a president.¹

It is not clear whether or when the current Ghani administration will be willing to negotiate a change. Under the National Unity Government Agreement (NUGA), the Constitution is supposed to be amended in 2016.² But as of today, time has run out for an amendment in 2016. Under the Constitution, the amendment process requires the appointment of a commission to draft amendments to the Constitution. The Constitution also requires a loya jirga to approve any amendments, and then the president must endorse those amendments.³ None of these time-consuming steps have been initiated. As

¹ See e.g., Abid Joyinda, *Senate Wants Loya Jirga Held to Address National Issues*, TOLONews (Nov. 1, 2015), <http://www.tolonews.com/en/afghanistan/22153-senate-wants-loya-jirga-held-to-address-national-issues>; Abid Joyinda, *Jihadi Council Intensifies Call for Convening Loya Jirga*, TOLONews (last updated Nov. 2, 2015); Siyar Sirat, *Newly Established Council Seeks Reforms, Stability*, TOLONews (Dec. 20, 2015), <http://www.tolonews.com/en/afghanistan/22868-newly-established-council-seeks-reforms-stability>.

² See, Agreement Between the Two Campaign Teams Regarding the Structure of the National Unity Government, September 20, 2014, *available at* http://www.tolonews.com/TOLONews_photo/National_Unity_Government_agreement.pdf.

³ QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 50, OFFICIAL GAZETTE NO. 818, 1382 (2004).

such, it appears likely that the government will not be able to amend the Constitution in 2016. That is unfortunate.

The NUGA's call to amend the 2004 Constitution represents a productive attempt at re-coordination of Afghan society. Opponents of the presidential system have essentially withdrawn their consent to the 2004 Constitution and are unwilling to operate under it. They are willing to acquiesce again only if it is amended to reflect a new order. How, precisely, this dilemma will be resolved is uncertain, but constitutional coordination and deferral theories may offer some helpful insights into how Afghanistan should proceed.

A. Elite Bargaining and Stakeholder Inclusion

Afghan constitutions have always been the product of domestic power struggles, reflecting bargains, interests, and the self-dealing of elites and powerful stakeholders—especially those holding government offices. Afghan politicians who have had a firm grip on power have played strategic roles in constitution-making exercises, in which self-interested actors have favored institutions that serve their own interests. Since most Afghan constitutions, including the 2004 Constitution, have not reflected genuine agreement, they have represented an image of haphazard bargains and the political agendas of self-interested politicians. The majority of Afghan rulers have used constitutions and the constitution-making processes as vehicles for advancing their ideologies, policy preferences, and institutional structures, while refusing to make space for other alternative viewpoints. More specifically, Afghan constitutions during the second half of the twentieth century were created by a small faction of stakeholders, and the constitutional text precluded any future negotiations over key constitutional issues—which ultimately led to the failure of each.

The drafting of the 2004 Constitution was also largely an elite-driven process. Although in theory it involved the public, the political interests of powerful politicians ultimately determined the outcome. Politicians at the cabinet level decided important aspects of the Constitution, such as the structure of government and the constitutional court. However, the text of the Constitution did not preclude elite bargaining going forward, a key factor in ensuring the 2004 Constitution coordinated politics in post-Taliban Afghanistan and survived longer than any other Afghan constitution in its original form. It was only when President Karzai's government began to clarify constitutional ambiguities in a manner that the polity found unacceptable that the structure of the government faced significant opposition (e.g., after the 2014 presidential elections), eventually leading to the decision to amend the Constitution.

Given that the two heads of the NUG, President Ghani and Chief Executive Abdullah, appear to disagree over the role of the proposed prime minister,⁴ it is highly likely that discussions over the design of that position will be heated among the political elites who currently hold power. Nevertheless, coordination theory and the history of Afghan constitutions together suggest that any future amendment process should be more inclusive—involving all of the currently powerful stakeholders or their representatives and all of the stakeholders that are likely to become powerful in the future—even if they currently lack the political or military power to make their voices heard. Without this approach, the Constitution may not get the buy-in it needs in the broader community and

⁴ See generally, Shamshad Pasarlay, Mohammad Qadamshah, & Clark B. Lombardi, *Reforming the Afghan Electoral System: The Current Debate and its implications for the Plans to Amend the Afghan Constitution*, INT'L J. CONST. L. BLOG (2015), <http://www.icconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-constitution/>.

among other interest groups, especially if the amendment process involves just the two parties that signed the NUGA. Any process to amend the Constitution should include these interested groups in hopes that they will acquiesce in the final product; without this effort, it is likely that coordination will ultimately fail.

Some important stakeholders that might demand participation in any constitutional amendment process include proponents of the presidential system (many of whom also support President Ghani), proponents of a semi-presidential system (mainly supporters of Chief Executive Abdullah), and other members of key political parties. The Taliban would arguably be another critical stakeholder in any constitutional amendment negotiation that is truly directed at coordination. Other important new stakeholders include communities who will likely be the next generation of elites; although they currently lack a political voice or military support within Afghanistan, they are growing in prestige, wealth, and influence among foreign powers who are frustrated with Afghanistan's old elites. These elites include Afghanistan's growing and far more assertive middle classes, many of whom have been educated in Afghanistan's growing university system, some of whom have a more global perspective and awareness, have traveled outside Afghanistan and its neighboring countries, have been educated in the West, or speak Western languages, have strong technological skills, and are demanding a new voice in Afghan society.

The process for amending the 2004 Constitution might include representatives of these stakeholders in two ways. First, the Constitution provides that a presidential decree should be issued to form a commission to draft amendments to the Constitution, a commission that includes members of the government, the Supreme Court, and

Parliament.⁵ But the Constitution does not provide any detail on how this commission should function or how many members it should include. As a result, the president can currently take advantage of this lacuna and appoint the amendment commission in a way that secures the representation of the powerful—and to some extent, the not-so powerful stakeholders.

Almost two years of experience under the NUG reveals that key governmental positions are being occupied by the people associated with either the President or the Chief Executive—a practice that has frustrated other stakeholders in the country, especially the former mujahideen leaders and members of the political parties. The appointment of the constitutional amendment commission should not be divided between the representatives of the two executives. Again, any discussion of the constitutional amendment negotiations held exclusively between the two parties that currently fill the executive will put coordination at a high risk.

Second, the Constitution requires the convention of a *loya jirga* to debate and ratify amendments to the Constitution.⁶ Under the Constitution, the *loya jirga* includes the members of the National Assembly and the presidents of the provincial and district councils.⁷ With this formation, the *loya jirga* appears to be a representative body; however, the government has failed to hold district council elections since the adoption of the Constitution. Complicating the matter further is the fact that the term of the sitting Afghan National Assembly expired in June 2015. But because no elections have been held, the previous members of the National Assembly still remain in office. Election for

⁵ QĀNUN-I ASSĀSI-YE JAMHŪRI-YE ISLĀMI-YE AFGHANISTAN [CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN] art. 150, OFFICIAL GAZETTE NO. 818, 1382 (2004).

⁶ *Id.* art. 150

⁷ *Id.* art. 110.

the new National Assembly remains subject to reforming the Afghan electoral laws and institutions as provided for under the NUGA.⁸

The question of whether the sitting National Assembly is legitimate has created major debates among Afghan political stakeholders. These stakeholders are not willing to convene the loya jirga unless a new National Assembly is elected. By the same token, the legitimacy of the loya jirga will rest upon the legitimacy of the elections that decide its members (elections to the National Assembly and the district councils). Further, the acquiescence of Afghans in any amendments to the Constitution will rest on whether they have representatives at the loya jirga, representatives that will debate the amendments. Thus, it will depend on the election rules to elect the bodies that comprise the loya jirga to ensure that a broad cross-section of the Afghan population is represented and has a voice.

B. A One-Shot Process vs. Incremental Constitutional Change

The majority of Afghan politicians have indicated a desire to fix all short-comings and ambiguities in the 2004 Constitution in one-shot, resolving all of the problems at once through a constitutional amendment process under the NUGA.⁹ As one example, these politicians want to resolve all constitutional ambiguities that obscure Afghanistan's electoral system.¹⁰ Similarly, others propose to alter the current structure of constitutional interpretation and judicial review through an amendment that establishes a constitutional court with powers of constitutional review and constitutional interpretation.

⁸ See e.g., Pasarlay et al, *supra* note 4.

⁹ This view was expressed by the members and head of the Electoral Reform Commission in an interview with Tolonews. See Mehwar: Electoral Reform Commission's Proposals Discussed (Dec. 23, 2015), YOUTUBE.COM. *available at* <https://www.youtube.com/watch?v=MfoCSQ3vyGs>.

¹⁰ *Id.*

Despite the force of these positions, this dissertation has shown that Afghan constitutions that adopted an incremental approach on divisive constitutional questions appear to have been more successful in coordinating politics and society than those that adopted a one-shot process for resolving difficult or contentious constitutional questions. For instance, the first Constitution of Afghanistan failed because of its revolutionary approach, which was aimed at creating a modern secular state that would be governed by statutes of secular nature—even though it sought to govern a tribal and religious-bound society.¹¹ In contrast, the 1931 Constitution’s success is largely attributable to its incrementalist approach in transforming Afghan society. Through a policy of deferral, it managed to coordinate Afghanistan for a considerably longer time than any other Afghan constitution to date. This constitution incrementally tried to build institutions that limited the power of the traditional elites over time, replacing those institutions with new and modernist ones. Because Afghanistan is experiencing such strong constitutional dissensus and crisis, an incrementalist, gradualist, strategy like this—rather than a one-shot process—might be more realistic and long-lasting.

From an incrementalist viewpoint, some of the constitutional ambiguities in the 2004 Constitution might be resolved through the ordinary political process rather than through constitutional amendments. Among these ambiguities, constitutional deferrals concerning the electoral laws and institutions seem to be most appropriately among the province of the legislature. Under the Constitution, it is, in fact, the role of the legislature to adopt these laws; it simply must do so in a way that does not provoke strife.

¹¹ MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY* 20 (1997).

Importantly, some deferrals should not be addressed at all because addressing them will inevitably provoke irreconcilable strife. For instance, constitutional deferral should remain over ideological questions (the role of Islam and its relations with liberal rights and democracy) and establishment of a constitutional court. In fact, the 2004 Constitution has generally succeeded in deferring on these questions. As discussed in Chapter Five, constitutional deferral on the creation of a constitutional court has succeeded because it avoided stoking conflict and ultimately the political branches have managed to reach a consensus on this question when they agreed to grant the Constitutional Commission power of abstract judicial review and constitutional interpretation.¹² From a coordination perspective, it would be acceptable to concretize the current structure of constitutional review and constitutional interpretation in Afghanistan.

Moreover, although deferral on ideological questions has not yet reached a consensus point, it has helped prevent conflict. At times, the Constitution's ideological clauses have offended both liberal democrats, Islamists and conservatives because the government has refused to adopt a clear position on them; in fact, there is no consensus in the country in favor of clear-cut solution to this question, and the government's refusal to concretize a particular view has been helpful in promoting discussion.

Only the structure of the government, the current presidential system, is something that the Afghan elites have agreed to change through a constitutional amendment, not because it failed to reach consensus, but because it caused conflict.¹³ However, given the way in which the NUGA was negotiated, as well as the tension it caused, it would not be a surprise if the political elites of Afghanistan disagreed over the design of the office of

¹² *See supra*, Chapter Five.

¹³ *Id.*

the prime minister—especially over how the prime minister should be appointed and removed and what powers the office would enjoy. At this time, it seems inevitable that the interested politicians will also choose to defer on these contested questions, as they did on the powers of the Chief Executive when they negotiated the NUGA. This might not be a bad idea. It will give the interested elites a chance to continue to debate these open questions, which would likely lead to continued constitutional coordination.

II. Can Afghanistan’s Example be Useful for Other Divided Societies?

Divided countries that are making a transition away from autocracy or recovering from violent conflict have frequently focused their constitution-making processes on building a new national compact.¹⁴ In particular, this compact has increasingly been seen as a multi-stakeholder enterprise that requires a broad cross-section of the polity to come together to agree on how to define or redefine the nation and how to live together peacefully, including how to share power and how to respect religious, cultural and linguistic differences.¹⁵ Despite these concerns, recent constitution-making exercises in some of the world’s most divided societies (particularly in the Middle East), have directed countries to adopt a constitution that represents an attractive social contract according to liberal democratic theory, without any regard for whether this constitution is likely to coordinate the society. This has turned out to be a mistake and the resulting exercises in constitution-making have failed.

The lessons we learn from the ambivalent constitutional experience of Afghanistan may be useful for other divided societies, like Libya and Yemen, where constitution-

¹⁴ Jason Gluck, *Constitution-building in a Political Vacuum: Libya and Yemen in 2014* in ANNUAL REVIEW OF CONSTITUTION-BUILDING PROCESSES: 2014, 43 (2014).

¹⁵ *Id.*

making did not coordinate the powerful stakeholders, efforts that ultimately failed. Neither Libya nor Yemen provided a critically-needed forum to discuss and potentially resolve foundational national challenges at the drafting stage.¹⁶ In fact, the constitution-making projects in both of these countries failed to connect constitution drafting to elite bargaining; therefore, the drafters developed texts that failed to secure the acquiescence of the powerful stakeholders. They tended to provide too many details on their countries' foundational issues, issues such as the role of Islam in Libya and the structure of federalism in Yemen, refusing to defer decisions about these issues. Lastly, the international community pushed these countries to draft constitutions that were in line with international "best practices," without any regard for the social and political realities on the ground. As a result, the constitution-making processes in both countries stumbled and seem to have precipitated a total breakdown.

A. Failed Constitution-Making Process in Libya: No Regard for Coordination

Following decades of authoritarian rule in Libya under Muammar Gadhafi, protests and a subsequent conflict led to an international intervention in Libya that ousted Gadhafi in 2011.¹⁷ A transitional period followed during which transitional institutions were established and a Constitutional Declaration was promulgated, providing for the election of a Constitution Drafting Assembly (CDA). The CDA was elected in February 2014 and tasked with writing a new constitution for Libya.¹⁸

¹⁶ *Id.*

¹⁷ THE INTERNATIONAL COMMISSION OF JURISTS, THE DRAFT LIBYAN CONSTITUTION: PROCEDURAL DEFICIENCIES, SUBSTANTIVE FLAWS, INTERNATIONAL COURT OF JUSTICE 4 (2015), *available at* <http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2015/12/Lybia-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf> [hereinafter ICJ LIBYAN CONSTITUTION REPORT].

¹⁸ *Id.* at 13.

The Libyan constitution-making process, however, has been hindered by the ongoing political and security crises in that country. Since 2012, Libya has shattered into different factions along political, ideological, and tribal lines.¹⁹ These factions are supported by a complex array of militia groups who are fighting for control of the country's future.²⁰ In some regions, the vacuum of state authority has been filled by armed groups and, in some instances, extremist and terror-linked groups, including groups claiming allegiance to the Islamic State in Iraq and the Levant (ISIL).²¹

Against this backdrop, the CDA was the one, popularly-elected institution that maintained at "least the ostensible support of all Libyan factions."²² However, some minority groups boycotted the CDA because of disagreements over the timing of the CDA's work and disputes over the lack of effective measures and mechanisms to ensure adequate representation of minorities.²³ The process also failed to ensure adequate mechanisms to provide for the structured, timely, and meaningful participation of all stakeholders who had the means to threaten force.²⁴

At the time of the drafting of the constitution, the major political fault lines in Libya seemed to split along regional lines, with support in Cyrenaica for federalism, support in Tripolitania for more central control, while allowing for administrative decentralization, and concern in Fezzan over minority rights.²⁵ These divisions led Libyans to decide to elect equal representatives from all these regions to maintain a balance among them.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Gluck, *supra* note 14, at 46-47.

²⁴ *Id.* at 46-50.

²⁵ *Id.* at 45.

Libyans then tried to determine who would represent the regions and sit at the negotiation table. In electing their representatives to the CDA, Libyans were heavily influenced by a mistrust of political parties.²⁶ Thus, candidates for the CDA ran on an individual basis rather than on party lists. The General National Congress members, one of Libya's key stakeholders, were barred from running for the CDA. As a result, the CDA became an institution of lawyers and academics with no previous record in political office or other basis to assert a political constituency.²⁷ In this way, the CDA did not include all of Libya's key stakeholders who were fighting each other in different areas of the country.

In addition, Libya's political landscape changed considerably soon after the CDA began its work. The regional dynamic, if it had ever truly reflected political constituencies, was no longer the prevailing political narrative.²⁸ Instead, it was replaced by an ever-changing assortment of political and security alliances between militias, tribes, and local leaders.²⁹ Lacking key power-brokers, it became increasingly unlikely that the CDA alone could deliver a constitution that could hold the country together.³⁰

At the heart of Libya's instability has been competition between multiple forces that have been variously described as being based on ideology (Islamists versus nationalists/liberals); tribal affiliation (Mistratis vs. Zintanis); institutional affiliation (the General National Congress vs. the House of Representatives); relationship to the February 2012 revolution (revolutionaries vs. counter-revolutionaries); and a loose

²⁶ *Id.* at 46.

²⁷ *Id.*

²⁸ *Id.* at 46.

²⁹ *Id.*

³⁰ *Id.*

conglomeration of militia alliances (Operation Dawn vs. Operation Dignity).³¹ It thus became clear by mid-2014 that the assumptions of political interest and constituency on which the CDA was designed were no longer valid.³² The various ideological, tribal, revolutionary, and militant parties competing for power were making claims and demands of a constitutional nature: they differed over the type and nature of government; federalism; natural resource management; revenue sharing; and the role and status of religion.³³ The CDA, however, was incapable of providing a forum for negotiating and resolving stakeholder differences. More controversially, the CDA believed that it had to stay “above the current political struggles.”³⁴ As a result, the CDA did not engage with Libya’s powerful stakeholders whose acquiescence was needed for any constitutional order to succeed.

After missing a couple of deadlines, and while the country was experiencing a deep crisis, the CDA published a draft constitution in October 2015.³⁵ In light of the process that led to creation of the draft, it is not surprising that the draft did not appear to satisfy some of the most important Libyan stakeholders and the international community.³⁶ Critics argued that the draft contained provisions that were contradictory to international

³¹ *Id.* at 47.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2–4.

³⁵ ICJ LIBYAN CONSTITUTION REPORT, *supra* note 17, at 14; Suliman Ibrahim, *Libya’s Long Awaited Constitution: Will it Finally See the Light of the Day*, CONSTITUTIONNET (March 2016), available at <http://www.constitutionnet.org/news/libyas-long-awaited-constitution-will-it-finally-see-light-day>

³⁶ For a detailed discussion on why the draft was not satisfactory see, Ibrahim, *supra* note 35 and UNSMIL suggests amendments to first constitutional draft, LIBYAPROSPECT (Jan. 2016), <http://libyapropect.com/index.php/2016/01/14/unsmil-suggests-amendments-to-first-constitutional-draft/>.

standards and “best practices” as well as Libyan laws.³⁷ In order to win the support of most, if not all, factions in Libya, the CDA began to revise this October 2015 draft. In February 2016, a working committee of the CDA finalized another version of a constitution.³⁸ However, this draft was approved without the input of and buy-in from the parties to the conflict that could further inflame tensions, polarize groups, and contribute to Libya’s declining stability.³⁹ Worse for the constitution-making process, on May 9, 2016, a Libyan appeals court (Administrative Department of Al-Bayda Appeals Court) annulled the final version of the draft constitution that had been approved in April 2016.⁴⁰

Today, Libya remains without a working constitution. It is not clear what will happen to the Libyan draft constitution annulled by the Al-Bayda Court. But one point is clear—Libya continues to struggle to adopt a constitution that can give the warring parties enough incentive to stop their hostilities and work under a constitutional order to promote their political goals.

B. Challenges of Constitution-Making in Yemen

Yemen has also struggled to adopt a constitution that can coordinate the powerful factions that have been fighting each other over the past years. While its struggle coincided with the so-called “Arab Spring” in the Middle East, a movement that initiated immediate constitutional reforms in countries like Jordan, Egypt, and Morocco, Yemen followed an altogether different path. Following Yemen’s 2011 uprising, most of the

³⁷ See Ibrahim, *supra* note 35.

³⁸ Gluck, *supra* note 14, at 48.

³⁹ *Id.*

⁴⁰ *Al-Bayda Appeals Court Annuls the Constitution Draft*, THE LIBYA OBSERVER (May 9, 2016), [http:// www.libyaobserver.ly/news/al-bayda-appeals-court-annuls-constitution-draft](http://www.libyaobserver.ly/news/al-bayda-appeals-court-annuls-constitution-draft).

country's major long-standing political players signed two documents—the Gulf Cooperation Council (GCC) Agreement and the Implementation Mechanism for the GCC Agreement.⁴¹ These documents set out the framework for what would be Yemen's transition towards a peaceful and democratic future.⁴² Among the many requirements, these two documents provided that a National Dialogue Conference (NDC) should be convened to discuss the process of drafting a new constitution. For the first time, Yemen's NDC brought together all of the country's major political movements, including many groups that have traditionally been marginalized.⁴³ The NDC's deliberations were to form the backbone of the new constitution.⁴⁴

Yemen's constitutional roadmap called for a Constitutional Drafting Committee (CDC), a body composed of representatives of the same groups that participated in the NDC, to produce a first draft, which would then be submitted for public comment and to a “national body” to confirm that the draft was consistent with the NDC outcomes.⁴⁵

On March 9, 2014, Yemeni President, Abd Rabbuh Mansur Hadi, appointed the 17 members of the CDC, a technical body composed of judges, lawyers, and other professionals that theoretically reflected Yemen's geographic, ethnic and political

⁴¹ HELEN LACKNER, YEMEN'S 'PEACEFUL' TRANSITION FROM AUTOCRACY: COULD IT HAVE SUCCEEDED? INTERNATIONAL IDEA 8 (2016), *available at* <http://www.idea.int/publications/yemens-peaceful-transition-from-autocracy/loader.cfm?csModule=security/getfile&pageID=77329>,

⁴² *Id.*

⁴³ *Id.* at 9.

⁴⁴ *Id.*

⁴⁵ JASON GLUCK & MICHELE BRANDT, PARTICIPATORY AND INCLUSIVE CONSTITUTION-MAKING: GIVING VOICE TO THE DEMANDS OF CITIZENS IN THE WAKE OF THE ARAB SPRING, UNITED STATES INSTITUTE OF PEACE 8 (January 29, 2015), *available at* <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf>.

diversity.⁴⁶ However, some in the Yemeni population did not welcome the appointment of the CDC, including several political groups such as the Socialist Party, independent youth organizations, and members of the Islah Party, groups that protested their lack of representation in the CDC. Others objected to the committee's overall composition, arguing that its members had virtually no expertise with the federalist system that Yemen aspired to adopt.⁴⁷ Despite these objections, the CDC continued its work.

The CDC was tasked with producing a draft that would address Yemen's foundational issues including the structure of federalism, whether the *Shari'a* should be "the" or "one of the" main sources of legislation, and the role and structure of the justice system.⁴⁸ However, this constitution-making process never enjoyed the elite political support required for it to achieve these objectives.⁴⁹ The NDC had failed to achieve political consensus on some of the most contentious and existential questions about the future Yemen state, including Yemen's precise federal character, and the number of regions and their boundaries.⁵⁰ The NDC's ability to reach agreement was also hindered because the leadership of the southern Yemeni separatist group, al-Hiraak, refused to participate in the drafting process.⁵¹

Furthermore, as in Libya, just as the CDC was beginning its work, the political landscape in Yemen changed dramatically, and in ways that would further undermine the basis on which the CDC was operating. In August 2014, Houthi rebels, a Zaidi Shi'ite

⁴⁶ Gluck, *supra* note 14, at 50.

⁴⁷ Ashraf Al-Falahi, *Yemen's Fraught Constitution Drafting Committee*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (March 2014), <http://carnegieendowment.org/sada/?fa=55496>.

⁴⁸ LACKNER, *supra* note 41, at 56.

⁴⁹ Gluck, *supra* note 14, at 50.

⁵⁰ *Id.*

⁵¹ *Id.*

group that had been in conflict with the regime of President Ali Abdullah Saleh for many years, mounted an offensive and took near-total control of the capital, Sana'a, and other cities.⁵² Houthi advances also empowered southern separatists to increase their calls for independence.⁵³ These developments greatly altered the political and power dynamics in Yemen, calling into question whether the CDA still accurately reflected the relative weight of Yemen's political forces and whether it was capable of negotiating and supporting Yemen's transition to democracy.⁵⁴

On September 21, 2014, Yemen's political parties (excluding the southern separatists), signed the Peace and National Partnership Agreement—a ceasefire agreement with the Houthis that reaffirmed the NDC outcomes and included provisions on the formation of an inclusive government.⁵⁵ The hope was that this agreement would revive the parties' support for the constitutional roadmap.⁵⁶ However, the agreement was soon ignored by the Houthis, who increased their military presence in Sana'a and advanced further into areas south and west of the capital.⁵⁷ The CDC continued its work in this rapidly deteriorating security environment.⁵⁸ With Sana'a under siege, and after a number of political assassinations, the CDC moved to Abu Dhabi, UAE, where it produced a first draft of the constitution by the end of 2014.⁵⁹

⁵² *Id.* at 52.

⁵³ *South Yemen separatists pledge to intensify protests*, YAHOO NEWS (October 2014), <http://news.yahoo.com/south-yemen-separatists-pledge-intensifyprotests-151901875.html>

⁵⁴ Gluck, *supra* note 14, at 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ United Nations, UN Constitutional Newsletter, Issue No. 3 (2014), at <http://peacemaker.un.org/Constitutions/Newsletter>.

⁵⁸ Gluck, *supra* note 14, at 52.

⁵⁹ *Id.* at 53.

This first draft was not satisfactory to the Houthi rebels as it contained “controversial language concerning the divisive unsettled issue of the country’s future federal arrangement.”⁶⁰ The Houthis were particularly concerned that the configuration of the six-region federal state would leave landlocked the traditional Houthis stronghold of Saadah.⁶¹ By January 22, 2015, the government and the Houthis reached an agreement that explicitly provided for “amendments, addition or deletion” to the draft constitution and a requirement that the draft be “agreed upon by all factions.”⁶² A day after this apparent deal had been reached, however, the Houthis continued to refuse to withdraw from the capital. President Hadi, who was under house arrest, resigned. The Houthis responded by putting in place a Supreme Revolutionary Committee and a Constitutional Decree to govern for a two-year transitional period, which would include a review of the CDC’s draft constitution before a referendum.⁶³ After several weeks under house arrest, the President escaped and fled to the city of Aden, withdrew his resignation, condemned the Houthi takeover as a coup, and declared all subsequent actions illegal and invalid.⁶⁴

In this way, Yemen tried and failed to draft a constitution in the middle of a deep, political division and constitutional dissensus. The country continues to struggle to draft a constitution that can garner sufficient buy-in and in which the key stakeholders can

⁶⁰ *Yemen Conflict Alert: Time for Compromise*, INTERNATIONAL CRISIS GROUP (Jan. 27, 2015), <http://www.crisisgroup.org/en/publication-type/alerts/2015/yemen-conflict-alert-time-for-compromise.aspx>.

⁶¹ Peter Salisbury, *Greed, brutality, and an unravelling coup in Yemen*, VICE NEWS (February 2015), <https://news.vice.com/article/greed-brutality-and-anunraveling-coup-in-yemen>.

⁶² Ali Al-Moshki, *Hadi and Houthis release agreement*, YEMEN TIMES (January 2015), <http://www.yementimes.com/en/1853/news/4823/Hadi-and-Houthisrelease-agreement.htm>.

⁶³ Gluck, *supra* note 14, at 53.

⁶⁴ *Id.*

acquiesce. The poorly designed constitution-making process, and the final draft that the process produced, undoubtedly played a significant role in Yemen's crisis.

III. What Went Wrong in Libya and Yemen

The primary flaw in the constitution-making processes in Libya and Yemen was that they were not designed with an eye to coordinating powerful stakeholders, whose acquiescence would have been necessary for a successful constitutional order. They failed to heed the lessons that we learn from the experience of Afghanistan: (1) the drafters should identify and include key powerful elites in the constitution-making process to prevent those groups from later challenging the resulting constitutional order; and (2) in divided societies, an issue on which two or more key groups deeply disagree cannot be constitutionalized in a way that is acceptable to even a broad cross-section of the society. The major purpose of constitutions in divided societies should not be to try to resolve every foundational issue at the outset; instead, constitutions should defer on these issues and create room for elite participation to influence the interpretation and the implementation of the constitution going forward.

Libya and Yemen failed to consider these important lessons that led to the failure of their constitution-making attempts. First, those who initiated the process and those who participated in it failed to identify the powerful elites who needed to be coordinated and involved in the constitution-making processes and further failed to bring them to the negotiation table. In Libya, while warring factions were making claims of a constitutional nature and demanding participation in the process to avoid a constitutional order offensive to them, the CDA believed that it had to remain above Libya's political

struggles,⁶⁵ instead of responding to those struggles. Similarly, in Yemen, the constitution-making process took place in a political vacuum.⁶⁶ The Constitutional Drafting Committee never realistically considered the need for elite bargaining and stakeholder inclusion, and the constitutional roadmap never enjoyed the buy-in and support of key power-brokers, most notably the Houthis and al-Hiraak, who refused to accept the final product of the process.⁶⁷

Second, the constitution-making exercises in Libya and Yemen failed to consider the need and possibility for elite negotiation and elite inclusion after the constitutional text was prepared. The constitutional texts that the constitution-making exercises in Libya and Yemen produced provided too much detail on key existential constitutional questions and did not leave room for future evolution of key terms. This eliminated opportunities for the parties not originally involved in the drafting to use normal political processes to meet their political needs. With no incentives to work under a constitution, the warring factions in Libya and Yemen continued to fight to achieve their goals.

For instance, Article 8 of the first draft of the Libyan Constitution stated the following:

Islam shall be the religion of the State, and Islamic [*Sharī'a*] shall be the source of legislation in accordance with the recognized sects and interpretations without being bound to any of its particular jurisprudential opinions in matters of interpretation. The provisions of the Constitution shall be interpreted in accordance with this.⁶⁸

⁶⁵ United Nations, UN Constitutional Newsletter, Issue No. 4 (2015), <http://peacemaker.un.org/Constitutions/Newsletter>.

⁶⁶ See generally, Gluck, *supra* note 14.

⁶⁷ *Id.*

⁶⁸ See Draft Libyan Constitution (February, 2016), Arabic text available at <http://www.constitutionnet.org/vl/item/Libya-Draft-Constitution-Feb-2016>.

More controversially, the text of this draft subjected international law, particularly international human rights norms, to the provisions of the Islamic *Sharī'a*.⁶⁹ This specificity troubled the international community and Libyan liberals who were concerned that this provision would hinder Libya's ability to give effect to its international human rights duties in its domestic laws, including the constitution itself, if any such obligations were to be deemed contrary to *Sharī'a*.⁷⁰ Moreover, the provision foreclosed those who wanted to interpret the Constitution or international human rights norms in ways other than those provided in the Constitution.

In contrast, Yemen's draft constitution avoided such details on the role of Islam. Article 4 stated that the Islamic *Sharī'a* is the source of legislation—a provision that the majority of the Muslim constitutions share and apparently seems acceptable to the parties involved. Apparently, as the experiences of other Muslim constitutions containing similar provisions show, this provision leaves it open for future developments to decide what method should be used to interpret both *Sharī'a* and the provision itself.⁷¹ As a result, this provision arguably did not provoke strife in Yemen.

⁶⁹ JÖRG FEDTKE, ANALYSIS OF THE DRAFT CONSTITUTION OF LIBYA: THEMATIC COMMITTEES OF THE CONSTITUTION DRAFTING ASSEMBLY, INTERNATIONAL IDEA 6 (March 2015), available at http://www.constitutionnet.org/files/2015.03.31_-_analysis_of_draft_libya_constitution_english.pdf.

⁷⁰ Ibrahim, *supra* note 35, at 26.

⁷¹ See generally, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L. L. REV. 379 (2006).

Nevertheless, the Yemeni draft constitution provided too much detail on the country's federal structure, detail that led to the rejection of the draft by the Houthis,⁷² and to the downfall of the constitution-making process all together. As the transition progressed from national dialogue to constitution-drafting, key stakeholders, the Houthis and the al-Hiraak, feared that the CDC would not be able to amend certain existential issues, which would therefore become permanently constitutionalized without any room for future evolution. They reacted accordingly.⁷³ In short, it would not be an overstatement to claim that the lack of stakeholder bargaining resulted in the collapse of a constitution-making process in both of these countries.

Notably, help from the international community has not been productive in resolving these struggles, especially to the extent that it has emphasized compatibility with “international best practices.” Best practices involve adopting constitutions that protect the same rights and liberties that are enshrined in international conventions;⁷⁴ however, such demands pushed the content of drafts far beyond the social and political realities on the ground—content that the key stakeholders were not comfortable with.

⁷² REIDER VISSER, THE FEDERALISM DIMENSION IN YEMEN'S DRAFT CONSTITUTION, IRAQ AND GULF ANALYSIS (2015), *available at* <https://gulfanalysis.wordpress.com/2015/01/20/the-federalism-dimension-in-yemens-draft-constitution/>.

⁷³ Gluck, *supra* note 14, at 54.

⁷⁴ *See*, Ibrahim, *supra* note 35.

The constitution-making process in Libya and Yemen could have succeeded, or can succeed going forward, if these countries considered the lessons from the constitutional experience of Afghanistan. Yemen and Libya today closely resemble Afghanistan in the 1990s: different groups controlled certain areas of the country and constitutions were drafted and adopted by the faction that controlled Kabul, without consultation with groups outside the capital and in a way that did not leave room for future evolution that other parties could exploit.⁷⁵ As a result, similar to today's Libya and Yemen, the constitution-making processes failed before delivering a final product simply because a large of key stakeholders were left out of the process, and they refused to accept the constitution-making processes.

Afghanistan's 2004 Constitution was drafted and adopted against such a background, and it has been successful in coordinating disparate and historically belligerent factions for a considerably longer period of time. It succeeded as a coordination device because the drafters of this Constitution worked to draft a document that could coordinate the mutually antagonistic factions that had fought each other in the previous decade.⁷⁶ They also recognized that to achieve this task, they needed to bring these factions to the constitutional negotiating table, and to defer resolution of foundational constitutional issues that had divided Afghanistan. The 2004 Constitution succeeded in part because the text was drafted in a way that did not preclude elite bargaining and elite negotiation after the Constitution was adopted.

⁷⁵ See *supra*, Chapter Two.

⁷⁶ See *supra*, Chapter Three.

The constitution-making processes in Libya and Yemen would likely have benefited from identifying and negotiating with key stakeholders from the outset. If the focus remains on a process that is separate from the deep divisions in these countries, despite the current political struggles, it is likely that they will fail. Moreover, the constitutional texts produced in Libya and Yemen were overly detailed on foundational issues. This has proven to be a mistake. Instead, the constitution-making process might benefit from a strategy of deferral by design, simply because it might enable continuation of elite bargaining following promulgation, and hopefully, lead to constitutional coordination.

Conclusion

Building on insights from coordination and deferral theories, this dissertation has tried to tell a complete, nuanced, and a theoretically informed constitutional history of Afghanistan, culminating in a close examination of the drafting and reception of the 2004 Constitution of Afghanistan. By viewing Afghan constitutional history through this lens, this dissertation has corroborated the observations of scholars who have suggested that, in divided societies, constitutions with fewer detailed provisions and more constitutional deferrals tend to coordinate politics more effectively. As coordination devices, these kinds of constitutions leave the evolution of constitutional text open to future influence and interpretation.

With the Afghan example, this dissertation has shown how this theory plays out: Afghan constitutions have survived longer when, even if the parties may have felt they did not get what they wanted at the time of the drafting, the text did not preclude them from getting what they wanted in the future. The Afghan example also revealed that in a divided society, especially one that is heavily armed, the effectiveness of a constitution may depend on whether the people feel there is a better chance of affecting politics and society through the political mechanisms set up in the constitution than through armed rebellion. It has also illustrated that the constitutional experience of Afghanistan has the potential to inform constitution-making efforts in other Muslim-majority divided societies that are grappling to reform their shattered polities.

By analyzing Afghan constitutional history in this way, this dissertation was able to identify common qualities shared by Afghanistan's longest-lived and most successful constitutions: (1) the constitution-making processes involved key stakeholders who had

the power to destabilize the constitutional order; (2) if the processes did not involve elite bargaining, the text of the constitution deferred in a way that guaranteed the possibility of elite bargaining after a constitutional order was in place; and (3) the government did not attempt to answer open questions in a way that concretized a particular constitutional structure deemed unacceptable by critical mass of the population. Most Afghan constitutions failed because they lacked these qualities.

This dissertation's major focus is the history of the drafting of the 2004 Constitution of Afghanistan, and its subsequent reception by a broad cross-section of the Afghan population and elites. This Constitution is best understood in terms of coordination. On one hand, it is riddled with ambiguity and unanswered questions on fundamental issues; these characteristics reflect the lack of agreement among the various stakeholders, including presidentialists, semi-presidentialists, Islamists, liberals, and a variety of ethnic groups. On the other hand, the Constitution created a system of government that, at least in the short term, offered enough to all parties to win their acceptance and the people's acquiescence. While they were not necessarily aware of constitutional theories like deferral and coordination, the makers of the 2004 Constitution of Afghanistan had the wisdom and foresight to embrace ambiguity and deferral on a number of particularly divisive questions as a way to gain the acquiescence of a broad cross section of Afghanistan's fractious communities and powerful stakeholders. These ambiguities and deferrals enabled the divided stakeholders to either operate under the Constitution and try to reach consensus with others for a mutually acceptable outcome, or harbor hopes that when the time came to resolve the ambiguity, they would have sufficient political power

to ensure that those issues were resolved to their liking. Both of these options proved acceptable to the majority of stakeholders that participated.

Seen from the perspective of coordination theory, the 2004 Constitution of Afghanistan has been a remarkably successful coordination device. Its makers knew that one of their primary tasks was to draft a constitution that did not offend Afghanistan's powerful political elites who had the means to use force to destabilize any constitutional order. The makers of the Constitution identified such stakeholders who needed to be included in the drafting process. They also drafted the text of the Constitution in a way that left major existential constitutional questions open for evolution: questions on the role of Islam, the structure of the government, and a constitutional court; they knew that doing otherwise would have caused irreconcilable strife.

Despite this general success, some deferrals have subsequently given rise to conflict, including the electoral system and the structure of the government. As this dissertation has shown, this failure can, at least in part, be attributable to President Karzai and his government's policies, policies that sought to resolve these issues too early, and most importantly, in a way that secured the executive's interests. In the process, Karzai and his allies offended other elites whose power rested in the parliament.

Against this backdrop, the controversy over the outcome of the 2014 presidential elections ushered political elites down a road to amending the Constitution and making it more acceptable to key stakeholders, stakeholders who felt disadvantaged by the structure of government that the 2004 Constitution described. In effect, they threatened to stop abiding by the rules of the Constitution—refusing to continue to be coordinated. This dissertation suggested that if all of the relevant stakeholders participate in drafting these

future amendments, the Constitution may be able to coordinate Afghanistan again, potentially surviving into the indefinite future, depending on how much room the amendments leave open to resolve future disagreements.

In short, by telling Afghanistan's constitutional history through the lens of coordination and deferral theory, this dissertation sheds new light on Afghan constitutional history and on the decisions made during the drafting of the 2004 Constitution of Afghanistan. It has also provided a valuable case study that adds nuance to our understanding of the theory of constitutional coordination and the role that deferral and constitutional ambiguity may play in the process of designing successful constitutions for divided societies.

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Interview with Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (March 16, 2015).

Interview with Shukria Barakzai, Member, Constitutional Review Commission, in Kabul, Afghanistan (March 25, 2015).

Interview with Nematullah Shahrani, Chair, Constitutional Drafting and Constitutional Review Commissions, in Kabul, Afghanistan (April 7, 2015).

Interview with Mohammad Amin Ahmady, Member, Constitutional Review Commission, in Kabul, Afghanistan (April 9, 2015).

Skype Interview with Professor Mohammad Hashim Kamali, Member, Constitutional Review Commission (April 13, 2015).

Interview with (J), Member, Constitutional Drafting and Constitutional Review Commission, in Kabul, Afghanistan (April 21, 2015).

Interview with Sediqa Balkhi, Member, Constitutional Review Commission, in Kabul, Afghanistan (May 10, 2015).

Telephone Interview with Mohammad Yaqub Wahidi, Member, Constitutional Review Commission, in Kabul, Afghanistan (June 6, 2015).

Interview with Mohammad Alam Eshaqzai, Member, Constitutional Review Commission, in Nangarhar, Afghanistan (June 9, 2015).

Interview with Amina Afzali, Member, Constitutional Review Commission, in Kabul, Afghanistan (June 23, 2015).

Interview with (X), Member, Constitutional Drafting Commission, in Kabul, Afghanistan (June 29, 2015).

Interview with (A), Member, Constitutional Drafting Commission, in Kabul, Afghanistan (July 2, 2015).

Interview with (B), Member, Constitutional Review Commission, in Kabul, Afghanistan (July, 6, 2015).

Interview with Mohammad Sediq Patman, Member, Constitutional Review Commission, in Kabul, Afghanistan (July 7, 2015).

Interview with Mir Mohammad Afzal, Member, Constitutional Review Commission, in Herat, Afghanistan (July 27, 2015).

Interview with (P), Member, Constitutional Review Commission, in Kabul, Afghanistan (July 14, 2015).

Facebook Voice Call Interview with (K), Member, Constitutional Review Commission (August 3, 2015).

Interview with Fatima Gillani, Member, Constitutional Review Commission, in Kabul, Afghanistan (August 14, 2015).

2. Interviews with Members of the Constitutional Loya Jirga

Interview with Abdul Rab Rasool Sayyaf, Chairman, Second Working Committee of the Constitutional Loya Jirga, Member, Emergency Loya Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (March 26, 2015).

Interview with Zalmay Hotak, Member, Emergency Constitutional Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (May 6, 2015).

Interview with Khalil Ahmad Khinjani, Member, Emergency Constitutional Jirga and Constitutional Loya Jirga, in Kabul, Afghanistan (May 18, 2015).

Interview with (T), Member, Constitutional Loya Jirga, Secretariat, (X) Working Committee of Constitutional Loya Jirga, in Kabul, Afghanistan (June 20, 2015).

Interview with Mohammad Ismail Yoon, Secretary, Reconciliation Committee of the Constitutional Loya Jirga, in Kabul, Afghanistan (July 12, 2015).

Interview with Abdul Hafeez Mansoor, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (July 28, 2015).

Interview with Abdul Shokor Waqif Hakimi, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (August 9, 2015).

Interview with Abdul Muneer Danish, Member, Constitutional Loya Jirga, in Kabul, Afghanistan (August 12, 2015).

3. Interviews with Members of the Secretariat of the Constitutional Commissions and the Constitutional Loya Jirga

Interview with Asadullah Jahidi, Member, Secretariat of the Constitutional Commissions and the Constitutional Loya Jirga, in Kabul, Afghanistan (May 2, 2015).

Interview with Mohammad Ismail Yoon, Head, Secretariat of the Constitutional Commissions, Eastern Zone Office, in Kabul, Afghanistan (July 12, 2015).

Interview with (Z), Member, Secretariat of the Constitutional Review Commission, in Kabul Afghanistan (April 13, 2015).

4. Interviews with Members of the Independent Commission for the Supervision of the Implementation of the Constitution.

Interview with Mohammad Amin Ahmady, Member, Independent Commission for the Supervision of the Implementation of the Constitution, in Kabul, Afghanistan (April 9, 2015).

Interview with (W), Member, Independent Commission for the Supervision of the Implementation of the Constitution, in Kabul, Afghanistan (March 12, 2015).

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Appendix A:

Short Bios of the Drafters of the 2004 Constitution (Members of the Constitutional Drafting and Constitutional Review Commissions)

Most of the information in the following biographies of the members of the Constitutional Drafting and Constitutional Review commissions comes from my interviews with these individuals. I was not able to interview all of the members of the two commissions. Information about the biographies of the members who were not interviewed comes from publicly available resources such as Who is Who in Afghanistan.

JOINT (CONSTITUTIONAL DRAFTING AND CONSTITUTIONAL REVIEW)

COMMISSION MEMBERS

Nematullah Shahrani, Chairman, Constitutional Drafting and Constitutional Review Commissions

Nematullah Shahrani is an ethnic Uzbek from Badakhshan Province. He completed his primary education in Badakhshan and later entered the Abu Hanifa Madrasa in Kabul. He did his bachelor's degree in Islamic law from Kabul University, Faculty of Sharia law. He later obtained his masters degree from al-Azhar University in Egypt. Shahrani has also spent some time in the United States as a Visiting Scholar in Georgetown University. After the Communist coup, the Communist government imprisoned Shahrani, but he was released later. A religious scholar trained in Afghanistan and Egypt, Shahrani has spent much of his life as an educator, author, and translator of important Islamic literature from Arabic. He lived about twenty years as a refugee in

Pakistan, supporting the Afghanistan Mujahideen resistance against Soviet occupation and communist regimes. After the fall of Taliban regime, he became one of four Vice Presidents to Hamid Karzai (2002–2004) and Chairman of the Constitutional Drafting and Constitutional Review Commissions. He also served as minister of Hajj and Religious Affairs since the election of Karzai as president of the Islamic Republic of Afghanistan in 2004. Shahrani is currently the head of the Center on Religious Toleration.

Abdul Salam Azimi, Vice Chairman, Constitutional Drafting and Constitutional Review Commissions

Abdul Salam Azimi was born in 1936 in Farah province and is an ethnic Pashtun of the Noorzai clan. In 1949 he moved to Kabul and was enrolled in a Paghman religious school (Madrassa), where local, Egyptian and Iraqi instructors also taught modern sciences. He was later enrolled in the Sharia Faculty of Kabul University, where he was appointed as assistant professor in 1959. He went to Cairo in 1967 to pursue his master's degree at al-Azhar University, majoring in Sharia and Law. Following his return home in 1969, he resumed his job at the Kabul University Sharia Faculty. Azimi studied in Washington DC from 1973 to 1975 and received a Certificate in Comparative law from George Washington University Law School. In 1978, under President Daud, he was appointed as Advisor on Legal Affairs to the Ministry of Justice and President of Kabul University. He left Kabul with his family and moved to Pakistan in 1982 before immigrating to the US in 1983. He was a member of Islamic Jurisprudence Encyclopedia Association in Kuwait in 1984. In 2001, Salam Azimi served as a senior advisor to President Karzai and as the Director of the Legal and Judicial Board at the Presidential Palace. In 2002 he

was appointed to the Constitutional Drafting and the Constitutional Review Commissions. From 2006-2014, Abdul Salam Azimi served as the Chief Justice of the Afghanistan Supreme Court.

Musa Ashari, Member, Constitutional Drafting and Constitutional Review Commissions

Mohammad Musa Ashari is a graduate of Sharia School of Kabul University. After graduation, Ashari joined the Sharia Faculty. Then he went to Egypt to get his Master's degree from al-Azhar University. Upon his return, he remained at the Faculty of Sharia at Kabul University. In 1966, he was appointed as a Justice of the Supreme Court under King Zahir Shah. After the Communists Coup, Ashari spent most of his life in exile in the U.S. After the fall of the Taliban regime he returned to Afghanistan and joined the faculty of Sharia at Kabul University. In 2002 he was appointed to the Constitutional Drafting and the Review Commissions.

Mohammad Sarwar Danish, Member, Constitutional Drafting and Constitutional Review Commission

Mohammad Sarwar Danish was born in 1961 in Daikundi Province. He is an ethnic Hazara. He completed his primary education in Afghanistan and his higher education in Iraq, Syria and Iran. He has earned a bachelor's degree in Law, a Certificate in Journalism, a degree in Islamic Culture and Education, a Master's degree in Islamic *Fiqh*, and is working on a PhD (in progress) in the same field. President Karzai appointed him to the Constitutional Drafting and Review Commissions. Sarwar Danish has served as the Afghan Minister of Justice, Minister of Higher Education, and several other positions. He is currently the Second Vice-president to President Ashraf Ghani Ahmadzai.

Musa Maroofi, Member Constitutional Drafting and Constitutional Review Commissions

Mohammad Musa Maroofi is an ethnic Pashtun and attended school in Kandahar. A graduate of Kabul University Law School (1965), Oxford University (1968), City University of New York (1971), and George Washington University (1978), he has taught Political Science and Law in Afghan and American universities. He has also lectured at the Institute of Diplomacy in Afghanistan's Ministry of Foreign Affairs, the UNDP training programs for the Afghan Parliamentarians and the Association of Afghan Journalists in the Ministry of Cultural Affairs. He left Afghanistan in the winter of 1978 as a protest against the Communist coup and returned after twenty-three years in order to join the Constitutional Drafting Commission. Maroofi has served in various capacities, including assistant dean of the Law School of Kabul University, and President of the Independent Commission of Afghanistan's Radio Television. He currently serves as the president of UNESCO's ad hoc Independent High Commission of Communication and Information for Afghanistan.

Mohammad Ashraf Rasooli, Member, Constitutional Drafting and Constitutional Review Commissions

Mohammad Ashraf Rasooli, an ethnic Tajik, is a lawyer by profession. He is a graduate of Kabul University School of Law and Political Science. In 2002, he was appointed as Deputy Minister of Justice and at the same time served as a member of the Constitutional Drafting and Constitutional Review Commissions. Since then, Rasooli has served as a member of the Legislation Department of the Ministry of Justice. He is currently an advisor to the First Vice-President of Afghanistan.

Mohammad Raheem Sherzoy, Member, Constitutional Drafting and Constitutional Review Commission

Mohammad Rahim Sherzoy is an ethnic Pashtun and a graduate of Kabul University Law School. He is a diplomat by profession. He has a PhD in political science. During the presidency of Mohammad Daud Khan, Sherzoy served as Afghanistan's Ambassador to Pakistan. Mohammad Rahim Sherzoy served as the Head of the Office of Afghanistan's former King, Zaher Shah in Rome, Italy in the 1980s. In 2002, President Karzai appointed him Deputy Foreign Minister and a member of the Constitutional Drafting and Review Commissions. In 2007 Karzai appointed Sherzoy Ambassador to England. Sherzoy is currently retired and lives in California, United States.

CONSTITUTIONAL DRAFTING COMMISSION MEMBERS

Mukarama Akrami, Member Constitutional Drafting Commission

Mukarama Akrami is a lawyer by profession. She has a degree from Kabul University School of Sharia. Mukarama Akrami worked as a defense attorney before becoming a judge in the Kabul Commercial Court in 2011. President Karzai appointed her to the Constitutional Drafting Commission in 2002. Mukarama Akrami currently works at the Commercial Chamber of the Afghan Supreme Court.

Mohammad Qasim Fazelly (Kacem Fazelly), Member Constitutional Drafting Commission

Mohammad Qasim Fazelly has spent most of his time in Paris, France, as an Afghan scholar working in Afghan political affairs and teaching at France's Sorbonne University (2001). He participated in the Bonn Conference as an advisor to the Rome Group. Later, he served as an advisor to the Afghan Foreign Ministry. In 2002, Fazelly was appointed to the Constitutional Drafting Commission but based on disagreements with Shahrani, he left the Commission. Fazelly has served as the Afghan Ambassador to the Czech Republic and later served as the Afghan Ambassador to UNESCO. He retired in 2014.

Asifa Kakar, Member, Constitutional Drafting Commission

Asifa Kakar holds a degree in law from Kabul University. She is a judge by profession. She has worked in Kabul as a High Court judge before moving to Peshawar where she taught at a university of Afghan refugees from 1990 to 1999. President Karzai appointed her to the Constitutional Drafting Commission in 2002. She is currently the head of the Secretariat of the Commercial Chamber of the Afghan Supreme Court.

CONSTITUTIONAL REVIEW COMMISSION MEMBERS

Mir Mohammad Afzal, Member, Constitutional Review Commission

Mir Mohamamd Afzal is also known as the Mir-i Gozargah-i Shareef. He is an ethnic Tajik from the Afghan Sufis. He is a very respected and famous religious personality in Western Afghanistan. In 2003, President Karzai appointed him to the Constitutional Review Commission.

He is currently a member of the Herat Council of Ulema and also a member of the Afghanistan Council of Ulema. He also heads a well-known shrine in Herat Province.

Amena Afzali, Member, Constitutional Review Commission

Amena Afzali is an ethnic Tajik. She received her early education in Kabul, Herat and Mazar-I Sharif. She has an undergraduate degree from the Kabul University Faculty of Sciences. She has also taught at the Faculty of Science. After the Russian invasion, Afzali went to Iran. While living in Iran she set up several courses to educate Afghan refugee girls who were excluded from Iranian schools. In 2002, Afzali returned to Afghanistan. She was a member of the Bonn peace talks, representing the Northern Alliance. She served as a member of the Afghanistan Independent Human Rights Commission. Later, President Karzai appointed her as the Minister of Labor Affairs. She is currently an advisor to the Afghan Red Cross Society.

Mohammad Amin Ahmadi, Member, Constitutional Review Commission

Mohammad Amin Ahmadi was born in Uruzgan Province and is an ethnic Hazara. He completed his primary education in that province. He then entered Iran for the purpose of studying, and in the 25 years of his stay there, he obtained degrees in law and Sharia. He also completed his PhD in Islamic philosophy from University of Tehran in Iran and taught there for many years. In 2003, President Karzai appointed him to the Constitutional Review Commission. Later, he served as a member of the Independent Commission for the Supervision of the Implementation of the Constitution. He is currently president of the Ibn-i Sina University in Kabul, Afghanistan.

Mohammad Akram, Member, Constitutional Review Commission

Mohammad Akram is an ethnic Tajik. He is an engineer by profession. He has a bachelor's degree and a Master of Science degree in mining engineering from Kabul Polytechnic Institute. Mohammad Akram has mostly worked in various capacities in the Mining Ministry of Afghanistan. In 2003, President Karzai appointed him to the Constitutional Review Commission. Since then, Mohammad Akram has served as the head of the mining department in the Ministry of Mines and Petroleum.

Parween Ali-Majroh, Member, Constitutional Review Commission

Parween Ali Majroh is an ethnic Tajik from Kabul. Parween Ali Majroh is an historian by profession. She has a degree from Kabul University. She is from the family of the great Shamsuddin Majrooh, Minister of Justice, during the reign of King Mohammad Zahir Shah. In 2003, Parween Ali was appointed to the Constitutional Review Commission. She currently resides in Germany.

Abdul Aziz Aziz, Member, Constitutional Review Commission

Abdul Abdul Aziz was born in Kabul. He is an ethnic Pashtun. He completed his primary education in Kabul. He then attended the Abu Hanifa religious school (Madrassa) and after that attended Kabul University School of Sharia. After graduating he began teaching there. Abdul Aziz has completed a degree from al-Azhar University in Egypt. He also has an LLM degree from the Georgetown University School of Law. In 2001, President Karzai appointed Abdul Aziz to the Commission on the Convention of the Emergency Loya Jirga. In 2003, he was

appointed to the Constitutional Review Commission. Aziz served as the Dean of the Kabul University Sharia Faculty from 2005-2009. He was appointed as a Supreme Court Justice in 2008. In 2014, his term ended and he is currently living in the United States.

Sediqa Balkhi, Member, Constitutional Review Commission

Sediqa Balkhi was born in 1950 in Mazar-i-Sharif. She is an ethnic Tajik Hazara. Balkhi has earned a bachelor's degree in Islamic Studies. She also followed religious studies in Iran during the years of migration and the civil war in Afghanistan. She attended the Bonn Conference as a representative of the Cyprus Group. In 2001, she was elected Chairwoman of the Afghan Civil Society and Women Affairs Committee. In 2003, President Karzai appointed her to the Constitutional Review Commission. She is currently an appointed senator at the Upper House of the Afghan Parliament.

Suliman Baloch, appointed Member, Constitutional Review Commission

Suliman Baloch is an ethnic Baloch from the Baloch tribes of Afghanistan. He is a well-known tribal leader in the Baloch community. President Karzai appointed him to the Constitutional Review Commission, however he was not able to attend the Commission for personal reasons.

Shukria Barakzai, Member, Constitutional Review Commission

Shukria Barakzai is an ethnic Pashtun from Kandahar Province. She was born in 1972 in Kabul and started primary education in Malalay School in Kabul. She began her higher education at Kabul University in the 1990s, but was forced to leave the country during the civil

war. She resumed her education after the fall of the Taliban. She has a bachelor's degree in Archaeology and Geology. She has worked as a teacher for decades, then as chief of Asian Women Association. In 2003, President Karzai appointed her to the Constitutional Review Commission. In the 2005 and 2010 parliamentary elections, she was elected as a member of the Wolesi Jirga. Barakzai is currently Afghan Ambassador to Norway.

Mohammad Tahir Borgai, Member Constitutional Review Commission

Mohammad Tahir Borgai is an ethnic Pashtun. He has a degree from Kabul University Faculty of Law and Political Science. He has worked in the Ministry of Interior and the Ministry of Education and later went to Germany for his PhD studies in law. After returning from Germany, he became a lecturer at the School of Law and Political Science at Kabul University and the head of the Islamic Scholars Office in the Ministry of Justice in 1985. Borgai was a member of the Constitutional Council under the 1987 Constitution and a Vice-President to President Najibullah. He spent most of his life in Pakistan after the fall of President Najibullah. In 2001, President Karzai appointed him to the Commission on the Convention of the Emergency Loya Jirga and later to the Constitutional Review Commission.

Abdul Hai Elahi, Member, Constitutional Review Commission

Abdul Hai Elahi is an ethnic Tajik from Panjsher Province of Afghanistan. Abdul Hai Elahi was one of the most influential members in the Jamiat-ye Islami Mujahideen Party. He served as an advisor to Ahmad Shah Massoud, head of the Shura-ye Nizzar (Supervisory Council), a military wing of the Jamiyyat-i Islami. During the war of resistance against the

Soviets and its installed regime in Afghanistan, Elahi migrated to Peshawar, Pakistan, where he took over the Cultural Affairs of the Jamiyyat-i Islami Party. After the fall of the Taliban, Elahi became the head of the newly established State High Commission for Drug Control. He was appointed to the Constitutional Review Commission in 2003. He passed away just before the convention of the Constitutional Loya Jirga

Mohammad Alam Eshaqzoy, Member, Constitutional Review Commission

Mohammad Alam Eshaqzai is from Nangarhar. He is an ethnic Pashtun. He completed his primary education in Kabul. He has a bachelor's degree in economics from Kabul University. He was a lecturer at the Kabul University during the presidency of Najibullah. In 1989 he received a scholarship from the former Soviet Union and completed a master's and PhD in economic theory. Upon his return from Russia in 1993, he was appointed Deputy of the Afghanistan Academy of Sciences. He left the country during the Taliban and returned back in 2001. He continued his work at the Academy of Sciences. In 2002, President Karzai appointed him to the Constitutional Review Commission. In 2006 he was appointed as the Governor of Baghlan Province. Mohammad Alam Eshaqzai was later appointed as the Deputy Governor of Nangarhar. After that, he has worked in the Ministry of Finance. Eshaqzai currently works as the Nangarhar Province Mustofi (State Accountant).

Fatima Gillani, Member, Constitutional Review Commission

Fatima Gillani was born in Kabul. She is an ethnic Pashtun. She is the daughter of Pir Sayed Ahmad Gillani, head of the Mahaz-i Mill-i Islami former Mujahideen party. She got

graduated from Malalay High School in Kabul and entered the Iranian National University 1978. In 1994 she obtained a master's degree in literature with a thesis about Sufism from Muslim College in London. She lived 20 years abroad in London where she worked as a spokesperson for the mujahideen during the Soviet War of the 1980s. She attended the 2001 Bonn Conference as an observer, and in 2002 was a delegate at the Emergency Loya Jirga. In 2003, President Karzai appointed her to the Constitutional Review Commission. Fatima Gillani has been serving as the President of the Afghan Red Crescent Society since 2004.

Mohammad Tahir Hashimi, Member, Constitutional Review Commission

Mohammad Tahir Hashimi is an ethnic Tajik. He is a political scientist by profession. He has a degree from Kabul University School Law and Political Science. He obtained his PhD from the United States and taught in the United States for many years. After the fall of the Taliban government, Hashimi returned to Afghanistan and began teaching in Kabul University School of Law and Political Science. He was then appointed as Minister Advisor to the Foreign Ministry. In 2003, Karzai appointed him to the Constitutional Review Commission. He is currently retired from teaching and is Vice-President of the National Movement of United Afghanistan political party.

Mohammad Hashim Kamali, Member, Constitutional Review Commission

Mohammad Hashim Kamali is an ethnic Pashtun from Nangarhar Province. He has a bachelor's degree from Kabul University School of Law and Political Sciences. He completed his higher education in University of London. Kamali has served as a professor in International

Islamic University Malaysia. In 2003, President Karzai appointed him to the Constitutional Review Commission. He is currently the director of the International Institute of Advanced Islamic Studies Malaysia. He resides in Kuala Lumpur, Malaysia.

Wakil Shamsuddin Khan, Member, Constitutional Review Commission

Wakil Shamsuddin Khan is an ethnic Tajik. He was born in Badakhshan Province. He was a well-known former mujahideen commander from the Jamiyyat-i Islami muajhdiheen party and a supporter of Ahmad Shah Massoud. Shamsudin Khan's forces were actively involved in the war against the Taliban. After the fall of the Taliban, President Karzai appointed him to the Constitutional Review Commission. Wakil Shamsudin Khan died in 2012.

Abdul Hai Khurasani, Member, Constitutional Review Commission

Abdul Hai Khurassani is an ethnic Tajik. He is a career diplomat. He is an influential member of the Jamiat-ye Islami mujahideen party. During the war of resistance, Abdul Hai Khurasani served as an active member of the Jamiyyat-i Islami. He has served in Afghan embassies in Iran, Poland and India. In 2003, President Karzai appointed him to the Constitutional Review Commission. He currently resides in London, UK.

Lekraj, appointed Member Constitutional Review Commission

Lekraj is from the Afghan Hindu community. President Karzai appointed him to the Constitutional Review Commission to represent the Afghan Hindu community, however Lekraj did not attend the Constitutional Review Commission citing personal reasons and other commitments.

Nadir Ali Mahdawi, Member, Constitutional Review Commission

Nadir Ali Mahdawi is an ethnic Hazara. He obtained his primary education in various madrasas inside and outside Afghanistan, particularly in Iran. Nadir Ali Mahdawi was an important member of the Shi'ite mujahideen parties. When the communists took power, Mahdawi went to Iran and worked for the Shi'ite mujahideen parties. After the fall of the Taliban regime, Mahdawi returned to Afghanistan. President Karzai appointed him as an advisor on religious and tribal affairs and to the Constitutional Review Commission. Ali Mahdawi died in 2013.

Mirajudin, Member, Constitutional Review Commission

Mirajudin is an ethnic Tajik. He is an engineer by profession. He is from the Ismaili sect of the Afghan Shi'ite community. In 2003, President Karzai appointed him to the Constitutional Review Commission to represent the Ismaili population in the Commission. Mirajuddin is currently working with the Afghanistan Red Cross Society.

Daud Musa, Member, Constitutional Review Commission

Daud Musa is an ethnic Tajik. He is an engineer by profession. President Karzai appointed Daud Musa to the Constitutional Review Commission. But Daud Musa left the Constitutional Review Commission in protest over the draft constitution's simultaneous recognition of Islam and liberal values. Daud Musa currently resides in the United States.

Nadir Shah Nikyar, Member, Constitutional Review Commission

Nadir Shah Nikyar is an ethnic Pashtun from Khost Province. He has a degree from Teachers Training University in Kabul and has taught there for many years. In 2003, President Karzai appointed him to the Constitutional Review Commission. After the work of the Constitutional Review Commission, Nadir Shah Nikyar resumed teaching at the University. He is currently retired.

Mohammad Sidiq Patman, Member, Constitutional Review Commission

Mohammad Sediq Patman is an ethnic Pashtun. He graduated from the Educational University of Afghanistan in 1978. He migrated to Pakistan in that year because of the Communist coup. Ideologically, Sediq Patman is a member of the Afghan Nation (Afghan Milat) political party. In Pakistan, however, Patman did his Jihad and cultural activities through the Mahaz-i Mill-i Islami former mujahideen party headed by the Gillani family. Patman also worked as the head of the cultural committee of the Mahaz-i Islami Party. He returned to Afghanistan after the fall of the Taliban government and headed the Afghanistan Reconstruction NGO. He also headed the Bayan newspaper and was appointed to the Constitutional Review Commission as a representative of Afghan civil society. From 2006 to 2013, Patman was Deputy Minister of Education.

Hakima Mashal Sediqi, Member, Constitutional Review Commission

Mashal Sediqi holds a university degree from the Faculty of Literature and Languages of Kabul University. After completing her higher education, she worked as teacher at a girl's high

school. She has worked for the Community Development Organization, a United Nation's support organization. After the fall of the Taliban, she worked with several nongovernmental organizations, including UNICEF and UN Habitat. In 2003, Karzai appointed her to the Constitutional Review Commission. She also worked with the Ministry of Education and the Ministry of Foreign Affairs in Kabul. She currently works for the Toronto-based Afghan Women's Organization.

Parween Momand Talwasa, Member Constitutional Review Commission

Parween Momand is an ethnic Pashtun from the Afghan nomads. She has a bachelor's degree from Kabul University School of Journalism and a Master's Degree in Pashtu from Kabul University School of Literature and Languages. She has worked with various news agencies in Afghanistan. She was working for the Pashtu service of Voice of America when President Karzai appointed her to the Constitutional Review Commission to represent the Afghan nomads. After that she was elected to the Parliament in 2005.

Mohammad Yaqub Wahidi, Member, Constitutional Review Commission

Mohammad Yaqub Wahidi is an ethnic Uzbek. He has a degree from Kabul University School of Literature and Languages. Wahidi obtained a PhD in history from the former Soviet Union in 1974. Wahidi then served as the head of the Afghanistan National Archive and also the head of the Afghanistan Association of Historians. Wahidi was a lecturer in the Afghanistan Academy of Sciences when he was appointed to the Constitutional Review Commission.

Currently, Yaqub Wahidi has retired and is serving as the head of the Library of Amir Ali Sher Nawai in Sar-i Pol Province in Afghanistan.

Abdul Haq Walah, Appointed Member, Constitutional Review Commission

Abdul Haq Walah is an ethnic Tajik born in Kabul. He has a degree from Kabul University School of Law and Political Sciences. After graduation, Walah joined the ministry of Foreign Affairs during the presidency of Mohammad Daud Khan. Later, he served in various positions in the Ministry of Information and Culture. After that, Walah was appointed to the Afghan Embassy in London. After the fall of President Daud, Walah went to Washington D.C. and settled there. When the Taliban government fell, Abdul Haq Walah returned to Afghanistan. He was appointed to the Constitutional Review Commission, but he refused to join the Commission. He currently resides in Washington D.C. United States.

Qazi Mohammad Amin Wiqad, Member, Constitutional Review Commission

Mohammed Amin Wiqad was born in 1947. He is an ethnic Pashtun from Nangahar Province. Qazi Amin attended a madrassa in Pakistan. Then, he attended Kabul University School of Sharia. While at the University, he became an active member of the Islamist Youth movement. In 1975, following the repression of the Islamist movement by Daud Khan, Qazi Amin went to Peshawar. During the late 1970s and early 1980s, he served several times as deputy leader of Hezb-i Islami Party. In 1985, he left Hezb-i Islami and founded his own party, which had only a limited influence. After the fall of the communists in 1992, he held a brief appointment as Minister of Communications. In 2003, President Karzai appointed him to the

Constitutional Review Commission and in 2004, as Minister of Justice. Later, he became a leading member of the National Front, a political party opposed to the Karzai administration. He then became the head of the Public Outreach Committee of the government's peace and reconciliation program at the High Peace Council (HPC). Currently, Amin Wiqad is a member of the Council of the Hizb-i Islami political party.

Appendix B
Changes to the Different Drafts of the 2004 Constitution in Each Stage of the Constitution-making Process

Appendix B shows changes that were made from the first draft of the Constitution (the CDC draft) all the way to the final draft of the Constitution. It lists only those articles of the first draft of the Constitution that the makers of the Constitution changed in one of the later stages.

The strikethrough text indicates that the text has been removed from the earlier drafts. The italicized and underlined text shows that the text has been added in later stages. (✓) identifies articles that remained unchanged in later drafts and (X) shows that the article was removed in later drafts of the Constitution.

This Appendix is for illustrative purposes; there are no official English language versions of the 2004 Afghanistan Constitution or its prior drafts. Mishrano Jirga is sometimes translated in other works as Upper House or House of Elders; Wolesi Jirga is translated as Lower House or House of People; Milli-ye Shura is translated as Parliament or National Assembly. Any translation errors/differences from the official Dari/Pashtu texts are unintentional and are the responsibility of the author.

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
Art. 1, Afghanistan is an Islamic Republic, independent, unitary and indivisible state based on social justice.	Art. 1, Afghanistan is an Islamic Republic, independent, unitary and indivisible state based on social justice.	✓	✓	✓

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>Art. 2, The religion of Afghanistan is the sacred religion of Islam. Followers of other religions are free to exercise their creeds within the provisions of the law.</p>	✓	✓	<p>Art. 2, The religion of <i>the state of</i> Afghanistan is the sacred religion of Islam. Followers of other religions are free to exercise their creeds within the provisions of the law.</p>	<p>Art. 2, The religion of <i>the state- Islamic Republic of</i> Afghanistan is the sacred religion of Islam. Followers of other religions are free to exercise their creeds within the provisions of the law.</p>
<p>Art. 3, In Afghanistan no law can contradict the basics of the sacred religion of Islam and other values enshrined in the Constitution.</p>	✓	<p>Art. 3, In Afghanistan no law can contradict the basics of the sacred religion of Islam and other values enshrined in the Constitution.</p>	<p>Art. 3, In Afghanistan no law can contradict <i>the beliefs and provisions of</i> the sacred religion of Islam and other values enshrined in the Constitution.</p>	✓
<p>Art. 4, National sovereignty shall belong to the nation which should be exercised directly by the people or by their representatives. The Afghan nation is comprised of all individuals who possess the Afghan nationality in accordance with the law. Each Afghan</p>	<p>Art. 4, National sovereignty shall belong to the nation which should be exercised directly by the people or by their representatives. The Afghan nation is comprised of all individuals who possess the Afghan nationality in accordance with the law. Each Afghan national is called an Afghan.</p>	✓	<p>Art. 4, National sovereignty shall belong to the nation which should be exercised directly by the people or by their representative. The Afghan nation is comprised of all individuals who possess the Afghan nationality. <i>The Afghan nation is comprised of the following tribes:</i></p>	<p>Art. 4: National sovereignty shall belong to the nation, which should be exercised directly by the people or their representatives <i>manifested directly and by its elected representatives.</i> The nation of Afghanistan is composed of all individuals who possess the nationality of</p>

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>national is called an Afghan.</p>	<p><i>Matters related to nationality and asylum should be regulated by law.</i></p>		<p><u>Pashtun, Tajik, Hazara, Uzbek, Baloch, Pachaie, Noristani, Aimaq, Qirghiz, Qizilbash, Gujar, Brahawi and other tribes.</u> Each Afghan national is called an Afghan.</p> <p>Matters related to nationality and asylum should be regulated by law.</p>	<p>Afghanistan. The Afghan nation is comprised of the following tribes: Pashtun, Tajik, Hazara, Uzbek, Turkman, Baloch, Pachaie, Noristani, Aimaq, <u>Arab</u>, Qirghiz, Qizilbash, Gujar, Brahawi and other tribes. <u>The word Afghan shall apply to every citizen of Afghanistan. No individual of the nation of Afghanistan shall be deprived of citizenship.</u></p> <p>The citizenship and asylum related matters should be regulated by law.</p>
<p>Art. 7, The state shall respect the basics of the United Nations Charter, observe the Universal Declaration of Human Rights, follow the policy of peaceful neighborhood</p>	<p>Art. 7, The state shall respect <u>observe</u> the basics of the United Nations Charter, observe <u>respect</u> the Universal Declaration of Human Rights, follow the policy of peaceful</p>	<p>Art. 7, The state shall respect <u>observe</u> the basics of the United Nations Charter, the Universal Declaration of Human Rights <u>and international treaties to which Afghanistan is a</u></p>	<p>✓</p>	<p>✓</p>

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
and prevent any kinds of terrorist activities and aggression.	neighborhood and prevent any kinds of terrorist activities <u>and drug cultivation and trafficking</u> aggression.	party, follow the policy of peaceful neighborhood and, the state shall prevent any kinds of terrorist activities and drug cultivation and trafficking.		
Art. 8, The state shall regulate the foreign policy of the country on the basis of observance of this constitution preserving the independence, national interests and territorial integrity and non-interference, good neighborliness, mutual respect and equality of rights.	✓	Art. 8, The state shall regulate the foreign policy of the country on the basis of observance of this constitution preserving the independence, national interests and territorial integrity and non-interference, good neighborliness, mutual respect and equality of rights.	✓	✓
Art. 9, Law should regulate the way of using mines, subterranean resources, dams and rivers, forests, energy, telecommunication, railways and airports,	Art. 9, Law should regulate the way of using mines, subterranean resources, dams and rivers, forests, energy, telecommunication, railways and airports,	✓	✓	Art. 9: Mines and other subterranean resources <u>as well as historical relics</u> shall be the estate property of the state. Law <u>shall</u> regulate the protection, <u>management</u> and proper <u>utilization</u> of

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
banks, insurance, harbors, public property and radio television establishment.	banks, insurance, harbors, public property and radio television establishment. <i>Mines and other subterranean resources are the estate of the state. Law should regulate the protection, administration and the correct usage of natural resources and public property.</i>			public properties as well as natural resources.
Art. 10, The state shall encourage, protect and ensure the safety of capital investment and private enterprises in accordance with the provisions of the law.	Art. 10, The state shall encourage, protect and ensure the safety of capital investment and private enterprises in accordance with the provisions of the law <i>and market economy.</i>	✓	✓	✓
Art. 12, The state shall design and implement effective programs for developing industries, expanding production and protecting activities of craftsmen to raise the living standard of the people.	✓	✓	Art. 13, The state shall design <i>enforce</i> and implement effective programs for developing industries, expanding production and protecting activities of craftsmen to raise the living standard of the	Art. 13, The state shall enforce <i>plan</i> and implement effective programs for developing industries, expanding production and protecting activities of craftsmen to raise the living standard of the

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>Art. 13, The state shall design and implement effective programs to develop agriculture and animal husbandry, improve economic, social and living conditions of farmers, herders, settlers and the nomads' livelihood.</p>	<p>Art. 14, The state shall design and implement effective programs to develop agriculture and animal husbandry, improve economic, social and living conditions of farmers, herders, settlers and the nomads' livelihood.</p> <p><i>The State shall take necessary measures in accordance with the provisions of the law to distribute public land to the needy.</i></p>	<p>Art. 14, The state shall, <i>within its financial capacity, enforce design</i> and implement effective programs to develop agriculture and animal husbandry, improve economic, social and living conditions of farmers, herders, settlers and the nomads' livelihood.</p> <p>The State shall take necessary measures in accordance with the provisions of the law to distribute public land to the needy.</p>	<p>people.</p> <p>✓</p>	<p>people.</p> <p>✓</p>
<p>Art. 14, The state shall take necessary measures to protect historic relics, natural wealth and promote the environment.</p>	<p>Art. 15, <i>Historical relics are the property of the State.</i></p> <p>The state shall take necessary measures to protect historic relics, natural wealth and promote the environment.</p>	<p>✓</p>	<p>✓</p>	<p>Art. 15, <i>The state shall be obligated to adopt necessary measures to protect and improve forests as well as the living environment.</i></p>

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>Art. 15, From amongst Pashtu, Dari, Uzbeki, Turkmani, Balochi and Pachaie, Pashtu and Dari shall be the official languages of the state. The state shall design and implement effective programs to foster and develop all languages of Afghanistan. Usage of all current languages in the country shall be free in press publications and mass media.</p>	<p>Art. 16, From amongst Pashtu, Dari, Uzbeki, Turkmani, Balochi, Pachaie, <i>Noristani and other languages</i>, Pashtu and Dari shall be the official languages of the state. The state shall design and apply effective programs to foster and develop all languages of Afghanistan. Usage of all current languages in the country shall be free in press publications and mass media.</p>	<p>✓</p>	<p>Art. 16, From amongst Pashtu, Dari, Uzbeki, Turkmani, Balochi, Pachaie, Noristani, <i>Pamiri</i> and other languages, Pashtu and Dari shall be the official languages of the state.</p> <p><i>Turki languages (Uzbeki and Turkish), Balochi, Pachaie, Noristani and Pamiri shall be considered the third official language besides Dari and Pashtu in places where they are spoken.</i></p> <p>The state shall enforce and apply effective programs to foster and develop all languages of Afghanistan. Usage of all current languages in the country shall be free in press publications and mass media.</p>	<p>Art. 16: From amongst Pashtu, Dari, Uzbeki, Turkmani, Balochi, Pachaie, Nuristani, Pamiri and other current languages in the country, Pashtu and Dari shall be the official languages of the state. <i>In areas where the majority of the people speak in any one of Uzbeki, Turkmani, Pachaie, Nuristani, Baluchi or Pamiri languages, any of the aforementioned language, in addition to Pashtu and Dari, shall be the third official language, the usage of which shall be regulated by law.</i> The state shall enforce and apply <i>plan and design</i> effective programs to foster and develop all languages of Afghanistan. Usage of all current languages in</p>

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				the country shall be free in press publications and mass media. <u>Academic and national administrative terminology and usage in the country shall be preserved.</u>
Art. 19, The National Anthem shall be in Pashtu adopted by the National Assembly.	Art. 20, The National Anthem should be in Pashtu adopted by the National Assembly. <u>The Loya Jirga shall adopt the national anthem.</u>	Art. 20, The Loya Jirga should adopt the national anthem. <u>The National Anthem is in Pashtu language.</u>	Art. 20, The National Anthem is in Pashtu language <u>with the mentioning of the phrase Allah-o-Akbar (God is Great) and the names of the tribes of Afghanistan.</u>	✓
Art. 21, Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, without consideration of language, ethnicity, sect, place of residence and social status have equal rights and duties before the law.	✓	Art. 22, Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan man and woman, without consideration of language, ethnicity, sect, place of residence and social status have equal rights and duties before the law.	Art. 22, Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, <u>including men and women</u> , have equal rights and duties before the law.	✓

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>Art. 30, Upon arrest, or to prove truth, every individual can appoint a defense attorney. In criminal cases, the state shall appoint a defense attorney for the indigent. Law shall regulate the duties and powers of defense attorneys.</p>	✓	✓	<p>Art. 31, Upon arrest, or to prove truth, every individual can appoint a defense attorney. In criminal cases, the state shall appoint a defense attorney for the indigent.</p> <p><i><u>Correspondence between the accused and the defense attorney shall be protected and are inviolable.</u></i></p> <p>Law shall regulate the duties and powers of defense attorneys.</p>	✓
<p>Art. 34, To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with the provisions of the law.</p> <p>The people of Afghanistan shall have the right, in accordance with the provisions of the law,</p>	✓	<p>Art. 35, To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with the provisions of the law.</p> <p>The people of Afghanistan shall have the right, in accordance with the provisions of the law, to form political parties, provided that:</p>	<p>Art. 35, To attain moral and material goals, the citizens of Afghanistan shall have the right to form associations in accordance with the provisions of the law.</p> <p>The people of Afghanistan shall have the right, in accordance with the provisions of the law, to form political parties, provided that:</p>	✓

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
<p>to form political parties, provided that:</p> <p>Their manifesto and charter shall not contravene the basics of the Holy religion of Islam and principles and values enshrined in this constitution;</p> <p>Their organizations and financial resources shall be transparent;</p> <p>They shall not have military or quasi-military aims and organizations; and</p> <p>They shall not be affiliated with foreign political parties or other sources.</p> <p>Formation and operation of a party on the basis of tribalism, parochialism, language, as well as religious sectarianism shall not be permitted. A party or association</p>		<p>Their manifesto and charter shall not contravene the basics of the Holy religion of Islam and principles and values enshrined in this constitution;</p> <p>Their organizations and financial resources shall be transparent;</p> <p>They shall not have military or quasi-military aims and organizations; and</p> <p>They shall not be affiliated with foreign political parties or other sources.</p> <p>Formation and operation of a party on the basis of tribalism, parochialism, language, as well as religious sects shall not be permitted. A party or association formed according to the provisions of the law shall not be dissolved</p>	<p>Their manifesto and charter shall not contravene the <i>tenets</i> of the Holy religion of Islam and principles and values enshrined in this constitution;</p> <p>Their organizations and financial resources shall be transparent;</p> <p>They shall not have military or quasi-military aims and organizations; and</p> <p>They shall not be affiliated with foreign political parties or other sources.</p> <p>Formation and operation of a party on the basis of tribalism, parochialism, language, as well as <i>Fiqhi</i> sects shall not be permitted. A party or association formed according to the provisions of the law shall not be dissolved</p>	

CDC Draft, March 2003	CRC Draft, October 2003	Government Revised Draft, November 2003	CLJ Draft, January 4, 2004	Final Version after adoption, Jan. 26, 2004
formed according to the provisions of the law shall not be dissolved without legal causes and the order of an authoritative court.		without legal causes and the order of an authoritative court.	without legal causes and the order of an authoritative court.	
Art. 41, Foreign individuals shall not have the right to own immovable property in Afghanistan. The sale of property to diplomatic missions of foreign countries and international organizations, to which Afghanistan is a party, shall be allowed in accordance with the provisions of the law.	✓	Art. 41, Foreign individuals shall not have the right to own immovable property in Afghanistan. <i>The lease of immovable property for the purpose of investment is allowed in accordance with law.</i> The sale of property to diplomatic missions of foreign countries and international organizations, to which Afghanistan is a party, shall be allowed in accordance with the provisions of the law.	✓	✓
Art. 42, Every Afghan shall pay taxes and duties to the state in accordance with the provisions of the law.	✓	Art. 42, Every Afghan shall pay taxes and duties to the state in accordance with the provisions of the law.	✓	✓

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<p>No taxes or duties shall be levied without legal representation. Tax rates and duties as well as the method of payment shall be determined, with due respect to social justice, by law. This provision shall also apply to foreign individuals and organizations.</p>		<p>No taxes or duties shall be levied without legal representation. Tax rates and duties as well as the method of payment shall be determined, with due respect to social justice, by law. This provision shall also apply to foreign individuals and organizations.</p> <p><i>All forms of paid taxes shall be transferred to a unified account of the state.</i></p>		
<p>Art. 43, Education is the right of all citizens of Afghanistan, which shall be offered for free by the state. To expand balanced education, provide mandatory intermediate education and abolish illiteracy throughout Afghanistan, the state shall design and implement effective programs and prepare</p>	✓	<p>Art. 43, Education is the right of all citizens of Afghanistan, which shall be offered for free <u>until the high school level</u> by the state. To expand balanced education and provide mandatory intermediate education, and abolish illiteracy throughout Afghanistan, the state shall design and implement effective programs and prepare</p>	<p>Art. 43, Education is the right of all citizens of Afghanistan, which shall be offered for free until the high school <u>bachelors</u> level by the state. To expand balanced education and provide mandatory intermediate education, the state shall enforce and implement effective programs and prepare the ground for teaching</p>	<p>Art. 43: Education is the right of all citizens of Afghanistan, which shall be offered up to the bachelors level in the <u>state educational institutes</u> free of charge by the state. To expand balanced education and provide mandatory intermediate education throughout Afghanistan, the state shall <u>plan</u> enforce and implement</p>

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the ground for teaching mother tongues in areas where they are spoken. The state is obliged to take necessary measures to improve the education of the nomads.		the ground for teaching mother tongues in areas where they are spoken. The state is obliged to take necessary measures to improve the education of the nomads.	mother tongues in areas where they are spoken.	effective programs and prepare the ground for teaching mother tongues in areas where they are spoken.
Art. 44, The state shall devise and implement a unified educational curriculum based on the tenets of the sacred religion of Islam, national culture, academic principles, and develop curricula for religious subjects for schools on the basis of existing Islamic sects in Afghanistan.	Art. 45, The state shall devise and implement a unified educational curriculum based on the tenets <i>basics</i> of the sacred religion of Islam, national culture, academic principles, and develop curricula for religious subjects for schools on the basis of existing Islamic sects in Afghanistan.	Art. 45, The state shall devise and implement a unified educational curricula based on the basics <i>tenets</i> of the sacred religion of Islam, national culture, academic principles, and develop curricula for religious subjects for schools on the basis of existing Islamic sects in Afghanistan.	✓	Art. 45: The state shall devise <i>plan</i> and implement a unified educational curricula based on the tenets of the sacred religion of Islam, national culture as well as academic principles, and develop curricula for religious subjects for schools on the basis of existing Islamic sects in Afghanistan.
Art. 46, The state shall enforce and implement effective programs for fostering knowledge, culture, literature and arts. The state shall guarantee the	✓	✓	✓	Art. 47: The state shall enforce and implement <i>plan</i> effective programs for fostering knowledge, culture, literature and arts. The state shall guarantee the copyrights

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copyrights of authors, inventors and discoverers, and shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.				of authors, inventors and discoverers, and shall encourage and protect scientific research in all fields, publicizing their results for effective use in accordance with the provisions of the law.
Art. 47, Work is the right of every Afghan. Working hours, paid holidays, employment and employee rights and related matters shall be regulated by the law. The main goal of laws regulating work is to reach a situation in which the rights and benefits of working classes are protected; the requirements of work and the relations between the employers and employees are regulated.	Art. 48, Work is the right of every Afghan. Working hours, paid holidays, employment and employee rights and related matters shall be regulated by the law. The main goal of laws regulating work is to reach a situation in which the rights and benefits of working classes are protected; the requirements of work and the relations between the employers and employees are regulated. <i>Choosing a profession is</i>	Art. 48, Work is the right of every Afghan. Working hours, paid holidays, employment and employee rights and related matters shall be regulated by the law. The main goal of laws regulating work is to reach a situation in which the rights and benefits of working classes are protected, the requirements of work be regulated and the relations between the employers and employees is regulated. Choosing a profession is free within the	✓	✓

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	<i>free within the provisions of the law.</i>	provisions of the law.		
Art. 48, Forced labor shall be forbidden. Active participation in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan.	Art. 49, Forced labor shall be forbidden. Active participation in times of war, disaster, and other situations that threaten public life and comfort shall be among the national duties of every Afghan. <i>Child work is prohibited.</i>	✓	✓	✓
Art. 49, Afghan nationals are accepted to the state institutions based on capacity and without any discrimination in accordance with law. Choosing a profession is free in accordance with the law.	Art. 50, <i>The State is obliged to take necessary measures to ensure a sound administration. Administrations perform their tasks in neutrality and in accordance with the law.</i> <i>Afghan nationals have the right to access information from the state administration.</i> Afghan nationals are accepted to the state institutions based on	Art. 50, The State is obliged to take necessary measures to ensure a sound administration. Administrations perform their tasks in neutrality and in accordance with the law. Afghan nationals have the right to access information from the state administration <i>in accordance with law.</i> <i>This right does not have any limits except</i>	Art. 50, The State is obliged to take necessary measures, <i>after the approval of the National Assembly,</i> to ensure a sound administration. Administrations perform their tasks in neutrality and in accordance with the law. Afghan nationals have the right to access information from the state administration in accordance with law.	✓

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	capacity and without any discrimination in accordance with law. Choosing a profession is free in accordance with the law.	<u>harming others' rights and public security.</u> Afghan nationals are accepted to the state institutions based on capacity and without any discrimination in accordance with law.	This right does not have any limits except harming others' rights and public security. Afghan nationals are accepted to the state institutions based on capacity and without any discrimination in accordance with law.	
Art. 55, No individual shall be allowed to manipulate the rights and liberties enshrined in this Constitution and act against independence, territorial integrity, sovereignty as well as national unity.	Art. 55, No individual shall be allowed to manipulate the rights and liberties enshrined in this Constitution and act against independence, territorial integrity, sovereignty as well as national unity.	<u>Art. 59, No individual shall be allowed to manipulate the rights and liberties enshrined in this Constitution and act against independence, territorial integrity, sovereignty as well as national unity.</u>	✓	✓
Art. 57, The President shall be the head of the state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the	Art. 59, The President shall be the head of the state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the	Art. 60, The President shall be the head of the state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the	Art. 60, The President shall be the head of the state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the	✓

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<p>provisions of this Constitution.</p>	<p>provisions of this Constitution.</p> <p><i>The President should have one Vice-President who should perform the tasks of the President in the absence of the President.</i></p>	<p>provisions of this Constitution.</p> <p><i>The President is responsible to the nation.</i></p> <p>The President should have one Vice-President who should perform the tasks of the President in the absence of the President.</p> <p><i>The President should announce the name of the Vice-President to the nation at the time of candidacy. The Vice-President performs the tasks of the President in the absence, death or resignation of the President.</i></p>	<p>provisions of this Constitution.</p> <p>The President is responsible to the nation.</p> <p>The President should have one <i>two</i> Vice-Presidents—<i>first and second</i>.</p> <p>The Presidential candidate should announce the names of the Vice-Presidents to the nation at the time of candidacy. The first Vice-President performs the tasks of the President in the absence, death or resignation of the President. <i>In the absence of the first Vice-President, the second Vice President performs these tasks.</i></p>	
<p>Art. 58, The President shall have one Vice-President who in the absence, resignation or death of the President</p>	<p>Art. 58, The President shall have one Vice-President who in the absence, resignation or death of the President</p>	<p>X</p>	<p>X</p>	<p>X</p>

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performs the duties of the President in accordance with this constitution.	performs the duties of the President in accordance with this constitution.			
Art. 59, The President shall be elected by receiving 51 percent of votes cast by voters through free, general, secret and direct voting for five years. If in the first round, none of the candidates get 51 percent of the votes, elections for the second round shall be held within one week from the date the election results are proclaimed, and, in this round, only two candidates who have received the highest number of votes in the first round shall participate. In the case that one of the presidential candidates dies during the first or second round of voting or after elections, but	Art. 60, The President shall be elected by receiving 51 percent <u>more than fifty percent</u> of votes cast by voters through free, general, secret and direct voting for five years. <u>The presidential term shall expire on 1st of Jawza of the fifth year after the elections. Elections for the new President shall be held within thirty to sixty days prior to the end of the presidential term.</u> If in the first round none of the candidates get 51 percent <u>gets more than fifty percent</u> of the votes, elections for the second round shall be held within one week <u>two weeks</u> from the date election results are	Art. 61, The President shall be elected by receiving more than fifty percent of votes cast by voters through free, general, secret and direct voting. The presidential term shall expire on 1 st of Jawza of the fifth year after the elections. Elections for the new President shall be held within thirty to sixty days prior to the end of the presidential term. If in the first round none of the candidates gets more than fifty percent of the votes, elections for the second round shall be held within two weeks from the date election results are proclaimed, and, in this round, only two candidates who have received the	Art. 61, The President shall be elected by receiving more than fifty percent of votes cast by voters through free, general, secret and direct voting. The presidential term shall expire on 1 st of Jawza of the fifth year after the elections. Elections for the new President shall be held within thirty to sixty days prior to the end of the presidential term. If in the first round none of the candidates gets more than fifty percent of the votes, elections for the second round shall be held within two weeks from the date election results are proclaimed, and, in this round, only two candidates who have received the	✓

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<p>prior to the declaration of results, re-election shall be held according to provisions of the law. The presidential elections should be held under the supervision of the Independent Commission for Overseeing Elections. This Commission should be established in accordance with the law to supervise any kind of elections in the country.</p>	<p>proclaimed, and, in this round, only two candidates who have received the highest number of votes in the first round shall participate. In the case that one of the presidential candidates dies during the first or second round of voting or after elections, but prior to the declaration of results, re-election shall be held according to provisions of the law.</p> <p>The presidential elections should be held under the auspices of the Independent Commission for Overseeing Elections. This Commission should be established in accordance with the law to supervise any kind of elections in the country.</p>	<p>highest number of votes in the first round shall participate. <u>In the second round, the candidate who obtains the majority of the votes should be declared the winner.</u></p> <p>In the case that one of the presidential candidates dies during the first or second round of voting or after elections, but prior to the declaration of results, re-election shall be held according to provisions of the law.</p> <p>The presidential elections should be held under the auspices of the Independent Commission for Overseeing Elections. This Commission should be established in accordance with the law to supervise any kind of elections in the country.</p>	<p>highest number of votes in the first round shall participate. In the second round, the candidate who obtains the majority of the votes should be declared the winner.</p> <p>In the case that one of the presidential candidates dies during the first or second round of voting or after elections, but prior to the declaration of results, re-election shall be held according to provisions of the law.</p> <p>The presidential elections should be held under the auspices of the Independent Commission for Overseeing Elections. This Commission should be established in accordance with the law to supervise any kind of elections in the country.</p>	
Art. 60, Elections for	Part of the above	✓	✓	✓

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<p>the new President should be held three months before the end of the term of the President. Law should regulate the way of the transfer of power. An individual cannot be appointed as President more than two times.</p>	<p>article Elections for the new President should be held three <i>two</i> months before the end of the term of the President. Law should regulate the way of the transfer of power. An individual cannot be appointed as President more than two times.</p>			
<p>Art. 61, In the case of the resignation, impeachment or death of the President, as well as an incurable illness impeding performance of duty, in three months new elections should be held. In this period, the Vice-President shall assume the authorities and duties of the President. The Vice-President, acting as interim President, cannot amend the Constitution.</p>	<p>Art. 67, In the case of the resignation, impeachment or death of the President, as well as an incurable illness impeding performance of duty, in three months new elections should be held. In this period, the Vice-President shall assume the authorities and duties of the President. The Vice-President, acting as interim President, cannot amend the Constitution; <i>the National Assembly cannot be dissolved and</i></p>	<p>Art. 67, In the case of the resignation, impeachment or death of the President, as well as an incurable illness impeding performance of duty, in three months new elections should be held. In this period, <i>the First Vice-President</i> shall assume the authorities and duties of the President. <i>The President shall personally tender resignation to the National Assembly.</i> <i>An authoritative medical</i></p>	<p>Art. 68: In the case that <i>any of the Vice-Presidents resign or die, another person shall be appointed by the President with the endorsement of the Wolesi Jirga. In the case of the simultaneous deaths of the President and the first Vice-President, the second Vice-President, the President of the Mishrano Jirga, the President of the Wolesi Jirga and the Foreign Minister shall succeed</i></p>	<p>✓</p>

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	<p><u>the Prime Minister and other Ministers cannot be fired and the Vice-President cannot call a referendum.</u></p>	<p><u>team assigned by the Supreme Court shall verify affirmation of an incurable illness. In such cases, elections for the new President shall be held within three months in accordance with Article 61 of the Constitution. The First Vice-President, acting as interim President, shall not perform the following duties:</u></p> <ol style="list-style-type: none"> <u>1. Amend the Constitution;</u> <u>2. Dismiss Ministers;</u> <u>3. Call a referendum.</u> <p><u>The Vice-Presidents can, according to the provisions of this Constitution, nominate themselves as presidential candidates. In the absence of the President, the duties of the First Vice-President</u></p>	<p><u>respectively and, in that order, and, according to Article 67 of this Constitution, shall assume the duties of the President.</u></p>	

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		<p><i>shall be determined by the President.</i></p> <p>The National Assembly cannot be dissolved and the Prime Minister and other Ministers cannot be fired and the Vice-President cannot call a referendum.</p>		
<p>Art. 62, A person who nominates himself as a President should have the following duties:</p> <p>1. The candidate and spouse shall be Afghan Muslim born of Afghan parents;</p> <p>2. Shall have higher education;</p> <p>3. Shall not be less than 40 and more than 70 years of age;</p> <p>4. Shall not have been accused of crimes and deprivation of civil rights; and</p> <p>5. Shall not have been</p>	<p>Art. 61, A person who nominates himself as a President should have the following duties:</p> <p>1. The candidate and spouse shall be Afghan Muslim born of Afghan parents <i>not holding other nationalities</i>;</p> <p>2. Should have higher education</p> <p>3. 2. Shall not be less than 40; and and more than 70 years of age</p> <p>4. Should not have been accused of crimes and deprivation of civil rights</p>	✓	✓	✓

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<p>accused of treason and crimes against humanity.</p> <p>These provisions also apply to the Vice President.</p>	<p>5. <u>3.</u> Shall not have been accused of treason and crimes against humanity and deprivation of civil rights by a court.</p> <p><i>No one can be appointed as President more than two times.</i></p> <p>These provisions also apply to the Vice President also.</p>			
<p>Art. 64, The President shall have the following authorities and duties:</p> <p>Supervise the implementation of the Constitution;</p> <p>Determine the fundamental lines of the policy of the country with the approval of the National Assembly;</p> <p>Be the Commander in Chief of the armed forces of Afghanistan;</p> <p>Declare war and peace</p>	<p>✓</p>	<p>Art. 64, The President shall have the following authorities and duties:</p> <p>Supervise the implementation of the Constitution;</p> <p>Determine the fundamental lines of the policy of the country with the approval of the National Assembly;</p> <p>Be Commander in Chief of the armed forces of Afghanistan;</p> <p>Declare war and peace with the endorsement of</p>	<p>Art. 64, The President shall have the following authorities and duties:</p> <p>Supervise the implementation of the Constitution;</p> <p>Determine the fundamental lines of the policy of the country with the approval of the National Assembly;</p> <p>Be Commander in Chief of the armed forces;</p> <p>Declare war and peace with the endorsement of the National Assembly;</p>	<p>✓</p>

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<p>with the endorsement of the National Assembly;</p> <p>Make necessary decisions to defend territorial integrity and preserve independence;</p> <p>Dispatch armed forces units outside of Afghanistan with the endorsement of the National Assembly;</p> <p>Appoint Ministers and the Attorney General on the approval of the National Assembly and fire them;</p> <p>Convene the Loya Jirga, except in the situation prescribed in Article 69 of this Constitution;</p> <p>Proclaim as well as terminate the state of emergency with the endorsement of the National Assembly;</p>		<p>the National Assembly;</p> <p>Make necessary decisions to defend territorial integrity and preserve independence;</p> <p>Dispatch armed forces units outside of Afghanistan with the endorsement of the National Assembly;</p> <p>Appoint Ministers and the Attorney General on the approval of the National Assembly and firing them;</p> <p>Convene the Loya Jirga, except in the situation prescribed in Article 69 of this Constitution;</p> <p>Proclaim as well as terminate the state of emergency with the endorsement of the National Assembly;</p> <p>Inaugurate the sessions of National Assembly and Loya Jirga;</p>	<p>Make necessary decisions to defend territorial integrity and preserve independence;</p> <p>Dispatch armed forces units outside of Afghanistan with the endorsement of the National Assembly;</p> <p>Appoint Ministers and the Attorney General, <i>the head of the Da Afghanistan Bank, the Director of the National Security Directorate, and the director of the Afghan Red Cross</i> on the approval of the National Assembly and fire them;</p> <p>Convene the Loya Jirga, except in the situation prescribed in Article 69 of this Constitution;</p> <p>Proclaim and terminate the state of emergency with the endorsement of the National Assembly;</p> <p>Inaugurate the sessions</p>	

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<p>Inaugurate the sessions of National Assembly and Loya Jirga;</p> <p>Accept the resignations of Vice-Presidents of the Republic;</p> <p>Appoint and dismiss and accept the resignation of the Prime Minister;</p> <p>Appoint members of the Supreme Court subject to the approval of the National Assembly;</p> <p>Appoint, dismiss and retire high ranking state officials;</p> <p>Appoint the members of the Supreme Constitutional Court;</p> <p>Appoint Afghan foreign missions' members;</p> <p>Accept the credentials of foreign governments' missions</p>		<p>Accept the resignations of Vice-Presidents of the Republic;</p> <p>Appoint and dismiss and accept the resignation of the Prime Minister;</p> <p>Appoint members of the Supreme Court subject to the approval of the National Assembly;</p> <p>Appoint, dismiss and retire high ranking state officials;</p> <p>Appoint the members of the Supreme Constitutional Court;</p> <p>Appoint Afghan foreign missions' members;</p> <p>Accept the credentials of foreign governments' missions to Afghanistan;</p> <p>Sign law and decrees;</p> <p>Issue credential letters for the conclusion of international treaties in accordance with the</p>	<p>of National Assembly and Loya Jirga;</p> <p>Accept the resignations of Vice-Presidents of the Republic;</p> <p>Appoint the Chief Justice and members of the Supreme Court subject to the approval of the National Assembly <i>parliament</i>;</p> <p>Appoint, dismiss and retire high ranking state officials;</p> <p>Appoint Afghan foreign missions' members;</p> <p>Accept the credentials of foreign governments' missions to Afghanistan;</p> <p>Sign law and decrees</p> <p>Issue credential letters for the conclusion of international treaties in accordance with the provisions of the law;</p> <p>Reduce and pardon penalties in accordance</p>	

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<p>to Afghanistan;</p> <p>Sign law and decrees;</p> <p>Issue credential letters for the conclusion of international treaties in accordance with the provisions of the law;</p> <p>Reduce and pardon penalties in accordance with law;</p> <p>Bestow medals, insignias as well as honorary titles in accordance with the provisions of law;</p> <p>Establish commissions to improve the administration of the country in accordance with the provisions of law; and</p> <p>Other powers that the Constitution prescribes to the President.</p>		<p>provisions of the law;</p> <p>Reduce and pardon penalties in accordance with law;</p> <p>Bestow medals, insignias and honorary titles in accordance with the provisions of the law;</p> <p>Establish commissions to improve the administration of the country in accordance with the provisions of the law; and</p> <p>Other powers that the Constitution prescribes to the President.</p>	<p>with law;</p> <p>Bestow medals, insignias as well as honorary titles in accordance with the provisions of the law;</p> <p>Establish commissions to improve the administration of the country in accordance with the provisions of the law; and</p> <p>Other powers that the Constitution prescribes to the President.</p>	
<p>Art. 66, On important national, political, social and economic</p>	<p>Art. 65, On important national, political, social and economic issues the</p>	<p>Art. 65, On important national, political, social and economic issues the</p>	<p>✓</p>	<p>✓</p>

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<p>issues the President can call for a referendum of the people of Afghanistan.</p>	<p>President can call for a referendum of the people of Afghanistan.</p> <p><u>Law should regulate referring to the referendum.</u></p>	<p>President can call for a referendum of the people of Afghanistan. Law should regulate referring to referendum.</p> <p><u>Referring to the referendum shall not be contrary to the provisions of this constitution or demanding its amendment.</u></p>		
<p>Art. 68, Accusations of crimes against humanity, national treason as well as a crime against the President shall be demanded by one-third of all members of the Wolesi Jirga. If this demand is approved by two-thirds of the Wolesi Jirga, the Wolesi Jirga shall convene the Loya Jirga within one month.</p>	<p>✓</p>	<p>Art. 68,</p> <p>Accusations of crimes against humanity, national treason as well as a crime against the President shall be demanded by one-third of all members of the Wolesi Jirga. If this demand is approved by two-thirds of the Wolesi Jirga, the Wolesi Jirga shall convene the Loya Jirga within one month.</p> <p>If the Loya Jirga, by</p>	<p>Art. 69, <u>The President is responsible to the nation.</u> Accusations of crimes against humanity, national treason as well as a crime against the President shall be demanded by one-third of all members of the Wolesi Jirga. If this demand is approved by two-thirds of the Wolesi Jirga, the Wolesi Jirga shall convene the Loya Jirga within one month.</p>	<p>✓</p>

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<p>If the Loya Jirga, by two-thirds majority, approves the accusation, the President shall be released from duty and the issue shall be referred to a special court, which shall be comprised of the President of the Mishrano Jirga, three members of the Wolesi Jirga, and three members of the Supreme Court appointed by the Loya Jirga. The case shall be presented by the individual appointed by the Loya Jirga. In such a situation the provisions of Art. 61 of this Constitution shall be applied.</p> <p>The President cannot dissolve the National Assembly when the President suffers from</p>		<p>two-thirds majority, approves the accusation, the President shall be released from duty and the issue shall be referred to a special court, which shall be comprised of the President of the Mishrano Jirga, three members of the Wolesi Jirga, and three members of the Supreme Court appointed by the Loya Jirga. The case shall be presented by the individual appointed by the Loya Jirga. In such a situation the provisions of Art. 61 <u>67</u> of this Constitution shall be applied.</p> <p>The President cannot dissolve the NA when the President suffers from accusation.</p>	<p>If the Loya Jirga, by two-thirds majority, approves the accusation, the President shall be released from duty and the issue shall be referred to a special court, which shall be comprised of the President of the Mishrano Jirga, three members of the Wolesi Jirga, and three members of the Supreme Court appointed by the Loya Jirga. The case shall be presented by the individual appointed by the Loya Jirga. In such a situation the provisions of Art. 67 of this Constitution shall be applied.</p>	

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accusation.				
<p>Art. 70, The government is the supreme executive organ of the Islamic Republic of Afghanistan. The government is comprised of a Prime Minister, Vice-Prime Minister and other Ministers. In the absence of the Prime Minister, his deputy performs the Prime Minister's tasks. Law shall determine the number of Ministers.</p>	<p>Art. 70, The government is the supreme executive organ of the Islamic Republic of Afghanistan. The government is comprised of a Prime Minister, Vice-Prime Minister and other Ministers. In the absence of the Prime Minister, his deputy performs the Prime Minister's tasks. The number of Ministers will be determined by law.</p>	<p>Art. 71, The government is the supreme executive organ of the Islamic Republic of Afghanistan. The government is comprised of a Prime Minister, Vice Prime Minister and other Ministers. <u>The President on the approval of the Parliament shall appoint Ministers. Law shall regulate the number and duties of the Ministers.</u></p>	<p>Art. 71, <u>The government is comprised of Ministers who perform their duties under the supervision of the President.</u> The government is the supreme executive organ of the Islamic Republic of Afghanistan. The government is comprised of the Ministers. The President on the approval of the Wolesi Jirga appoints Ministers. Law shall regulate the number and duties of the Ministers.</p>	✓
<p>Art. 71, A person appointed as a Prime Minister, Vice Prime Minister or Minister shall have the following qualifications:</p> <p>1. Shall be an Afghan national born of Afghan parents;</p>	<p>Art. 71, A person appointed as a Prime Minister, Vice Prime Minister or Minister shall have the following qualifications:</p> <p>1. Shall be an Afghan national born of Afghan parents;</p>	<p>Art. 72, A person appointed as a Prime Minister, Vice Prime Minister or Minister shall have the following qualifications:</p> <p>1. Shall be an Afghan national; born of Afghan parents.</p>	<p>Art. 72, The individual appointed as Minister shall have the following qualifications:</p> <p>Shall have only the citizenship of Afghanistan. <u>If the ministerial candidate has the citizenship of another country as well,</u></p>	✓

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<p>2. Shall not be less than 35 and more than 65 years of age;</p> <p>3. Shall not have been accused of crimes and deprivation of civil rights by a court;</p> <p>4. Shall not have been convicted of treason or crimes against humanity; and</p> <p>5. Shall have higher education, a good reputation and work experience,</p>	<p>2. Shall not be less than 35 and more than 65 years of age;</p> <p>3. Shall not have been accused of crimes and deprivation of civil rights by a court;</p> <p>4. Shall not have been convicted of treason or crimes against humanity; and</p> <p>5. Shall have higher education, a good reputation and work experience,</p>	<p>2. Shall not be less than 35 years of age;</p> <p>3. Shall not have been accused of crimes and deprivation of civil rights by a court;</p> <p>4. Shall not have been convicted of treason or crimes against humanity; and</p> <p>5. Shall have higher education, a good reputation and work experience,</p>	<p><i><u>the Parliament shall have the right to approve or reject the nomination;</u></i></p> <p>Shall have higher education, work experience as well as a good reputation;</p> <p>Shall not be less than thirty five years of age; and</p> <p><i><u>Shall not have been convicted of crimes against humanity, a criminal act or deprivation of civil rights by a court.</u></i></p>	
<p>Art. 72, The Prime Minister and Ministers can be appointed from the National Assembly or outside. A person appointed as a prime minister from the National Assembly shall lose membership in the National Assembly.</p>	<p>✓</p>	<p>Art. 73, The Prime Minister and Ministers can be appointed from the National Assembly or outside. A person appointed as a minister from the National Assembly shall lose membership in the National Assembly.</p>	<p>✓</p>	<p>✓</p>

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<p>Art. 73, The President shall appoint the Prime Minister. The Prime Minister shall present the policy and members of the government to parliament. If the Prime Minister gets a vote of confidence, the President shall issue a decree appointing the Prime Minister and members of the government. If the parliament does not give vote of confidence, the parliament shall elect another person as a Prime Minister and introduce him to the President. If the parliament fails to elect a person in three days, the President shall issue a decree appointing his nominated Prime Minister.</p>	<p>Art. 73, The President shall appoint the Prime Minister by a decree. The Prime Minister presents the policy and members of the government to parliament. If the Prime Minister gets a vote of confidence, the President issues a decree appointing the Prime Minister and member of the government. If the parliament does not give vote of confidence, the parliament should elect another person as a Prime Minister and introduce him to the President. If the parliament fails to elect a person in three days, the President issues a decree appointing his nominated Prime Minister. <i>The Ministers are appointed on the suggestion of the Prime Minister and approval of</i></p>	<p>Art. 73, The President appoints the Prime Minister through a decree. The Ministers are appointed on the suggestion of the Prime Minister and approval of the President. The Prime Minister presents the government and his policy to the national assembly.</p>	<p>X</p>	<p>X</p>

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	<i>the President. The Prime Minister presents the government and his policy to the national assembly.</i>			
<p>Art. 74, Before assuming office, the Prime Minister and the Ministers shall take the following oath in the presence of the President:</p> <p>“In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty that I shall protect the Holy religion of Islam, respect the Constitution and other laws of Afghanistan, safeguard the rights of citizens as well as the independence, territorial integrity and national unity of the people of Afghanistan, and, in all my deeds consider the</p>	✓	<p>Art. 74, Before assuming office, the Prime Minister and the ministers shall take the following oath in the presence of the President:</p> <p>“In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty that I shall protect the Holy religion of Islam, respect the Constitution and other laws of Afghanistan, safeguard the rights of citizens as well as the independence, territorial integrity and national unity of the people of Afghanistan, and, in all my deeds consider the Almighty’s presence,</p>	✓	✓

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Almighty’s presence, performing the entrusted duties honestly.”		performing the entrusted duties honestly.”		
Art. 75, The government has the duty to execute the laws and final decisions of the courts; preserve the independence, defend the territorial integrity and safeguard the interests and prestige of Afghanistan in the international community; maintain public law and order and eliminate every kind of administrative corruption; prepare the budget, regulate the financial conditions of the state and protect public wealth; devise and implement social, cultural, economic and technological development	✓	Art. 75, The government has the duty to execute the laws and final decisions of the courts; preserve the independence, defend the territorial integrity and safeguard the interests and prestige of Afghanistan in the international community; maintain public law and order and eliminate every kind of administrative corruption; prepare the budget, regulate the financial conditions of the state and protect public wealth; devise and implement social, cultural, economic and technological development programs;	✓	✓

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<p>programs; report to the National Assembly at the end of the fiscal year, about the tasks achieved as well as important programs for the new fiscal year; suggest the issuance of money after the permission of the High Council of the Economy. The High Council of the Economy and financial affairs should be established by law; and perform other duties that, in accordance with this Constitution and other laws, fall within the government's responsibilities.</p>		<p>report to the National Assembly at the end of the fiscal year, about the tasks achieved as well as important programs for the new fiscal year; suggest the issuance of money after the permission of the High Council of the Economy. The High Council of the Economy and financial affairs should be established by law; and financial affairs; and perform other duties that, in accordance with this Constitution and other laws, fall within the government's responsibilities.</p>		
<p>Art. 77, The Prime Minister shall head the sessions of the Ministers and administer and instruct the activities of the government. The</p>	<p>Art. 77, The Prime Minister shall head the sessions of the Ministers and administer and instruct the activities of the government. <i>If the President deems</i></p>	<p>Art. 77, The Prime Minister heads the sessions of the Ministers and administer and instruct the activities of the government. If the President deems</p>	<p>X</p>	<p>X</p>

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preservation of relations of the government with the President and National Assembly is the duty of the Prime Minister.	<i>necessary, he can head the sessions of the Ministers.</i> The preservation of relations of the government with the President and National Assembly is the duty of the Prime Minister.	necessary, he can head the sessions of the Ministers. The preservation of relations of the government with the President and National Assembly is the duty of the Prime Minister.		
Art. 78, The Ministers shall perform their duties as the heads of the administrative units under the direction of the Prime Minister and within the framework of this Constitution and as other laws prescribe.	✓	Art. 77, The Ministers shall perform their duties as the heads of the administrative units under the direction of the Prime Minister and within the framework of this Constitution and as other laws prescribe. <i>The Ministers are responsible to the President and the Wolesi Jirga for the specific duties.</i>	✓	✓
Art. 79, The Prime Minister and the Ministers shall be responsible to the President and Wolesi Jirga for their specified	✓	Art. 79, The Prime Minister and the Ministers shall be responsible to the President and Wolesi Jirga for their specified	See Art. 77	See Art. 77

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duties.		duties.		
<p>Art. 80, The government falls in the following situations:</p> <p>Death or resignation of the Prime Minister;</p> <p>Withholding of confidence vote by the National Assembly;</p> <p>Accusation of the Prime Minister or half of the Ministers of treason or other crimes in accordance with art. 72 of this constitution;</p> <p>The end of the presidential term; and</p> <p>Dissolution of the National Assembly and the end of legislative period.</p> <p>The government in the final two situations ends with the first meeting of the new legislation. If the government falls</p>	<p>Art. 80, The government falls in the following situations:</p> <p>Death or resignation of the Prime Minister;</p> <p>Withholding of confidence vote by the National Assembly;</p> <p>Accusation of the Prime Minister or half of the ministers of treason or other crimes in accordance with Art. 81 of this constitution;</p> <p>The end of the presidential term; and</p> <p>Dissolution of the National Assembly and the end of legislative period.</p> <p><i>In case of the death of the Prime Minister, one minister on the order of the President performs the duties of the Prime Minister until the</i></p>	<p>Art. 80, The government falls in the following situations:</p> <p>Death or resignation of the Prime Minister;</p> <p>Withholding of confidence vote by the National Assembly;</p> <p>Accusation of the Prime Minister or half of the ministers of treason or other crimes in accordance with Art. 81 of this constitution;</p> <p>The end of the presidential term; and</p> <p>In case of the death of the Prime Minister, one minister on the order of the President performs the duties of the President until the creation of the new government.</p> <p>If the government falls as a result of the</p>	<p>X</p>	<p>X</p>

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<p>because of the accusation of the Prime Minister and other Ministers of treason; the President appoints another person to form a government who should go to the Parliament for a vote of confidence and shall function until the end of the legislative period. In the remaining instances the government functions until the election of the new Parliament.</p>	<p><u>creation of the new government.</u> <u>If the government falls as a result of the accusation or commitment of treason, crimes against humanity or other crimes under Art. 81, the President in accordance with Article 72 issues a decree creating a new government. In other situations, the government continues its work until the creation of a new government.</u></p>	<p>accusation or commitment of treason, crimes against humanity or other crimes under Art. 81, the President in accordance with Article 72 issues a decree creating a new government. In other situations, the government continues its work until the creation of a new government.</p>		
<p>Art. 81, The no-confidence vote on a minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the Parliament.</p>	<p>✓</p>	<p>Article 81 became part of another article [article 92 in the Final Version]</p>	<p>✓</p>	<p>✓</p>
<p>Art. 82, If more than</p>	<p>✓</p>	<p>Art. 82, If more than</p>	<p>✓</p>	<p>Art. 78, If a Minister is</p>

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<p>one-third of the members of the parliament demand the trial of the Prime Minister half or more than half of the ministers for treason, the parliament should adopt this demand by a two thirds majority, the government falls and the case goes to a special court. Law should regulate the organization of this court. This provision also applies to cases in which one or less than half of the ministers are accused of such crimes. In this case the matter goes to the court and the accused are sacked of their positions.</p>		<p>one third of the members of the parliament demands the trial of the Prime Minister half or more than half of the ministers for treason, the parliament should adopt this demand by a two thirds majority, the government falls and the case goes to a special court. The organization of this court should be regulated by law. This provision also applies to cases in which one or less than half of the ministers are accused of such crimes. In this case the matter goes to the court and the accused are sacked of their positions. If a minister is accused of treason or other crimes, the case goes to a special court observing Article 134 of the Constitution.</p>		<p>accused of <i>crimes against humanity, national</i> treason or other crimes, the case goes to a special court observing Article 134 of the Constitution.</p>
Art. 84, The Prime	✓	Art. 80, The Prime	✓	✓

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Minister and other ministers shall not use their positions for linguistic, sectarian, tribal, religious or partisan purposes.		Minister and other ministers shall not use their positions for linguistic, sectarian, tribal, religious or partisan purposes.		
<p>Art. 85, The National Assembly of the Islamic Republic of Afghanistan, as the highest legislative organ, shall manifest the will of its people as well as represent the entire nation.</p> <p>While being elected from a certain district, every member of the Assembly, when voting, shall judge according to the general interests as well as the supreme benefits of the people of Afghanistan.</p>	<p>Art. 84, The National Assembly of the Islamic Republic of Afghanistan, as the highest legislative organ, shall manifest the will of its people as well as represent the entire nation.</p> <p>While being elected from a certain district, Every member of the Assembly, when voting, shall judge according to the general interests as well as the supreme benefits of the people of Afghanistan.</p>	✓	✓	✓
<p>Art. 86, The National Assembly consists of two houses: the Wolesi Jirga and the Mishrano Jirga..</p>	<p>Art. 85, The National Assembly consists of two houses: the Wolesi Jirga and the Mishrano Jirga. <i>No one can be a</i></p>	✓	✓	✓

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	<i>member of both houses at one time.</i>			
<p>Art. 87, The people shall elect the members of the Wolesi Jirga through free, general, secret and direct elections for five years. For this purpose each province of Afghanistan shall be one electoral district and members shall be elected based on population. The candidate with more votes in his district shall be considered the winner. The date of the election to the Wolesi Jirga and other matters related to it shall be regulated by law.</p>	<p>Art. 86, The people through free, general, secret and direct balloting shall elect members of the Wolesi Jirga for five years. For this purpose each province of Afghanistan is one electoral district and members should be elected based on population. The candidate with more votes in his district would be considered winner. The date of the election to the Wolesi and other matters related to it should be regulated by law.</p> <p><i>The work period of the Wolesi Jirga shall terminate, after the disclosure of the results of the elections, on the 1st of Saratan of the fifth year and the new</i></p>	<p>Art. 86, The people through free, general, secret and direct balloting shall elect members of the Wolesi Jirga.</p> <p>The work period of the Wolesi Jirga shall terminate, after the disclosure of the results of the elections, on the 1st of Saratan of the fifth year and the new parliament shall commence work. The elections for members of the Wolesi Jirga shall be held shall not be held in less than 30 days and more than 60 days <u>30-60 days</u> prior to the expiration of the term of the Wolesi Jirga.</p> <p>The number of the members of the Wolesi Jirga shall be proportionate to the</p>	<p>Art. 83, The people through free, general, secret and direct balloting shall elect Members of the Wolesi Jirga.</p> <p>The work period of the Wolesi Jirga shall terminate, after the disclosure of the results of the elections, on the 1st of Saratan of the fifth year and the new parliament shall commence work. The elections for members of the Wolesi Jirga shall be 30-60 days prior to the expiration of the term of the Wolesi Jirga.</p> <p>The number of the members of the Wolesi Jirga shall be proportionate to the population of each constituency, 250 individuals maximum.</p>	<p>✓</p>

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	<p><u>parliament shall commence work. The elections for members of the Wolesi Jirga shall not be held in less than 30 days and more than 60 days prior to the expiration of the term of the Wolesi Jirga.</u></p> <p><u>The number of the members of the Wolesi Jirga shall be proportionate to the population of each constituency, between 220 and 250 individuals. Electoral constituencies as well as other related issues shall be determined by the elections law. The elections law shall adopt measures to attain, through the electoral system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at</u></p>	<p>population of each constituency, between 220 and 250 individuals <u>maximum</u>. Electoral constituencies as well as other related issues shall be determined by the elections law. The elections law shall adopt measures to attain, through the electoral system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least one female shall be the elected members of the Wolesi Jirga from each province.</p>	<p>Electoral constituencies as well as other related issues shall be determined by the elections law. The elections law shall adopt measures to attain, through the electoral system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least one <u>two</u> females shall be the elected members of the Wolesi Jirga from each province.</p>	

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	<i>least one females shall be the elected members of the Wolesi Jirga from each province.</i>			
<p>Art. 88, Members of the Mishrano Jirga shall be elected and appointed as follows:</p> <p>From amongst each provincial council members, one individual shall be elected by the respective council for a four year term;</p> <p>From amongst district councils of each province, one individual shall be elected by the respective councils, for a three year term; and</p> <p>The remaining one third of the members shall be appointed by the President for a five year term, from amongst experts and</p>	<p>Art. 87, Members of the Mishrano Jirga shall be elected and appointed as follows:</p> <p>From amongst each provincial council members, one individual shall be elected by the respective council for a four year term;</p> <p>From amongst district councils of each province, one individual shall be elected by the respective councils, for a three year term; and</p> <p>The remaining one third of the members shall be appointed by the President, for a five year term, from amongst experts and experienced personalities. <i>Half of the appointed members</i></p>	✓	<p>Art. 84, Members of the Mishrano Jirga shall be elected and appointed as follows:</p> <p>From amongst each provincial council members, one individual shall be elected by the respective council for a four year term;</p> <p>From amongst district councils of each province, one individual shall be elected by the respective councils, for a three year term; and</p> <p>The remaining one third of the members shall be appointed by the President, for a five year term, from amongst experts and experienced personalities, <i>including two members from</i></p>	✓

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<p>experienced personalities.</p> <p>A person appointed to the Mishrano Jirga loses his membership in the related councils and another person should be elected in their place in accordance with Art. 153 and 155</p>	<p><u>should be women.</u></p> <p>A person appointed to the Mishrano Jirga loses his membership in the related Council and another person should be elected in their place in accordance with Art. 153 and 155</p>		<p><u>amongst the impaired and handicapped, as well as two from the nomads.</u></p> <p>The President shall appoint fifty percent of these individuals from amongst women. The individual selected as a member of the Mishrano Jirga shall lose membership to the related Council, and, another individual shall be appointed in accordance with Art. 153 and 155 <u>the provisions of the law.</u></p>	
<p>Art. 89, An individual who becomes a candidate or appointed to the membership of the National Assembly, in addition to the completion of the conditions of the election, shall have the following qualifications:</p>	<p>Art. 89, An individual who becomes a candidate or appointed to the membership of the National Assembly, in addition to the completion of the conditions of the election, shall have the following qualifications:</p> <p>Shall be a citizen of</p>	<p>Art. 85, An individual who becomes a candidate or appointed to the membership of the National Assembly, in addition to the completion of the conditions of the election, shall have the following qualifications:</p> <p>Shall be a citizen of</p>	<p>Art. 85, An individual who becomes a candidate or appointed to the membership of the National Assembly, in addition to the completion of the conditions of the election, shall have the following qualifications:</p> <p>Shall be a citizen of</p>	<p>✓</p>

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<p>Shall be a citizen of Afghanistan or shall have obtained citizenship of the state of Afghanistan at least ten years prior to candidacy or appointment date;</p> <p>Shall not have been convicted of crimes against humanity, as well as a crime or deprivation of civil rights by a court; and</p> <p>Shall have completed twenty-five years of age on the candidacy date for the Wolesi Jirga, and thirty years on the candidacy date or appointment to the Mishrano Jirga.</p> <p>The members of the Wolesi Jirga should at least be high school graduates.</p>	<p>Afghanistan or shall have obtained citizenship of the state of Afghanistan at least ten years prior to candidacy or appointment date not having other nationality;</p> <p>Shall not have been convicted of crimes against humanity, as well as a crime or deprivation of civil rights by a court; and</p> <p>Shall have completed twenty-five <u>thirty</u> years of age on the candidacy date for the Wolesi Jirga, and thirty <u>forty</u> years on the candidacy date or appointment to the Mishrano Jirga.</p> <p>The members of the Wolesi Jirga should at least be high school graduates</p>	<p>Afghanistan or shall have obtained citizenship of the state of Afghanistan at least ten years prior to candidacy or appointment date not having other nationality;</p> <p>Shall not have been convicted of crimes against humanity, as well as a crime or deprivation of civil rights by a court; and</p> <p>Shall have completed twenty-five thirty years of age on the candidacy date for the Wolesi Jirga, and <u>thirty-five</u> forty years on the candidacy date or appointment to the Mishrano Jirga.</p>	<p>Afghanistan or shall have obtained citizenship of the state of Afghanistan at least ten years prior to candidacy or appointment date; not having other nationality;</p> <p>Shall not have been convicted of crimes against humanity, as well as a crime or deprivation of civil rights by a court; and</p> <p>Shall have completed twenty-five years of age on the candidacy date for the Wolesi Jirga, and thirty-five on the candidacy date or appointment to the Mishrano Jirga.</p>	
<p>Art. 90, The Prime Minister, Ministers,</p>	<p>Art. 90, The Prime Minister, Ministers,</p>	<p>X</p>	<p>X</p>	<p>X</p>

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judges, military officers and other governmental workers cannot become members of the National Assembly unless they resign from their posts prior to candidacy. No one can become a member of the both houses at one time.	judges, military officers and other governmental workers cannot become members of the National Assembly unless they resign from their posts prior to candidacy. No one can become a member of the both houses at one time.			
Art. 91, A Commission comprised of representatives from the Supreme Court, the Constitutional Court, the Election Commission and the Attorney General shall review the election credentials of the candidates to the Wolesi Jirga.	Art. 89, A Commission comprised of representatives from the Supreme Court, the Constitutional Court, the Election Commission and the Attorney General shall review the election credentials of the candidates to the Wolesi Jirga.	Art. 86, A Commission comprised of representatives from the Supreme Court, the Election Commission and the Attorney General <i>The Independent Commission for the Supervision of Elections</i> should review the election credentials of the candidates to the Wolesi Jirga.	✓	✓
Art. 96, The Wolesi Jirga shall have the following special	Art. 91, The Wolesi Jirga shall have the following special	✓	✓	✓

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<p>authorities:</p> <p>Decision-making authority on granting or not granting a vote of confidence to ministers; and</p> <p>Decision-making authority on the development programs as well as the state budget in cases of disagreement between the two houses.</p>	<p>authorities:</p> <p>Decision-making authority on granting or not granting a vote of confidence to Ministers; and</p> <p>Decision-making authority on the development programs as well as the state budget in cases of disagreement between the two houses.</p> <p><i>The approval of appointments shall be in accordance with this constitution.</i></p>			
<p>Art. 99, Proposals for drafting laws shall be first submitted to the Wolesi Jirga by the government or the Supreme Court. The Wolesi Jirga cannot postpone the proposal for more than two months. The Wolesi Jirga, after approving</p>	<p>✓</p>	<p>Art. 97, Proposals for drafting laws shall be first submitted to the Wolesi Jirga by the government or the Supreme Court. The Wolesi Jirga can postpone the proposal for more than two months.</p> <p><i>The Wolesi Jirga, after</i></p>	<p>✓</p>	<p>✓</p>

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<p>the proposed draft, shall send it to the Mishrano Jirga.</p> <p>The Mishrano Jirga shall decide on it within one month. If the proposal is rejected by one of the houses, it shall be included in the agenda of the house to which the suggestion is made after the approval of ten members</p>		<p><i>discussing the draft proposal, either approves or rejects it.</i></p> <p><i>The Wolesi Jirga cannot postpone the draft proposal for more than one month.</i></p> <p>The Wolesi Jirga after approving the proposed draft shall send it to the Mishrano Jirga.</p> <p>The Mishrano Jirga shall decide on it within one month fifteen days. If the proposal is rejected by one of the houses, it should be included in the agenda of the house to which the suggestion is made after the approval of ten members</p> <p><i>The Wolesi Jirga shall prioritize laws, international treaties and developmental programs proposed by the government which demands immediate</i></p>		

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		<p><i>considerations.</i></p> <p><i>If drafting a law is proposed by ten members of either house, after approval of one-fifth of the members of that house, it shall be included in the agenda of the concerned house.</i></p>		
<p>Art. 101, The Mishrano shall present the government budget and developmental plans to the Wolesi Jirga. The decision of the Wolesi Jirga shall be final after the signature of the President without presenting it to the Mishrano Jirga. If, for some reason, the adoption of the budget does not take place at the beginning of the financial year, the budget of the previous year shall be in force. The government is</p>	<p>Art. 102, The Mishrano shall present the government budget and developmental plans to the Wolesi Jirga along with its advisory views.</p> <p>The decision of the Wolesi Jirga shall be implemented without presentation to the Mishrano Jirga, after endorsement by the President. If, for some reason, the budget is not approved before the beginning of the new fiscal year, the budget of the previous year shall be applied pending the passage of the new</p>	<p>Art. 98, The Mishrano shall present the government budget and developmental plans to the Wolesi Jirga along with its advisory views.</p> <p>The decision of the Wolesi Jirga shall be implemented without presentation to the Mishrano Jirga, after endorsement by the President. If for some reasons the budget is not approved before the beginning of the new fiscal year, the budget of the year before shall be applied pending the passage of the new</p>	✓	✓

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<p>responsible to present matters related to the previous year's budget to the Wolesi Jirga one month before the new budget.</p>	<p>budget. <i>The Government shall present, during the fourth quarter of the financial year, the budget for the next year, with the brief account of the current year budget, to the National Assembly. The precise account of the previous year's financial budget shall be presented to the National Assembly during the next six months according to the provisions of the law. The Wolesi Jirga shall not delay approval of the budget for more than one month after receiving it and give permission to obtain or grant loans not included in the budget, for more than fifteen days.</i></p>	<p>budget. The government shall present, during the fourth quarter of the financial year, the budget for the next year, with the brief account of the current year budget, to the National Assembly. The precise account of the previous year's financial budget shall be presented to the National Assembly during the next six months according to the provisions of the law. The Wolesi Jirga shall not delay approval of the budget for more than one month after receiving it and give permission to obtain or grant loans not included in the budget, for more than fifteen days.</p> <p><i>If the Wolesi Jirga does not decide in 15 days to obtain or grant loans, the proposal is considered approved.</i></p>		

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<p>Art. 102, In cases where matters related to public security, territorial integrity and independence of the country are at issue in the meeting of the National Assembly, the meeting cannot end before adopting the measures.</p>	<p>✓</p>	<p>Art. 99, In cases where matters related to public security, territorial integrity, independence and <i>developmental programs</i> of the country are at issue in the meeting of the National Assembly, the meeting cannot end before adopting the measures.</p>	<p>✓</p>	<p>Art. 99, In cases where matters related to public security, territorial integrity, independence <i>the annual budget, or</i> developmental programs of the country are at issue in the meeting of the National Assembly, the meeting cannot end before adopting the measures.</p>
<p>Art. 103, If one House rejects decisions of the other, a joint commission comprised of an equal number of members from each House shall be formed to solve the difference. The decision of the commission, after endorsement by the President, shall be enforced. If the joint commission does not solve the difference, the decision shall be considered rejected. In</p>	<p>Art. 103, If one House rejects decisions of the other, a joint commission comprised of an equal number of members from each House shall be formed to solve the difference. The decision of the commission, after endorsement by the President, shall be enforced. If the joint commission does not solve the difference, the decision shall be considered rejected. In</p>	<p>Art. 100, If one House rejects decisions of the other, a joint commission comprised of an equal number of members from each House shall be formed to solve the difference. The decision of the commission, after endorsement by the President, shall be enforced. If the joint commission does not solve the difference, the decision shall be considered rejected. In</p>	<p>Art. 100, If one House rejects decisions of the other, a joint commission comprised of an equal number of members from each House shall be formed to solve the difference. The decision of the commission, after endorsement by the President, shall be enforced. If the joint commission does not solve the difference, the decision shall be considered rejected. <i>In</i></p>	<p>✓</p>

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<p>such a situation, the Wolesi Jirga shall pass it with two-thirds majority in its next session. This decision, without submission to the Mishrano Jirga, shall be promulgated once endorsed by the President.</p>	<p>such a situation, the Wolesi Jirga shall pass it with two-thirds majority in its next session. This decision, without submission to the Mishrano Jirga, shall be promulgated once endorsed by the President.</p> <p><i><u>If the approval comes from the Wolesi Jirga, it can adopt it in its next session by majority vote, the decision is considered final without presenting it to the Mishrano Jirga after the endorsement of the President.</u></i></p> <p><i><u>If the disagreement of the two chambers concerns a financial law, the Wolesi Jirga can approve the proposal by majority votes. This decision is final after the approval of the President without</u></i></p>	<p>such a situation, the Wolesi Jirga shall pass it with two-thirds majority in its next session. This decision, without submission to the Mishrano Jirga, shall be promulgated once endorsed by the President.</p> <p>If the approval comes from the Wolesi Jirga, it can adopt it in its next session by majority vote, the decision is considered final without presenting it to the Mishrano Jirga after the endorsement of the President.</p> <p>If the disagreement of the two chambers concerns a financial law, the Wolesi Jirga can approve the proposal by majority vote. This decision is final after the approval of the President without presenting it to</p>	<p><i><u>such a situation, the Wolesi Jirga shall pass it with two-thirds majority in its next session. This decision, without submission to the Mishrano Jirga, shall be promulgated once endorsed by the President.</u></i></p> <p>If the approval comes from the Wolesi Jirga, it can adopt it in its next session on majority votes, the decision is considered final without presenting it to the MJ after the endorsement of the President.</p> <p>If the disagreement of the two chambers concerns a financial law, the WJ can approve the proposal by majority votes. This decision is final after the approval of the President without presenting it to the Mishrano Jirga.</p>	

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	<i>presenting it to the Mishrano Jirga.</i>	the Mishrano Jirga.		
Art. 104, The Wolesi Jirga can impeach the Prime Minister and other minister on the recommendation of one-third of its members.	Art. 104, The Wolesi Jirga can impeach the Prime Minister and other minister on the recommendation of one- third of its members	X	X	X
Art. 105, The commissions of each house can ask the Prime Minister and other Ministers specific questions. The person being questioned can give a written or oral answer.	Art. 105, The commissions of each house can ask the Prime Minister and other Ministers specific questions. The person being questioned can give a written or oral answer	✓	✓	Now Art. 93
Art. 106, The National Assembly can be dissolved in cases demanded by the national interests on the order of the President and approval of a commission comprised of the Prime Minister, chief justice and head of the	Art. 105, The National Assefmbly can be dissolved in cases demanded by the national interests on the order of the President and approval of a commission comprised of the Prime Minister chief justice and head of the Supreme	Art. 105, The National Assembly can be dissolved in cases demanded by the national interests on the order of the President and approval of a commission comprised of the Prime Minister chief justice and head of the Supreme	X	X

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<p>Supreme Constitutional Court. The dissolution of the National Assembly includes the non-elected members of the Mishrano Jirga. The new National Assembly cannot be dissolved in one year. The National Assembly cannot be dissolved in the final six months of the presidential term.</p>	<p>Constitutional Court, on the advice of the Prime Minister and heads of the two houses of the National Assembly. The dissolution of the National Assembly includes the non-elected members of the Mishrano Jirga. The new National Assembly cannot be dissolved in one year. The National Assembly cannot be dissolved in the final six months of the presidential term.</p>	<p>Constitutional Court. On the advice of the Prime Minister and heads of the two houses of the National Assembly. The dissolution of the National Assembly includes the non-elected members of the Mishrano Jirga. The new National Assembly cannot be dissolved in one year. The National Assembly cannot be dissolved in the final six months of the presidential term.</p>		
<p>Art. 109, Ministers can participate in the sessions of either house of the National Assembly. Either house of the National Assembly can demand the participation of the Prime Minister and Ministers in its session.</p>	<p>✓</p>	<p>Art. 103, Ministers can participate in the sessions of either house of the National Assembly. Either house of the National Assembly can demand the participation of the Prime Minister and Ministers in its session.</p>	<p>✓</p>	<p>✓</p>

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<p>Art. 116, The Loya Jirga is the highest manifestation of the will of the people of Afghanistan. The Loya Jirga consists of:</p> <p>Members of the National Assembly;</p> <p>Presidents of the provincial as well as district councils;</p> <p>The Prime Minister, Ministers, Chief Justice and members of the Supreme Court and the constitutional court as well as the attorney general shall participate in the Loya Jirga sessions without voting rights.</p>	✓	<p>Art. 110, The Loya Jirga is the highest manifestation of the will of the people of Afghanistan. The Loya Jirga consists of:</p> <p>Members of the National Assembly;</p> <p>Presidents of the provincial as well as district assemblies; and</p> <p>The Prime Minister, Ministers, Chief Justice and members of the Supreme Court and the constitutional court as well as the attorney general shall participate in the Loya Jirga sessions without voting rights.</p>	✓	✓
<p>Art. 118, If the Loya Jirga is convened when the National Assembly is dissolved, members of the National Assembly maintain their position as</p>	X	X	X	X

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members of the Loya Jirga.				
<p>Art. 124, The Supreme Court shall be comprised of nine members, appointed by the President with the endorsement of the Wolesi Jirga, and in accordance with the provisions of Arts. 49 and 125 for ten years. The President shall appoint one of its members as Chief Justice of the Supreme Court. Members of the Supreme Court, except under circumstances stated in Article 134 of this Constitution, shall not be dismissed until the end of their term.</p>	✓	✓	<p>Art. 117, The Supreme Court shall be comprised of nine members, appointed by the President with the endorsement of the Wolesi Jirga, in accordance with the provisions of clause three of Article 50 and Article 118 of this Constitution. Justices shall be initially appointed for ten years in the following manner:</p> <p><i>Three members for a period of four years, three members for seven years, and three members for ten years. Later appointments shall be for period of ten years. Appointment of members for a second term shall not be permitted.</i></p> <p>The President shall</p>	✓

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			appoint one of its members as Chief Justice of the Supreme Court. Members of the Supreme Court, except under circumstances stated in Article 127 of this Constitution, shall not be dismissed until the end of their term.	
<p>Art. 125, Members of the Supreme Court shall have the following qualifications:</p> <p>At time of appointment, the age of the Chief Justice of the Supreme Court and its members shall not be less than forty years and more than sixty years;</p> <p>Shall be a citizen of Afghanistan;</p> <p>Shall have higher education in legal studies or Islamic jurisprudence as well</p>	<p>Art. 124, Member of the Supreme Court shall have the following qualifications:</p> <p>At time of appointment, the age of the Chief Justice of the Supreme Court and its members shall not be less than forty years and more than sixty years;</p> <p>Shall be a citizen of Afghanistan <i>not having other nationalities</i>;</p> <p>Shall have higher education in legal studies or Islamic jurisprudence as well as</p>	<p>Art. 118, Members of the Supreme Court shall have the following qualifications:</p> <p>At time of appointment, the age of the Chief Justice of the Supreme Court and its members shall not be less than forty years;</p> <p>Shall be a citizen of Afghanistan not having other nationalities;</p> <p>Shall have higher education in legal studies or Islamic jurisprudence as well as expertise and adequate</p>	✓	✓

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<p>as expertise and adequate experience in the judicial system of Afghanistan;</p> <p>Shall have a good character as well as a good reputation;</p> <p>Shall not have been convicted by a court for crimes against humanity, crimes, or deprivation of civil rights; and</p> <p>Shall not be a member of any political party during his term of duty.</p>	<p>expertise and adequate experience in the judicial system of Afghanistan;</p> <p>Shall have a good character as well as a good reputation;</p> <p>Shall not have been convicted by a court for crimes against humanity, crimes, or deprivation of civil rights; and</p> <p>Shall not be a member of any political party during his term of duty.</p>	<p>experience in the judicial system of Afghanistan;</p> <p>Shall have a good character as well as a good reputation;</p> <p>Shall not have been convicted by a court for crimes against humanity, crimes, or deprivation of civil rights; and</p> <p>Shall not be a member of any political party during his term of duty.</p>		
<p>Art. 127, The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of</p>	<p>Art. 127, The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.</p>	<p>✓</p>	<p>✓</p>	<p>Now Art. 120</p>

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<p>the law.</p> <p>No authority can interfere in the judicial proceedings</p>	<p>No authority can interfere in the judicial proceedings</p>			
<p>Art. 128, No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent the formation of military courts. The authority of these courts relate to military crimes. Law shall regulate the organization and authority of these courts.</p>	<p>Art. 127, No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority. This provision shall not prevent the formation of military courts <i>and special courts for the trial of the President and members of the Supreme Court.</i> The authority of these courts relate to military crimes. Law shall regulate the organization and authority of these courts.</p>	✓	✓	✓
<p>Art. 134, If more than one third of the members of the Wolesi Jirga demand the trial</p>	<p>Art. 132, If more than one-third of the members of the Wolesi Jirga demand the trial of</p>	✓	✓	Now Art. 127

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<p>of the Chief Justice of the Supreme Court or any of its members accused of a crime related to job performance or committing a crime, and, the Wolesi Jirga approves this demand by two thirds majority of all members, the accused shall be dismissed and the issue referred to a special court. The formation of the court and procedure of the trial shall be regulated by law. If a judge is accused of a crime, the Supreme Court in accordance with law considers the case. After hearing the defense of the judge, if the Supreme Court considers the accusation valid, it recommends the sacking of the judge to</p>	<p>the Chief Justice of the Supreme Court or any of its members accused of a crime related to job performance or committing a crime, and, the Wolesi Jirga approves this demand by two-thirds majority of all members, the accused shall be dismissed and the issue referred to a special court. The formation of the court and procedure of the trial shall be regulated by law. If a judge is accused of a crime, the Supreme Court in accordance with law considers the case. After hearing the defense of the judge, if the Supreme Court considers the accusation valid, it recommends the sacking of the judge to the President. The Accused judge should be fired and punished in</p>			

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the President. The Accused judge should be fired and punished in accordance with law.	accordance with law.			
<p>Art. 139, Judges are appointed at the proposal of the Supreme Court and approval of the President.</p> <p>Appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court.</p>	<p>Art. 139, Judges are appointed at the proposal of the Supreme Court and approval of the President.</p> <p>Appointment, transfer, promotion, punishment and proposals for retirement of judges, carried out according to provisions of the laws, shall be within the authority of the Supreme Court.</p> <p><i>For the purpose of better performance of its duties, the Supreme Court should establish the General Administration Office of the judicial organ.</i></p>	✓	✓	Now Art. 132✓
Art. 140, Discovery of crimes shall be the duty of the police;	Art. 139, Discovery of crimes shall be the duty of the police;	Art. 134, Discovery of crimes shall be the duty of the police;	✓	✓

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<p>investigation and filing the case against the accused in the court shall be the responsibility of the Attorney General's Office, in accordance with the provisions of the law. The Attorney's General shall be part of the executive organ and shall be independent in its performance. Law shall regulate the organization, authority as well as method of work of the Attorney General's Office.</p>	<p>investigation and filing the case against the accused in the court shall be the responsibility of the Attorney General's Office, in accordance with the provisions of the law. The Attorney General's Office shall be part of the Executive organ and shall be independent in its performance. Law shall regulate the organization, authority as well as method of work of the Attorney General's Office.</p> <p><i>A special law shall regulate the discovery and investigation of crimes by armed forces.</i></p>	<p>investigation and filing the case against the accused in the court shall be the responsibility of the Attorney General's Office, in accordance with the provisions of the law. The Attorney General's Office shall be part of the Executive organ and shall be independent in its performance. Law shall regulate the organization, authority as well as method of work of the Attorney General's Office.</p> <p>A special law should regulate the discovery and investigation of crimes by armed forces, <u>police, and officials of national security.</u></p>		
<p>Art. 142, The Supreme Constitutional Court oversees the compliance of laws</p>	<p>✓</p>	<p>X</p>	<p>X</p>	<p>X</p>

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with the constitution.				
<p>Art. 143, The Supreme Constitutional Court is comprised of nine members appointed by the President for a period of six years. The President appoints one member as the head of the Court. The members of the Court can be reappointed. The Presidents of the country shall be the permanent members of the Court after their terms of service.</p>	<p>Art. 142, The Supreme Constitutional Court is comprised of nine six members appointed by the President <i>on the approval of the Mishrano Jirga</i> for a period of six <i>nine</i> years. The President appoints one member as the head of the Court. The members of the Court can be reappointed. The Presidents of the country shall be the permanent members of the Court after their terms of service.</p> <p><i>Law should regulate the organization and the way of the work of the Constitutional Court.</i></p>	X	X	X
<p>Art. 144, Members of the Supreme Constitutional Court shall have the following qualifications:</p>	<p>Art. 143, Members of the Supreme Constitutional Court shall have the following qualifications:</p>	X	X	X

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<p>Should have a good character;</p> <p>Should have higher legal and jurisprudential (Fiqhi) education and ten-year experience in legislative, legal and judicial affairs;</p> <p>Should have completed 40 years of age; and</p> <p>Should not have been convicted for a crime and deprivation of civil rights.</p>	<p><i>Should be Afghan nationals not having other nationalities;</i></p> <p>Should have a good character;</p> <p>Should have higher legal and jurisprudential (Fiqhi) education and ten-year experience in legislative, legal and judicial affairs;</p> <p>Should have completed 40 years of age; and</p> <p>Should not have been convicted for a crime and deprivation of civil rights</p>			
<p>Art. 145, The Supreme Constitutional Court has the following authorities:</p> <p>Examine the conformity of laws, legislative decrees and international treaties with the Constitution;</p> <p>Interpret the</p>	<p>Art. 144, The Supreme Constitutional Court has the following authorities:</p> <p>Examine the conformity of laws, legislative decrees and international treaties with the Constitution;</p> <p>Interpret the</p>	X	X	X

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Constitution, laws and legislative decrees: Examine and adjudicate on frauds in the presidential elections; Offer legal advice to the President; and Other authorities bestowed on the Court by law.	Constitution, laws and legislative decrees; Examine and adjudicate on frauds in the presidential elections; Offer legal advice to the President; and Other authorities bestowed on the Court by law.			
Art. 146. The President or the government can refer legislative bills to the Court for their compliance with the Constitution.	Art. 145, The President or the government <i>and one-fifth of either house of the National Assembly</i> can refer legislative bills to the Court for a review of their compliance with the Constitution.	X	X	X
Art. 147, In situations when a court, while adjudicating on a dispute, determines that the provision of the law in question in the disputes is in contradiction with the Constitution, the	Art. 146, In situations when a court, while adjudicating on a dispute, determines that the provision of the law in question in the disputes is in contradiction with the Constitution, the	X	X	X

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<p>proceeding stops and the issue is referred to the Supreme Constitutional Court. This provision also applies in cases when a party to the dispute claims such a contradiction and the court approves it.</p>	<p>proceeding stops and the issue is referred to the Supreme Constitutional Court. This provision also applies in cases when a party to the dispute claims such a contradiction and the court approves it.</p> <p><i><u>The Independent Human Rights Commission can also refer laws to the Constitutional Court if it deems that a law violates the fundamental rights of the people enshrined in this constitution.</u></i></p>			

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<p>Art. 148, The decision of the Supreme Constitutional Court shall be final without review. Its decisions are to be published in the Official Gazette.</p>	<p>Art. 147, <u>Laws that the Supreme Constitutional Court finds in contradiction with the constitution are void.</u></p> <p>The decision of the Supreme Constitutional Court shall be final without review. Its decisions were to be published in the Official Gazette.</p>	X	X	X
<p>Art. 149, The property of the President, Vice-President, Prime Minister, members of the government and justices of the Supreme Court shall be recorded and examined in the Supreme Constitutional Court before and after their terms of service.</p>	X	X	X	X
<p>Art. 150, Law should regulate the structure and procedure of the Supreme</p>	X	X	X	X

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Constitutional Court.				
<p>Art. 151, The administration of the Islamic Republic of Afghanistan, based on the units of the central government and local offices, shall be regulated according to the law. The central administration shall be divided into several administrative units, each headed by a Minister.</p> <p>The local administrative unit shall be a province. The number, area, divisions and related provincial organizations and number of offices shall be regulated on the basis of population, social and economic conditions and geographical location.</p>	<p>Art. 148, The administration of the Islamic Republic of Afghanistan, based on the units of the central government and local offices, shall be regulated according to the law. <i>The Prime Minister is at the head of administration.</i> The central administration shall be divided into several administrative units, each headed by a Minister.</p> <p>The local administrative unit shall be a province. The number, area, divisions and related provincial organizations as well as number of offices shall be regulated on the basis of population, social and economic conditions, as well as geographical location.</p>	<p>Art. 136, The administration of the Islamic Republic of Afghanistan, based on the units of the central government and local offices, shall be regulated according to the law. The Prime Minister is at the head of administration. The central administration shall be divided into several administrative units, each headed by a Minister.</p> <p>The local administrative unit shall be a province. The number, area, divisions and related provincial organizations as well as number of offices shall be regulated on the basis of population, social and economic conditions, as well as geographical location.</p>	✓	✓

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<p>Art. 154, The provincial council shall participate in the attainment of the development objectives of the state and improvement of the affairs of the province in the manner prescribed by law, and shall advise the provincial administrations on related issues. The provincial council shall perform its duties with the cooperation of the provincial administration.</p>	<p>✓</p>	<p>✓</p>	<p>Art. 139: The provincial council shall participate in the attainment of the development objectives of the state and improvement of the affairs of the province in the manner prescribed by law, and shall advise the provincial administrations on related issues. The provincial assembly council shall perform its duties with the cooperation of the provincial local administration.</p>	<p>Art. 139: The provincial council shall participate in the attainment of the development objectives of the state and improvement of the affairs of the province in the manner prescribed by law, and shall advise the provincial administrations on related issues. The provincial assembly council shall perform its duties with the cooperation of the local <i>provincial</i> administration.</p>
<p>Art. 157, If, because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in</p>	<p>Art. 150, If, because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in this Constitution, a state</p>	<p>✓</p>	<p>✓</p>	<p>Now Article 143✓</p>

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<p>this Constitution, a state of emergency shall be proclaimed by the President, throughout the country or part thereof, with the endorsement of the National Assembly. If the state of emergency continues for more than three months, the consent of the National Assembly shall be required for its extension.</p>	<p>of emergency shall be proclaimed by the President, throughout the country or part thereof, with the endorsement of the National Assembly. If the state of emergency continues for more than three <i>two</i> months, the consent of the National Assembly shall be required for its extension.</p>			
<p>Art. 158, During the state of emergency, the President can, in consultation with the Presidents of the National Assembly as well as the Chief Justice of the Supreme Court and the Constitutional Court, transfer some powers of the National Assembly to the government.</p>		<p>Art. 143, During the state of emergency, the President can, in consultation with the Presidents of the National Assembly as well as the Chief Justice of the Supreme Court, and the constitutional court transfer some powers of the National Assembly to the government.</p>	✓	Now Art. 144

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<p>Art. 161, If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, the presidential and parliamentary terms shall extend up to four months. If the state of emergency continues for more than four months, the President shall call the Loya Jirga. Within three months after the termination of the state of emergency, elections shall be held.</p>	<p>Art. 159, If the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential and parliamentary terms shall extend up to four months. If the state of emergency continues for more than four months, the President shall call the Loya Jirga. Within three <u>two</u> months after the termination of the state of emergency, elections shall be held.</p>	<p>✓</p>	<p>Changed to Art. 146</p>	<p>Now Art. 147</p>
<p>Art. 162, At the end of the emergency situation, steps taken in Article 157 and 158 should no longer apply.</p>	<p>✓</p>	<p>✓</p>	<p>✓</p>	<p>Art. 148, At the end of the emergency situation, steps taken in Article <u>144 and 145</u> 157 and 158 should no longer apply.</p>

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Art. 163, If a government is created during a state of emergency and has not obtained a vote of confidence, it should obtain vote of confidence after the emergency situation concludes.	Art. 163, If a government is created during a state of emergency and has not obtained a vote of confidence, it should obtain vote of confidence after the emergency situation concludes.	X	X	X
Art. 165, To process an amendment proposal, a commission comprised of members of the government, National Assembly, the Supreme Court and the Supreme Constitutional Court shall be formed by presidential decree to prepare the draft proposal. To approve the amendment, the Loya Jirga shall be convened by a presidential decree in accordance with the provisions of the	✓	Art. 150, To process an amendment proposal, a commission comprised of members of the government, National Assembly, the Supreme Court and the Supreme Constitutional Court shall be formed by presidential decree to prepare the draft proposal. To approve the amendment, the Loya Jirga shall be convened by a presidential decree in accordance with the provisions of the Chapter on Loya Jirga. If the Loya Jirga	✓	✓

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Chapter on Loya Jirga. If the Loya Jirga approves the amendment with a majority of two-thirds of its members, the President shall enforce it after endorsement.		approves the amendment with a majority of two-thirds of its members, the President shall enforce it after endorsement.		
Art. 166, The President, Vice-President, Prime Minister, Ministers, Chief Justice and members of the Supreme Court, members of the Constitutional Court, during their term of offices, shall not engage in any profitable business with the state.	Art. 168, The President, Vice-President, Prime Minister, Ministers, Chief Justice and members of the Supreme Court, members of the Constitutional Court, during their term of offices, shall not engage in any profitable business with the state. <i><u>This provision does not apply to transactions for the personal needs of these individuals.</u></i>	Art. 151, The President, Vice-Presidents, Prime Minister , Ministers, Chief Justice and members of the Supreme Court, members of the Constitutional Court during their term of offices, shall not engage in any profitable business with the state. This provision does not apply to transactions for the personal needs of these individuals.	Art. 151, The President, Vice-Presidents, Ministers, Chief Justice and members of the Supreme Court, the <i><u>attorney general, heads of the Central Bank and National Directorate of Security, governors and mayors</u></i> , during their term of offices, shall not engage in any profitable business with the state. This provision does not apply to transactions for the personal needs of these individuals.	✓
Art. 167, The President, Vice-	Art. 164, The President, Vice-President, Prime	Art. 152, The President, Vice-Presidents, <u>Prime</u>	✓	✓

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President, Prime Minister, Ministers, Chief Justice, head of the constitutional court and members of the Supreme Court, Presidents and members of the National Assembly shall not engage in other jobs during their term of office.	Minister, Ministers, Chief Justice, head of the constitutional court and members of the Supreme Court, Presidents and members of the National Assembly, <i>the attorney general and judges</i> shall not engage in other jobs during their term of office.	Minister , Ministers, Chief Justice head of the constitutional court and members of the Supreme Court, Presidents and members of the National Assembly, the attorney general and judges shall not engage in other jobs during their term of office.		
Art. 168, High ranking state officials and their wives should only have Afghan nationality.	X	X	X	X
Art. 170, Suitable salaries shall be fixed for Prime Ministers, Ministers, Presidents, as well as members of the National Assembly and Supreme Court and constitutional court judges, and attorneys general in accordance with the provisions of the law.	✓	Art. 155, Suitable salaries shall be fixed for Prime Ministers , Ministers, Presidents, as well as members of the National Assembly and Supreme Court and constitutional court judges , and attorneys general in accordance with the provisions of the law.	✓	Art. 155, Suitable salaries shall be fixed for <i>Vice Presidents</i> , Ministers, Presidents, as well as members of the National Assembly and Supreme Court, and constitutional court judges , <i>judges</i> and attorneys general in accordance with the provisions of the law.

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<p>Art. 172, This Constitution shall be enforced from the date of approval by the Loya Jirga, and promulgation by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws of 5/12/11, laws and legislative decrees and the Bonn Agreement contrary to its provisions shall be invalid.</p>	<p>Art. 172, This Constitution shall be enforced from the date of approval by the Loya Jirga, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan. Upon the enforcement of this Constitution, laws of 5/12/11, laws and legislative decrees and the Bonn Agreement contrary to its provisions shall be invalid.</p>	<p>✓</p>	<p>✓</p>	<p>Now Art. 162</p>
	<p>Articles added to the CDC Draft by the CRC</p>	<p>Changes to the New Art. By the Gov. Draft.</p>	<p>Articles Added to The Loya Jirga Draft</p>	<p>Final Draft</p>
	<p>Art. 12: Da Afghanistan Bank shall be independent and the central bank of the state. Currency issuance as well as formulating and implementing the monetary policy of the country shall be,</p>	<p>Not changed until the end</p>	<p>✓</p>	<p>✓</p>

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	according to provisions of the law, the authority of the central bank. Law shall regulate the organization and operational methods of Central Bank.			
	Art. 58: To monitor respect for fundamental rights in Afghanistan as well as to foster and protect them, the state shall establish the Independent Human Rights Commission of Afghanistan. Every individual shall complain to this Commission about the violation of fundamental human rights. The Commission shall refer human rights violations of individuals to legal authorities. Law shall regulate the organization and the methods of operation of the Commission. No individual shall be	Not changed until the end	✓	✓

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	allowed to manipulate the rights and liberties enshrined in this Constitution and act against independence, territorial integrity, sovereignty as well as national unity.			
	Art. 166: The wealth of the President, Vice-President, Prime Minister, Ministers and members of the Supreme Court shall be registered, reviewed and published prior to and after their terms of office by an organ established by law.	Art. 166: The wealth of the President, Vice-President, Prime Minister , Ministers and members of the Supreme Court shall be registered, reviewed and published prior to and after their terms of office by an organ established by law.	✓	Now Art. 154
	Art. 168: The title of the Father of the Nation and privileges bestowed upon His Majesty Mohammad Zahir Shah, the former King of Afghanistan, by the Emergency Loya Jirga of one thousand three hundred and eighty one	✓	✓	Now Art. 158

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	(HS), (2002), with due respect to the provisions of this Constitution, shall be preserved during his lifetime.			
	<p>Art. 169: The period between the adoption of the Constitution and the inauguration of the National Assembly shall be considered the transition period.</p> <p>The Islamic Transitional Government of Afghanistan, during the transitional period, shall perform the following duties within less than one year:</p> <p>Issuing legislative decrees related to elections of the President, National Assembly as well as local councils;</p> <p>The organization and jurisdiction of courts and the organization of the</p>	<p>Art. 157: The period between the adoption of the Constitution and the inauguration of the National Assembly shall be considered the transition period.</p> <p>The Islamic Transitional Government of Afghanistan, during the transitional period, shall perform the following duties within less than one year:</p> <p>Issuing legislative decrees related to elections of the President, National Assembly as well as local councils;</p> <p>The organization and jurisdiction of courts and the organization of the</p>	✓	<p>Art. 159: The <i>interim</i> period between the adoption of the Constitution and the inauguration of the National Assembly shall be considered the transition period.</p> <p>The Islamic Transitional Government of Afghanistan, during the transitional period, shall perform the following duties within less than one year:</p> <p>Issuing legislative decrees related to elections of the President, National Assembly as well as local councils <i>within six months;</i></p> <p><i>Issuing decrees</i></p>

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	<p>basic structures;</p> <p>The establishment of the Independent Constitutional Court in Accordance with this Constitution;</p> <p>Establishing the Independent Elections Commission;</p> <p>Completing necessary reforms to better regulate executive as well as judicial affairs; and</p> <p>Adopting necessary measures to prepare the ground for implementing the provisions of the Constitution.</p>	<p>basic structures;</p> <p>The establishment of the Independent Constitutional Court in Accordance with this Constitution;</p> <p>Establishing the Independent Elections Commission;</p> <p>Completing necessary reforms to better regulate executive as well as judicial affairs; and</p> <p>Adopting necessary measures to prepare the ground for implementing the provisions of the Constitution.</p>		<p><i>regarding</i> the organization and jurisdiction of courts and <i>commencement of work on</i> the organization of the basic structures <i>law in less than one year</i>;</p> <p>The establishment of the Independent Constitutional Court in Accordance with this Constitution;</p> <p>Establishing the Independent Elections Commission;</p> <p>Completing necessary reforms to better regulate executive as well as judicial affairs; and</p> <p>Adopting necessary measures to prepare the ground for implementing the provisions of the Constitution.</p>

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	<p>Art. 170: The President of the Transitional Administration of Afghanistan, to fulfill the requirements of the second clause of Article 69, appoints three members as the interim members of the Constitutional Court. These members perform their duties until the establishment of the constitutional court.</p> <p>The President, appointed in accordance with this constitution, has the duty to appoint, within 30 days, two members for two years, two members for six years and two members for six years to the constitutional court. Later appointments take place in accordance with the provisions of Article 142.</p>	X	X	X
	Art. 171: The first President-Elect shall,	Art. 158: The first President-Elect shall,	✓	Art. 160: The first President-Elect shall,

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	<p>according to the provisions of this Constitution, commence work thirty days after election results are declared. After the inauguration of the first session of the Wolesi Jirga, the government and the Supreme Court should be established in thirty days. The President of the transitional state should continue his work until the newly elected President begins work.</p> <p>Executive and judicial organs shall continue work until the establishment of the new government and the Supreme Court. Legislative decrees enforced from the beginning of the interim period shall be referred to the first session of the National Assembly. These decrees shall be</p>	<p>according to the provisions of this Constitution, commence work thirty days after election results are declared. After the inauguration of the first session of the Wolesi Jirga, the government and the Supreme Court should be established in thirty days. The President of the transitional state should continue his work until the newly elected President begins work.</p> <p><u>Elections for the National Assembly should take place in one year after the election of the President. Until the election of the National Assembly, the powers of the National Assembly should be exercised by the government.</u></p>		<p>according to the provisions of this Constitution, commence work thirty days after election results are declared. <u>Multilateral efforts shall be made to hold presidential as well as National Assembly elections concurrently and simultaneously. Pending the establishment of the National Assembly, its powers, enshrined in this Constitution, shall be submitted to the government, and the interim Supreme Court shall be established by presidential decree.</u></p> <p>Elections for the National Assembly should take place in one year after the election of the President. Until the election of the National Assembly, the powers of the National Assembly should be exercised by</p>

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	enforceable unless annulled by the National Assembly.			the government.
		Articles Added by the Government Draft		
		<p>Art. 121: Only at the request of the Government or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution.</p> <p>The Supreme Court has the power to interpret the Constitution and other laws and legislative decrees.</p>	<p>Art. 121, Only, At the request of the Government or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and <i>their interpretation in accordance with the law.</i></p> <p>The Supreme Court has the power to interpret the Constitution and other laws and legislative decrees.</p>	✓
		Art. 159: Immediately after inauguration, the National Assembly shall exercise its powers in	✓	Now Art. 161

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		<p>accordance with the provisions of this Constitution. After inauguration of the first session of the National Assembly, within thirty days, the government as well as the Supreme Court shall be inaugurated in accordance with the provisions of the Constitution. The President of the Islamic Transitional Government of Afghanistan shall perform his duties until the inauguration of the President-elect. The executive and judicial organs of the state, in accordance with Clause Four of Article 159 of this Constitution, shall continue with their duties pending the formation of the government as well as the Supreme Court.</p>		

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		Legislative decrees enforced from the beginning of the interim period shall be referred to the first session of the National Assembly. These decrees shall be enforceable unless annulled by the National Assembly.		
			Articles added by the CLJ Draft	Final Draft
			Art. 156, The Independent Elections Commission shall be established to administer and supervise every kind of elections as well as refer to general public opinion of the people in accordance with the provisions of the law.	✓
			Art. 157: The Independent Commission for supervision of the implementation of the Constitution shall be	Art. 157: The Independent Commission for supervision of the implementation of the Constitution shall be

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			<p>established in accordance with the provisions of the law. The President shall appoint members of this Commission.</p>	<p>established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President <i>with the approval of the Wolesi Jirga.</i></p>